

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA STATE BOARD OF EDUCATION

Proposed Permanent Rules
Relating to Certification of
Skilled School Interpreters and
Translitterators for the Deaf and
Hard of Hearing; Minnesota Rules
Chapter 3525.2385

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles at 9:00 a.m. on February 21, 1997, at the Capitol View Conference Center, 70 West County Road B2, Little Canada, Minnesota 55117. The hearing continued until all interested persons had been heard.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota State Board of Education (hereinafter also referred to as the "Board") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not any modifications to the rules proposed by the Board after initial publication are substantially different.

Bernard E. Johnson, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota, 55101-2103 appeared for and on behalf of the Minnesota Department of Children, Families and Learning and the Minnesota State Board of Education. The Board's hearing panel consisted of the following persons: Wayne Erickson, Director of Special Education, Minnesota Department of Children, Families and Learning; Curt Micka, Executive Director, Minnesota Commission Serving the Deaf and Hard of Hearing; and Jan Radatz; Planner, Minnesota Department of Human Services, Division of Deaf and Hard of Hearing. Approximately 50 persons attended the hearing and 34 persons signed the hearing register on February 21, 1997. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the hearing, to date. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on March 24, 1996 the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during

the comment period. The Board submitted written comments responding to matters discussed in written comments and at the hearing.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Board of Education makes changes in the rule other than those recommended in this report, the Board must submit the rule with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

When the Board files the rules 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 the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Nature of the Proposed Rules

1. The proposed rules establish a competency-based certification system for school interpreters and transliterators. The competency-based system makes standard minimum qualifications and competency levels for interpreters and transliterators in education programs for students who are deaf or hard of hearing. The goal of the proposed rules is to improve the quality of education for Minnesota's deaf and hard of hearing students.

2. The proposed rules follow the mandate of the Minnesota Legislature as set forth in Minn. Stat. § 125.1895, Skilled School Interpreters Law. Minnesota Laws 1994, Chapter 647, Article 3, Section 17. The law provides that by July 1, 2000, any person employed by a school district to provide American sign language/English interpreting or sign transliterating services must hold current interpreter and transliterator certificates awarded by the Registry of Interpreters for the Deaf (RID) or the general level interpreter proficiency certificate awarded by the National Association of the Deaf (NAD), and satisfactorily complete an interpreter/transliterator training program affiliated with an accredited educational institution. In addition, any person employed to provide oral transliterating or "cued speech" transliterating services for a school district after July 1, 2000 must hold a current transliterator certificate awarded by the national certifying association or comparable state certification. Pursuant to the law, the Department of Children, Families and Learning shall only reimburse school districts for the services of those interpreters/transliterators who satisfy the standards of competency under this section.

3. Prior to passage of the 1994 law, no formal standards existed for defining or assessing the minimum qualifications for educational interpreters.

4. The 1994 Minnesota Legislature in Minnesota Laws 1994, chapter 647, article 3, section 22(a) directed the State Board of Teaching to conduct a study of the availability and appropriate training for school interpreters and transliterators throughout the state and the cost to the state, school districts, and their employees for training and certification. This study was completed and presented to the Board of Education in January 1995 and to the Legislature during its 1995 session.

5. According to the Board's Statement of Need and Reasonableness (SONAR), the study reported in part that "Minnesota has three interpreter training programs; two are in public colleges and the other is in a private college. None of the three's primary focus is preparing interpreters for K-12 education settings ... Outreach training by interpreter programs to greater Minnesota is minimal due to the limited number of qualified instructors, the cost of travel arrangements, and the logistics of geography and numbers of trainees needed to justify offering classes."

6. The 1994 Minnesota Legislature also mandated that the State Board of Education, in consultation with the State Board of Teaching, interpreter/transliterator training programs, the Minnesota Resource Center: Deaf and Hard-of-Hearing, the Minnesota Registry of Interpreters for the Deaf, the Minnesota Association of Deaf Citizens, the Minnesota Commission Serving Deaf and Hard-of-Hearing people, and the Deaf and Hard-of-Hearing Services Division of the Department of Human Services, develop and adopt a competency-based certification system for school interpreters and transliterators. The Legislature further required that the Board adopt by rule the state certification system by July 1, 1997, effective for interpreters and transliterators employed after July 1, 2000.

7. The proposed rules are consistent with the legislative directive of the Skilled School Interpreters law, Minn. Stat. § 125.1895. In fact, the rules primarily restate the provisions of the statute by requiring that to be eligible for special education reimbursement for the employment as American Sign Language (ASL)/English interpreter/transliterator or cued speech transliterator of the Deaf and Hard of Hearing, the school board in each district shall employ persons who have completed a training program affiliated with an educational institution accredited by the state and hold an interpreter and transliterator certificate awarded by RID or a general proficiency certificate at level 3 awarded by NAD. The proposed rule further states that to qualify as a cued speech transliterator, a person shall hold a current applicable transliterator certificate awarded by the Cued Speech National Certifying Association. (The name of this association will be changed in the rules to "Testing, Evaluation and Certification Unit, Inc." See the discussion of subpart 4 on page 18 of this report.)

Rulemaking Legal Standards

8. An agency must comply with several rulemaking legal requirements as a prerequisite to the agency exercising the lawmaking authority delegated by the

Legislature. In general, the agency must demonstrate (a) that it has statutory authority to adopt the proposed rule; (b) that it has fulfilled all relevant legal and procedural requirements of law or rule; (c) that the rule as finally proposed does not result in a rule substantially different from that published in the State Register; and finally (d) that the need for and reasonableness of each portion of the proposed rule has been established by an affirmative presentation of facts.

9. The Board prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Board relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rules. The SONAR was supplemented by the comments made by the Board at the public hearing and in its written post-hearing responsive comments.

10. Unless otherwise stated herein, the Administrative Law Judge finds that the Board has complied with all rulemaking legal standards imposed on it by the Legislature as a precondition to the promulgation of the proposed rule.

A. Statutory Authority

11. The Board of Education stated that it has rulemaking authority to adopt the proposed rules under Laws of Minnesota 1994 Chapter 647, article 3, section 22(a). The Administrative Law Judge finds that the Board has the specific statutory authority to adopt the proposed rules.

B. Need for and Reasonableness of the Proposed Rules

12. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rules, pt. 1400.2100, one of the determinations which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 234, 244 (Minn. 1984); Mammenga v. Department of Human Services, 442 N.W.2d 786 (Minn. 1989).

13. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule. In re Hanson, 275 N.W.2d 790 (Minn. 1978); Hurley v. Chaffee, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. Greenhill v. Bailey, 519 F.2d 5, 10 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. Mammenga v. Department of Human Services, 442 N.W.2d 786, 789-90 (Minn. 1989); Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 444 (Minn. App. 1985). The Minnesota Supreme Court has further defined the agency's burden in adopting rules by requiring it to "explain on what

evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute, 347 N.W.2d at 244. An agency is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one a rational person could have made. Federal Security Administrator v. Quaker Oats Company, 318 U.S. 218, 233 (1943).

14. In addition to need and reasonableness, the Administrative Law Judge must assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another, or whether the proposed language is not a rule. Minn. Rules, pt. 1400.2100.

15. Where changes are 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. § 14.15, subd. 3 (Minn. Supp. 1995). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (Minn. Supp. 1995).

16. Unless otherwise stated herein, the Judge finds the Board has established the need and reasonableness of the proposed rules by an affirmative presentation of the evidence.

17. Unless otherwise stated herein, the Judge finds that the Board's changes to the proposed rule subsequent to publication in the State Register do not result in a substantially different rule.

C. Procedural Requirements

18. On October 25, 1996, the Board requested the scheduling of a hearing and filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules, approved as to form by the Revisor of Statutes;

(b) The Dual Notice proposed to be submitted to the State Register; and

(c) A copy of the Statement of Need and Reasonableness (SONAR) containing the Board's proposed notice plan;

19. The Board proposed an Additional Notice Plan that included providing notice to all superintendents of public school districts, all special education directors, statewide organizational list of deaf and hard of hearing, statewide educational organizations including Minnesota School Board Association, educational interpreters and transliterators, and teachers and coordinators of the deaf and hard of hearing.

20. On November 4, 1996, Administrative Law Judge George Beck approved the Board's Additional Notice Plan as meeting the requirements of Minn. Rules, pt. 1400.2060, subp. 2(B), and Minn. Stat. § 14.22.

21. On November 14, 1996, the Board mailed the Dual Notice to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and to the persons who appear on the list of additional persons to receive the Dual Notice.

22. On November 25, 1996, the Dual Notice and the proposed rules were published at 21 State Register 737.

23. At the hearing the Board filed the following documents with the Administrative Law Judge:

(a) Resolution Authorizing Notice of Solicitation of Outside Information dated February 12, 1996;

(b) Certificate of Resolution Authorizing Notice of Solicitation of Outside Information dated February 12, 1996;

(c) Notice of Intent to Solicit Outside Information;

(d) The Notice of Intent to Solicit Outside Information as published at 20 State Register, p. 2215, on February 26, 1996;

(e) Affidavit of Mailing Notice of Intent to Solicit Outside Information and mailing list;

(f) Affidavit of Discretionary Mailing and mailing list;

(g) Certificate of Mailing List;

(h) A copy of the proposed rules certified by the Revisor of Statutes;

(i) A letter to Chief Administrative Law Judge Kevin Johnson regarding prior approval of additional notice plan;

(j) The Statement of Need and Reasonableness (SONAR);

(k) The Certificate of Mailing and a copy of the letter transmitting the Statement of Need and Reasonableness to the Legislative Coordinating Commission;

(l) Resolution Proposing Rule;

(m) Certificate of the State Board of Education Authorizing Resolution;

(n) A copy of the Dual Notice as mailed and published at 21 State Register, p. 737, on November 25, 1996;

(o) The Board's Affidavit of mailing the Dual Notice of Intent to Adopt Rules and mailing list;

(p) The Board's affidavit of mailing additional notice;

(q) Certificate of mailing list;

(r) The 57 written comments on the proposed rule received by the Board (Board's Exhibits 27.1 - 27.52; 31 - 35);

(s) Notice of Hearing to those who requested a hearing;

(t) The Board's certificate of mailing the Notice of Hearing to those who requested a hearing and mailing list;

(u) The Board's list of witnesses;

(v) The prepared testimony of Mary Cashman-Bakken, Department of Children, Families and Learning.

Board's Exhibits 1-36

24. The Board failed to include a citation to the agency's grant of statutory authority to adopt the rule in their SONAR as required by Minn. Rules, pt. 1400.2070, subpart 1(D). However, the Administrative Law Judge finds that this procedural omission constitutes harmless error as the omission did not deprive any person or entity of the opportunity to meaningfully participate in the rulemaking process pursuant to Minn. Stat. § 14.15, subd. 5(1).

25. The documents were available for inspection at the Office of Administrative Hearings from the date of the hearing.

D. Costs and Alternative Assessments in SONAR

26. Minn. Stat. § 14.131 provides that state agencies proposing rules must identify classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule's goals; what alternatives were not chosen; the costs that will be incurred complying with the rule; and differences between the proposed rules and existing federal regulations.

27. In its SONAR, the Board concluded that the proposed rule will specifically affect persons seeking employment in the Minnesota public schools as educational interpreters or transliterators, and the deaf and hard of hearing students who receive the

benefit of their services. Persons currently employed or seeking employment as interpreters and transliterators will be required to obtain certification by completing a training program and obtaining an interpreter and transliterator certificate awarded by RID or a general level proficiency certificate awarded by NAD. The cost of the certification exam will range from \$150 - \$600 depending on which national test is taken. In addition, in order to maintain certification, interpreters will have to pay for continuing education courses and annual membership dues. The annual membership dues for RID is currently \$100.

28. Other persons and organizations that will be affected by the proposed rule include higher education institutions that provide training for interpreters and transliterators, and school districts that employ interpreters and transliterators. Presumably, higher education institutions will see an increase in enrollment in interpreter training programs. School districts may realize increased costs if they grant higher salaries to persons who become certified as interpreters and transliterators. However, because salaries are negotiated district by district, it is not possible to assess the potential higher costs at this time.

29. According to the Board's SONAR, the costs to the State of Minnesota include costs associated with training evaluators and purchasing the necessary testing equipment for cued speech transliterator exams; developing a book to help prepare applicants for the RID tests; setting up a training program at the University of Minnesota from which interpreters may graduate; and funding workshops geared to regional interpreter needs. In addition, there will be the costs to the State associated with the implementation of a process to monitor whether the individuals employed by school districts as interpreters and transliterators have received their certificate; and potential higher reimbursement costs if the districts give salary increases to staff employed as interpreters and transliterators as a result of their having obtained certification. However, the current state reimbursement formula is determined on a "second-prior-year" base formula. Consequently, the state will not realize additional reimbursement costs for at least two years.

30. The statute requires that by the 2000/2001 school year, interpreters hold certificates from RID, NAD "or a comparable state certification from the state board of education". Minn. Stat. § 125.1895, subd. 1. The Board of Education considered alternatives to the RID and NAD tests for achieving certification. Pursuant to a mandate of the 1994 Minnesota Legislature, the Board formed a Ad Hoc Committee made up of representatives of the State Board of Teaching, Interpreter/Transliterator Training Programs, the Minnesota Resource Center: Deaf and Hard-of-Hearing, the Minnesota Registry of Interpreters for the Deaf, the Minnesota Association of Deaf Citizens, the Minnesota Commission Serving Deaf and Hard-of-Hearing People, and the Deaf and Hard-of-Hearing Services Division of the Department of Human Services. The Committee met several times and considered three alternatives for achieving the rule's goal of establishing a certification system.

31. One of the alternatives the Committee considered was purchasing a certification standard developed by another state. The Committee examined the

existing competency standards for interpreters in the states of Florida, Kansas, Texas, Michigan, Wisconsin, and South Dakota. However, the Committee found essential components lacking and critical weaknesses in each of them. Specifically, Florida does not have a state level exam. Rather, testing of interpreters is handled locally. The Committee rejected a local system of testing because of the potential for problems with consistency and the lack of centralized state control. Furthermore, the legislature specifically mandated that the Board develop a state certification system. The Committee found that Michigan, after studying the issue, decided against implementing a certification process for its interpreters and transliterators. Wisconsin requires only graduation from a preparation program. The Committee rejected Wisconsin's system because it believed that a minimum skill level needed to be in place where the legislature specifically mandated that the Board adopt a "competency-based" certification system. Texas certifies interpreters and transliterators through its Commission for the Deaf. The Texas certification exam has 5 levels and level 1-beginners are accepted for employment in schools. The Committee felt that the skills level of the Texas exam was too low, particularly for school aged children who do not have the ability to advocate on their own behalf for their educational needs.

32. The Committee also considered creating a new certification system unique to Minnesota. This option was rejected as too costly and too time consuming, given the July 1, 2000 statutory deadline.

33. Finally, the Committee decided to simply adopt the certification standard developed by the national organizations named in the statute. The Board determined that, unlike the standards set up in other states, the certification standards developed by the national organizations adequately met Minnesota's needs. The standards are as follows:

(a) Registry of Interpreters for the Deaf (RID) Certification. This organization provides a test developed by interpreters for interpreter certification at a national level. This test includes written and performance elements. The written test must be passed prior to taking the performance test. RID also has additional provisions for oral interpreting certification and certified deaf interpreter-provisional. Certified RID interpreters are responsible for 90 clock hours of additional training within a three year period to maintain their certification. Interpreters who do not fulfill the continuing education requirement are required to retake all tests to remain certified.

(b) National Association of the Deaf (NAD) Program Certification. This organization provides a test that includes a three step process: screening, warm-up, and a performance assessment session and results in certification at one of five levels. Level 1 = novice; Level 2 = novice 2; Level 3 = intermediate; Level 4 = advanced; and Level 5 = master. This test can be administered by a state assessment team and is available in Minnesota through the Minnesota Association of Deaf Citizens Interpreter Assistance Program (MADC-IAP) or the National Association of the Deaf Interpreter Assistance Program (NAD-IAP). The Committee recommended to the State Board that an interpreter be required to hold a Level 3 certificate or higher to be considered as possessing the skills necessary to meet the needs of Minnesota learners.

(c) Testing Evaluation and Certification Unit, Inc. (TECUnit). This national organization provides a test for cued speech transliterators. The test can be administered at the state level and is a two part test with both written and performance areas assessed.

34. In a written comment received after the hearing, Kathy Gunderson, a sign language interpreter in the Rochester public schools, questioned whether the Committee had thoroughly examined alternative certification tests and standards of other states. Ms. Gunderson believes the RID and NAD exams are unreasonably expensive, especially when coupled with the cost of taking classes and workshops to prepare for the tests. Ms. Gunderson asserts that the Committee should have looked at more state certification systems in attempt to find a less expensive process. Likewise, educational interpreters Donna Moe and Brenda Totman stated that it was unreasonable to offer only the RID and NAD exams as the options for certification.

35. In testimony on behalf of the Board, Jan Radatz, Program Planner for the Deaf and Hard of Hearing Services with the Department of Human Services, stated that because the Board found these existing national testing resources to be adequate and effective, the Board concluded it was unable to justify the need for and the expense of developing a new certification system unique to Minnesota. In addition, Wayne Erickson, Director of Special Education for the Department of Children, Families, and Learning, stated at the hearing that the Department will continue to monitor other state tests as they are developed to determine if one meets Minnesota's requirements.

36. The Administrative Law Judge finds that the Board has met the requirements of Minn. Stat. § 14.131 relating to cost and alternative assessments. Furthermore, the Judge finds that the Board's decision not to develop a new certification exam unique to Minnesota and not to adopt another state's certification standard is reasonable. The Board explained in its SONAR and in testimony at the hearing that it examined several different state systems and came to the conclusion that each lacked elements deemed critical to Minnesota's needs. The Judge finds that the Board's determination has a rational basis and was arrived at after much consideration.

E. Impact on Farming Operations

37. Minn. Stat. § 14.111 (1996) imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rule will not affect farming operations and no additional notice is required.

Analysis of the Proposed Rule

General

38. This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because some sections 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.

39. The Administrative Law Judge initially notes that several persons raised matters of legitimate concern, either in written comment form or at the hearing, that are outside the scope of this rulemaking. In particular, many commentators expressed the opinion that salaries of interpreters are too low and need to rise; that the quality and quantity of training programs need to increase; and that the cost of the certification tests and the continuing education classes are overly burdensome. As the Judge explained at the hearing, these concerns are worthy of discussion but are not within the subject matter of this rule review process. The Judge recognizes the deep frustration on the part of the interpreters who took the time to comment on the proposed rules. However, the proposed rules merely reiterate what is mandated by Minnesota Statute § 125.1895. The Judge recommends that the commentators bring their concerns and requests for changes to the attention of the Legislature which enacted the Skilled School Interpreter law upon which the rules are based.

Rule-by-Rule Discussion

3525.2385, subpart 1. Definitions

40. In this subpart to the proposed rule, the Board provides definitions for the terms “cued speech” and “interpreter/transliterator”.

41. The Department received a written comment from Tori Erickson, a Cued Speech transliterator, who pointed out that the definition of “Cued Speech” in subpart 1 of the rule is incorrect. Ms. Erickson contacted the TECUnit (National Testing, Evaluation, and Certification Unit for Cued Speech) for their definition. According to Earl Fleetwood, Director of Research and Development for TECUnit, the accurate definition of “Cued Speech” is as follows:

Cued Speech is a system which visually presents traditionally spoken languages. Handshapes representing groups of consonant phonemes and hand placements denoting groups of vowel phonemes are utilized in combination with non-manual signals to present a visually distinct model of a traditionally spoken language. Whether through the visual channel via Cued Speech, it is the choice, assembly, and arrangement of linguistic units called phonemes, that comprises and conveys the words and grammatical structure of languages that are spoken and languages that are cued.

42. In its written response, the Department stated that it does not object to changing the definition of Cued Speech found at subpart 1(A) line 7 to the paragraph suggested above.

43. The Department also received written comments before the hearing pointing out that the word “Pidgeon” in the definition “interpreter/transliterator” in subpart 1(B) at line 12 was misspelled and should be replaced with the word “Pidgin”. “Pidgin” is the correct spelling for the term that refers to the blending of two different languages.

44. In his testimony on behalf of the Board, Wayne Erickson stated that the word “Pidgeon” would be changed to “Pidgin” on line 12 of subpart 1(B).

45. Kitri Larson Kylo, District 917 Program Supervisor, suggested in written comments received by the Department prior to the hearing that the word “modalities” be added after the word “tactile” at the end of the sentence in subpart 1(B). The definition would read that interpreters interpret by “... American Sign Language (ASL), Pidgin Signed English (PSE), Manually Coded English (MCE), cued speech, voice, oral, or tactile modalities.” (Board’s Exhibit No. 27.46).

46. The Department did not respond to this comment.

47. The Department also received a written comment from Dr. Susan Rose, an Associate Professor at the University of Minnesota’s Department of Educational Psychology, Special Education Programs. Dr. Rose expressed concern over the lack of a definition for the term “training program affiliated with an educational institution accredited by the state” in subpart 3 lines 20-21 of the rule. Dr. Rose asked: “Does this mean that the training program must be certified or the institution must be certified by the state? In what area must it be certified? What is the training program (interpreting, teacher training, speech pathology, vocational rehabilitation)?” (Board’s Exhibit No. 27.16).

48. In its written responsive comments the Department stated that it recognizes that a “great deal of work needs to be done in interpreter training programs.” Currently, there is no standardization of interpreter training curricula or accreditation of interpreter training programs. Despite this and the lack of child development or basic education classes in the training programs presently available, the Department still strongly believes that interpreters who attend the training programs are better prepared than interpreters who do not attend training programs.

49. The Administrative Law Judge finds that, with the replacement of the word “Pidgeon” with “Pidgin” and the modification of the “cued speech” definition, the definitions provided in subpart 1 are reasonable in that they are consistent with the common usage of the terms in the field of education for students who are deaf and hard of hearing. The definitions assist the reader by clarifying the meaning of the terms as they are used in the proposed rule. The Judge finds that the definitions are needed and reasonable and the changes do not result in a substantially different rule than was initially published.

50. The Judge also recommends that the Board add the word “modalities” after the word “tactile” at the end of the definition of “Interpreter/transliterator” at line 13 in subpart 1(B). The word “modalities” makes the sentence clearer without changing the

substance of the definition. The Judge recommends that the Board add the word for clarification. If the Board does insert the word “modalities”, the Judge finds that the change will not result in a substantially different rule than was initially published.

51. Finally with respect to Dr. Rose’s concern over the confusion with the term “training program affiliated with an educational institution accredited by the state”, the Judge recommends that the Board substitute this term with “training program affiliated with a state accredited educational institution”. The term is found in subpart 3 at lines 20-21. This rephrasing of the term makes the language clearer and should remove potential confusion. The Judge recommends that the agency make the change to eliminate confusion. If the agency adopts this change, the Judge finds that it does not result in a substantially different rule than was initially published. The Judge also recommends that the Board work toward standardizing interpreter training curricula and in future rulemakings consider providing a definition of “training programs” for more clarification and guidance.

3525.2385, subpart 2. Special Education Reimbursement

52. The proposed rule requires that to be eligible for special education reimbursement for the employment of American Sign Language (ASL)/English interpreter/transliterator or cued speech transliterator of the Deaf and Hard of Hearing, the school board in each district shall employ persons who meet the certification requirements in subparts 3 or 4.

53. This subpart follows the requirements of Minn. Stat. § 125.1895, subdivision 1 (1994), which provides that:

“... any person employed to provide American sign language/English interpreting or sign transliterating services on a full-time or part-time basis for a school district after July 1, 2000, must:

(1) hold current interpreter and transliterator certificates awarded by the Registry of Interpreters for the Deaf (RID), or the general level interpreter proficiency certificate awarded by the National Association of the Deaf, or a comparable state certification from the state board of education; and

(2) satisfactorily complete an interpreter/transliterating training program affiliated with an accredited educational institution.

54. In written comments received before and after the hearing, several persons objected to the lack of a “grandfathering” provision to waive the certification and/or training program requirements for those educational interpreters currently employed in the school districts. (Board’s Exhibit Nos. 27.5-.6; 27.10; 27.14-.15; 27.47). In a letter to the Administrative Law Judge received March 17, 1997, Linda Lyon stated: “...some consideration should be given to ‘grandpersoning in’ present interpreters ... Their experience has been hard won and it needs to be acknowledged as valuable.” Likewise, in a letter received by the Judge on March 10, 1997, educational interpreter

Cheryl Kinney strongly recommended that interpreters currently working in the field be “grandparented in” to prevent what many commentators predict will be a shortage of educational interpreters able to obtain certification by the year 2000.

55. In its responsive comments the Department stated that the Ad Hoc Committee vehemently opposed any type of a grandfathering or provisional certificate clause in the rules. The Board of Education followed the Committee’s recommendation. The Department argues that Minnesota needs consistent minimum standards and a way to measure competency so that deaf and hard of hearing students are able to learn as their hearing peers do. Prior to this legislative effort, there have been no standards in place for interpreters in Minnesota. A provision allowing currently employed interpreters to bypass the certification requirement would defeat the rule’s purpose of standardizing the minimum qualifications and competency levels for educational interpreters.

56. The Department also pointed out in its written responsive comments that school districts can apply for a variance under State Board Rules 3525.1510. Pursuant to this rule, school districts would be eligible to hire an interpreter if they meet the variance criteria. However, Minn. Stat. § 125.1895, subd. 4, prohibits the Department from reimbursing school districts for the services of interpreters or transliterators who fail to satisfy the certification requirements.

57. The Administrative Law Judge finds that this subpart is reasonable as it follows the requirements of Minn. Stat. § 125.1895, subdivision 1. Furthermore, the Judge finds that the Board’s decision not to provide a “grandfathering” clause has a rational basis and is not unreasonable. The purpose of the statute and proposed rules is to establish a consistent measure of competency of educational interpreters. Allowing those interpreters currently employed by school districts to bypass the training and examination requirements, without any sort of assessment of their ability to interpret, would defeat the Board’s quality assurance objective.

58. However, the Judge recommends that the Board add the effective date of the rule to subpart 2. It is reasonable that the rule specifically state that the rule goes into effect on July 1, 2000. If the Board does insert the effective date, the Judge finds that the change will not result in a substantially different rule than was initially published.

3525.2385, subpart 3. Interpreter/transliterator

59. The proposed rule requires that in order to qualify as a sign language interpreter/transliterator, a person shall have completed a training program affiliated with an educational institution accredited by the state and hold: (A) an interpreter and transliterator certificate awarded by the Registry of Interpreters for the Deaf (RID); or (B) a general level proficiency certificate at Level 3 awarded by the National Association of the Deaf (NAD).

60. In pre-hearing comments and at the hearing, several persons objected to the RID and NAD exams as not being valid measurements for testing the skills needed to be an educational interpreter. (Board's Exhibit No. 27.50). In a written comment received before the hearing, Kathryn B. Walsh objected to both the RID and NAD exams as being inappropriate to provide an adequate evaluation of the skills used in an educational setting. Ms. Walsh stated that the national tests are "geared toward freelance interpreting/transliterating situations and not educational situations". (Board's Exhibit No. 27.14). Likewise, Marcia Averbrook, a lobbyist for the Minnesota Federation of Teachers, testified at the hearing that the standards of the RID and NAD exams do not contain many of the elements needed by interpreters who work in an educational environment. Ms. Averbrook stated that many educational interpreters will spend a great deal of time and money preparing for and taking a test "which does little to establish their proficiency as an educational interpreter." Janet Bender, an educational interpreter, wrote that she thought a more appropriate test for assessing an interpreter's versatility and skills would be to evaluate educational interpreters in their immediate school setting. (Board's Exhibit No. 27.11).

61. Similarly, Dr. Susan Rose, Associate Professor at the University of Minnesota's Department of Educational Psychology, expressed concern over the lack of an educational component in the proposed testing. According to Dr. Rose, none of the tests' primary focus is preparing interpreters for K-12 education settings. Dr. Rose strongly believes that the rule must provide assurance that the educational interpreter/transliterating has preparation or knowledge regarding language development, child development, behavior assessment, or special education issues. Lori Classon, Cheryl Kinney, and Bill Giese, interpreters for District # 287, also objected to the use of the NAD and RID tests where neither focus on educational interpreting. In their written comments all three emphasized that "[k]nowledge of minimal language skills and developmentally appropriate language are the foundations of an interpreter's job at this level." (Board's Exhibit Nos. 27.16; 27.21-23; 27.39).

62. In its responsive comments the Department maintained that the RID and NAD test are valid for educational interpreters. The Department stated:

"Both RID and NAD tests assess the fundamental or core skills that are critical to all venues of interpreting. These tests determine whether or not an interpreter has requisite language and interpreting skills that are the foundation of all interpreting skills. It is upon this core of knowledge that one develops specialized educational interpreting skills."

63. At the hearing, Jan Radatz, a Program Planner with the Deaf and Hard of Hearing Services Division with the Department of Human Services and a member of the Board's hearing panel, testified and submitted written comments in support of using the existing national certification examinations. Ms. Radatz stated that:

"[w]hile the examinations do not evaluate performance specifically in a classroom setting, they do assess the basic skills and knowledge that are required of *any* interpreter or transliterator, including those who work in

schools. ... The argument made by some people that the RID generalist test is not appropriate for educational interpreters is invalid because RID tests for the skills basic to *all* sign language interpreting and transliterating. It is reasonable for educational interpreters to prove that they have the proper foundation (certification of generalist skills) upon which the specialization of educational interpreting can be built.” (Emphasis hers.)

64. With respect to Dr. Rose’s concern over the lack of a child development/educational component to the training and testing requirements, the Board explained in its testimony at the hearing that the Ad Hoc Committee felt that in addition to the signing skills level required, it would be appropriate to require child development classes and introductory courses in education, special education, educational interpreting, and education of the deaf and hard of hearing students. However, after much discussion, the Committee determined that while these educational requirements would be ideal, these additional requirements would go beyond the requirements of the statute and potentially nullify the rule.

65. Several commentators also expressed the opinion that it is onerous and unrealistic to expect new graduates of interpreter training programs to pass the RID or NAD certification exam by the year 2000. Approximately 20 interpreters stated in written comments received before the hearing that it takes several years after completing a interpreter training program for an interpreter to develop the skills and gain the experience necessary to allow him or her to successfully pass the RID exam and obtain certification. Almost all of these commentators expressed the opinion that RID certification should be a goal and not an entry level requirement. Ms. Kendra Rask suggested that an interpreter be allowed five years after completing a training program to obtain the required certification. (Board’s Exhibit Nos. 27.2-.3; 27.7-.9; 27.12-13; 27.20, 27.26-.33; 27.35-.37).

66. In pre-hearing comments numerous commentators also objected strongly to the requirement that interpreters obtain both a certificate of interpretation (CI) and a certificate of transliteration (CT) from RID. Educational interpreter Judy Ann Leonard-Leach suggested in written comments that the wording in subpart 3 be changed so that an interpreter need hold either an interpreter certificate or a transliterator certificate from RID. According to Ms. Leonard-Leach, “requiring both the CT and CI would be financially difficult, time consuming and almost redundant.” Likewise, Deanne Kosel, a sign language interpreter for District #12, objected to the requirement that educational interpreters hold both a certificate of interpretation and a certificate of transliteration. Ms. Kosel stated that “[m]ost educational interpreters use either English or ASL at school all day”, and therefore do not need to be certified in both. (Board’s Exhibit Nos. 27.43 and 27.44)

67. Kelly Anderson, a deaf/hard-of-hearing teacher and sign language interpreter, expressed concern over the ability of RID and NAD to provide adequate testing opportunities for the approximately 400 interpreters in the state of Minnesota to meet the July 2000 deadline. According to Ms. Anderson, RID currently only offers its

exam three times a year with a maximum of four candidates per certification area each test date. (Board's Exhibit No. 27.38).

68. Finally, commentators suggested that the training program referenced at line 20 in subpart 3, be required to be a minimum of two years and that applicants be required to successfully complete the training program. According to the commentators, adding the word "successfully" would prevent individuals who have only taken core courses or who completed the training but received grades of D or Failing from claiming they had fulfilled the training program requirement.

69. In its written responsive comments submitted after the hearing, the Minnesota Department of Children, Families and Learning objected to the suggestion that Line 22 be changed from "and" to "or". The Department argues that it is in the best interest of deaf and hard of hearing students to have an interpreter who is qualified both as a certified interpreter ("CI") and a certified transliterator ("CT"). Having both certificates allows for greater flexibility to meet the variety of needs of the student body. More importantly for the purpose of rulemaking, the requirement that interpreters hold both a CI and a CT is mandated by the statute. Minnesota Statute § 125.1895, subdivision 1(1). The Department cannot change what is required by the statute.

70. The Administrative Law Judge finds that this subpart is reasonable as it closely follows the statutory language of Minn. Stat. § 125.1895, subdivision 1. In developing and adopting by rule a competency based certification system, the State Board of Education is without the authority to change what is already required by law. Consequently, requests to change the RID or NAD certification requirements are outside the scope of this rule review. Given the mandate of the legislature as reflected in the statute, the State Board of Education is unable to change the requirement that interpreters hold both a CI and CT from RID. Likewise, the Board cannot extend the July 1, 2000 statutory deadline.

71. Moreover, the Judge finds that the Board has demonstrated that the decision to use the RID and NAD exams has a rational basis and that these exams are valid assessment tools for educational interpreters. As the Board explained in its testimony, the exams evaluate the basic skills and knowledge required of any interpreter or transliterator. In addition, with respect to the concern over the lack of testing opportunities, the Judge notes that, pursuant to a post-hearing written comment from RID, the local testing center at the College of St. Catherine has agreed to become a "test-on-demand" center which will allow individuals to schedule performance tests when their own schedule allows.

3525.2385, subpart 4. Cued speech transliterator

72. The proposed rule requires that in order to qualify as a cued speech transliterator, a person must hold a current applicable transliterator certificate awarded by the Cued Speech National Certifying Association.

73. In a written comment received by the Department prior to the hearing, Tori Erickson pointed out that the term “Cued Speech National Certifying Association” was incorrect. The correct name is “Testing, Evaluation, and Certification Unit”. (Board’s Exhibit No. 27.25).

74. In its written response comments after the hearing, the Department stated that it does not object to changing the phrase “by Cued Speech National Certifying Association” in Subpart 4 at line 27, to “by Testing, Evaluation and Certification Unit, Inc. (TECUnit).”

75. On March 17, 1997, the Administrative Law Judge received a written comment signed by six cued speech transliterators. These commentators expressed concern over the requirement that cued speech transliterators obtain national certification by the year 2000. The commentators pointed out that there is currently no established, ongoing Cued Speech training program in Minnesota. According to the commentators, the only established training program in the United States is located Silver Springs, Maryland. During the 1995-1996 school year, Cued Speech training workshops were presented by the Maryland TECUnit at the St. Paul Technical College. However, in order to complete the required cycle of education, more workshops are needed. Due to the lack of available training in Minnesota, the commentators maintain that they will be obligated to travel to Maryland to take workshops and the certification test. The commentators object to having to incur such high costs for training and certification.

76. In its SONAR, the Board stated that the national TECUnit Cued Speech certification test can be administered at the state level. The Board further stated that state funds are being spent to train two evaluators in TECUnit for cued speech and to fund additional training workshops.

77. The Administrative Law Judge finds that this subpart, with the above agreed to modification, is needed and reasonable and not substantially different than the rule as originally proposed. The language of this subpart closely follows the language of Minn. Stat. § 125.1895 which requires that cued speech transliterators achieve national certification or a comparable state certification by the year 2000. As discussed earlier, it is reasonable for the Board to decide not to develop a state certification exam where the national exam meets Minnesota’s needs and the costs of developing a state exam are prohibitive. Moreover, the Board recognizes the need for additional training and evaluators and has committed state funds to that effect. Accordingly, the Judge finds this subpart to be reasonable and consistent with the statute.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Board of Education (the Board) gave proper notice of this rulemaking hearing.

2. The Board has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. The Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, and 14.50 (i) and (ii).

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. The additions and amendments to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

6. Any Findings which might properly be termed Conclusions are hereby adopted as such.

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that the resulting rule is not substantially different from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rule be adopted.

Dated this ____ day of April, 1997.

ALLEN E. GILES
Administrative Law Judge