

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Permanent Rules on Teacher Education Programs, Student Teaching, Field Experience and Technical Changes, *Minnesota Rules* Parts 8700, 8705 and 8710.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on May 30, 2014. The public hearing was held in Room 16 of Conference Center B, of the Minnesota Department of Education's offices in Roseville, Minnesota.

The Minnesota Board of Teaching (the Board) proposes to amend its rules so as to clarify existing teacher licensing and accreditation standards. Among the Board's regulatory objectives were to sharpen accreditation standards so as to make them "clearer and measurable"; align licensure standards with best practices for teacher preparation and complete rulemaking required by Minn. Stat. Chapter 122A.¹ The Board undertook these revisions so as bring a sharper "focus on [teacher] candidate performance outcomes and continuous improvement in all teacher license programs."²

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.³ The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit Board representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially

¹ Ex. J at 1 (Statement of Need and Reasonableness, or SONAR).

² *Id.* at 7.

³ See, Minn. Stat. §§ 14.131 through 14.20.

published in the *State Register* are within the scope of the matter that was originally announced.⁴

The agency panel at the public hearing included Erin Doan, Executive Director of the Board of Teaching; JoAnn VanArernum, Member of the Board of Teaching; Richard Wassen, Director of Educational Licensing for the Minnesota Department of Education; and John Melick, Member of the Advisory Group on Program Effectiveness Reports for Continuing Approval.⁵

Approximately 14 people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Seven members of the public made statements or asked questions during the hearing.⁶

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until June 19, 2014 – to permit interested persons and the Agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.⁷ The hearing record closed on June 26, 2014.

SUMMARY OF CONCLUSIONS

The Board has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are needed and reasonable.

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

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. The current licensing and accreditation standards were promulgated in October of 2000. Since that time, the educational literature regarding planning and programming for students, instructional design and teacher evaluation has grown significantly. Board members and key stakeholders were persuaded that the Board's accreditation rules needed updating to reflect the now-current science.⁸

⁴ Minn. Stat. §§ 14.05, 14.131, 14.23 and 14.25.

⁵ Ex. P; DIGITAL RECORDING, OAH Docket No. 8-1302-30331 (May 30, 2014).

⁶ HEARING ROSTER, at 1-2.

⁷ See, Minn. Stat. § 14.15, subd. 1.

⁸ Ex. Q, at 3 (Doan Testimony); 25 *State Register* 805 (October 9, 2000).

2. In 2008, the Board convened an advisory group to assist in the redesign effort. The Advisory Group included representatives of various Minnesota colleges and universities, and MACTE (Minnesota Association of Colleges for Teacher Education). Through this process, the Board hoped to better link approval of teacher education with “measures of candidate competence and performance data” and to permit “data analysis to inform policy discussions,” decision-making and “practices at the institutional level.”⁹

II. Rulemaking Authority

3. The Agency cites Minn. Stat. § 122A.08, subds. 4(c) and 4(d) as its source of statutory authority for these proposed rules. These provisions authorize the Board to “adopt rules to approve teacher preparation programs,” “implement a research based, results-oriented curriculum that focuses on the skills teachers need in order to be effective,” and establish systems that “assure program effectiveness based on proficiency of graduates in demonstrating attainment of program outcomes.”¹⁰

4. The Administrative Law Judge concludes that the Agency has the statutory authority to adopt rules governing the review and accreditation of teacher preparation programs.

III. Procedural Requirements of Chapter 14

A. Publications

5. On January 7, 2013, the Board requested approval of its Additional Notice Plan.¹¹

6. By way of a letter dated January 17, 2013, Administrative Law Judge Manuel J. Cervantes approved the Board’s Additional Notice Plan.¹²

7. On January 22, 2013, the Board published in the *State Register* a Request for Comments seeking comments on “possible amendment to rules governing unit and program approval for teacher preparation.”¹³

8. On April 28, 2014, the Board published a Notice of Hearing. The Notice set the rulemaking hearing for Friday, May 30, 2014.¹⁴

⁹ Ex. O at Attachment A; Ex. Q, at 2.

¹⁰ Minn. Stat. § 122A.08, subds. 4(c) and 4(d); Ex. O, at 1-2 (SONAR).

¹¹ Ex. D.

¹² Ex. F.

¹³ Ex. E; 37 *State Register* 1088 (January 22, 2013).

¹⁴ Ex. L; 38 *State Register* 1401 (April 28, 2014).

9. On May 7, 2014, the Board sent a copy of the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.¹⁵

10. On May 7, 2014, the Board sent a copy of the Notice of Hearing to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over teacher accreditation. It does not appear that the statement of need and reasonableness (SONAR) was sent to these legislators or any communication with the Legislative Coordinating Commission.¹⁶

11. A copy of the SONAR was not sent to the Legislative Reference Library until after the close of the rulemaking hearing. This filing was made on July 14, 2014.¹⁷

12. The Notice of Hearing identified the date and location of the hearing in this matter.¹⁸

13. At the hearing on May 30, 2014, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

- a. the Agency's Request for Comments as published in the *State Register* on January 22, 2013;¹⁹
- b. the proposed rules dated April 28, 2014, including the Revisor's approval;²⁰
- c. the Agency's SONAR;²¹
- d. the Notice of Hearing as mailed and as published in the *State Register* on April 28, 2014;²²
- e. copies of electronic mail messages including the Notice of Hearing sent on May 5 and May 7, 2014; and

¹⁵ Ex. M at 4; 1st Supplementary Filing at 2-4 (July 16, 2014).

¹⁶ Ex. M at 6; Minn. Stat. § 14.116 (b).

¹⁷ See, 1st Supplementary Filing at 6-7; Minn. Stat. § 14.131.

¹⁸ Ex. L.

¹⁹ Ex. E.

²⁰ Ex. N.

²¹ Ex. O.

²² Exs. K, L and M.

- f. a copy of an electronic mail message including the Notice of Hearing sent on May 7, 2014 to certain legislators.²³

B. Notice Practice

1. Notice to Stakeholders

14. Minn. Stat. §§ 14.131 and 14.23 require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

15. On May 5, 2014, the Board began the process of sending the Notice of Hearing to interested stakeholders.²⁴

16. On May 7, 2014, the Board completed sending the Notice of Hearing according to the Additional Notice Plan approved by the Office of Administrative Hearings. The Notice of Hearing was:

- Posted to the Board's website and the Board has maintained these materials continuously since they were posted.²⁵
- Sent by Electronic Mail to:
 - those for whom the Board had valid electronic mail addresses and subscribed to the Board's rulemaking distribution list;
 - members of the Minnesota Association of Colleges for Teacher Education;
 - members of the Board of Teaching's Advisory Committee on Standards and Rules;
 - senior officials of the Minnesota Department of Education; and
 - Superintendents and Directors of Charter Schools.²⁶

17. Minn. Stat. § 14.14, subd. 1a provides that: "[t]he agency shall, at least 30 days before the date set for the hearing, give notice of its intention to adopt rules by

²³ Ex. M at 6.

²⁴ See, Ex. M at 1-2 and 1st Supplementary Filing at 4.

²⁵ Ex. M at 4-6 and 9; 1st Supplementary Filing at 3-4.

²⁶ Ex. M at 1-5.

United States mail or electronic mail to all persons on its list, and by publication in the State Register.”²⁷

18. There are 32 days between April 28 (the date on which the Board published its rulemaking Notice in the *State Register*) and the date of the hearing, May 30, 2014.

19. There are 25 days between May 5 (the date on which it began sending its notices to stakeholders) and the date of the hearing, May 30, 2014.

20. Likewise significant, the Notices of Hearing that the Board sent to legislators and its stakeholders were different, and far shorter, than the Notice it published in the *State Register*. Moreover, the Notice sent to stakeholders and legislators omitted a number of elements that are required for such notices.²⁸

21. The Administrative Law Judge concludes that the Board fulfilled its responsibilities to publish a proper notice in the *State Register* at least 30 days before the date set for the hearing.

22. However, the Administrative Law Judge cannot conclude that the Board fulfilled its responsibilities under statute and rule because its Notice to key stakeholders was both late and incomplete.

2. Notice to Legislators

23. On May 7, 2014, the Board sent a copy of the Notice of Hearing to legislators as required by Minn. Stat. § 14.116. It does not appear that a copy of the SONAR accompanied this notice.²⁹

24. There are 23 days between May 5 (the date on which it began sending its notices to stakeholders) and the date of the hearing, May 30, 2014.

25. Minn. Stat. § 14.116 requires the agency to send a copy of the Notice of Hearing and the SONAR to certain legislators on the same date that it mails its Notice of Hearing to persons on its rulemaking list and pursuant to its additional notice plan.³⁰

26. In this context, it is important to note that the communique sent legislators included an internet hyperlink to the *State Register* notice, which in turn, on page 6 of the 52-paged linked document, included an internet hyperlink to the SONAR.

²⁷ Minn. Stat. § 14.14, subd. 1a.

²⁸ Compare, Ex. M at 1-6 and 9 with Minn. R. 1400.2080, subp. 2 (B), (E), (F) and (G) and Minn. R. 1400.2080, subp. 4 (D), (E), (F), (G) and (H).

²⁹ Ex. M at 6.

³⁰ Minn. Stat. § 14.116.

27. The Administrative Law Judge concludes that the Board did not fulfill its responsibilities to provide the designated legislative leaders with more direct access to the SONAR or to complete the required notices 30 days before the date set for the hearing. Again, the Board's Notice to these stakeholders was both late and incomplete.³¹

3. Notice to the Legislative Reference Library

28. On July 14, 2014, the Board mailed a copy of the SONAR to the Legislative Reference Library – two weeks after the hearing record closed.³²

29. Minn. Stat. § 14.131 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Hearing is mailed.³³

30. The Administrative Law Judge concludes that the Board did not fulfill its responsibilities, to mail the SONAR to the Legislative Reference Library 30 days before the date set for the hearing.

4. Impacts of the Procedural Errors

31. While mindful that the Board's "rulemaking initiative has taken place under the leadership of three different Executive Directors during FY 14," the series of missed deadlines and incomplete filings is troubling.³⁴

32. The notice and filing requirements in Chapter 14 and Part 1400 serve important public purposes. These requirements are not "bureaucratic red tape" for the sake of red tape. Instead, the required notices and filings help to ensure that the public, and key legislators, have the information that they need in order to perform a thorough review of the agency's work.³⁵

33. It is that review that lends legitimacy to any later rules. The Minnesota Legislature delegates law-making power to Executive Branch agencies on the condition

³¹ Minn. Stat. §§ 14.14 and 14.116.

³² See, 1st Supplementary Filing at 1.

³³ Minn. Stat. §§ 14.14 and 14.116.

³⁴ 1st Supplementary Filing at 6.

³⁵ See, Minn. Stat. § 14.001 ("The purposes of the Administrative Procedure Act are: (1) to provide oversight of powers and duties delegated to administrative agencies; (2) to increase public accountability of administrative agencies; (3) to ensure a uniform minimum procedure; (4) to increase public access to governmental information; (5) to increase public participation in the formulation of administrative rules ... with the expectation that better substantive results will be achieved in the everyday conduct of state government by improving the process by which those results are attained.").

that, prior to the effective date of any administrative rules, there is thorough oversight and evaluation of the agency's drafting.³⁶

34. In this case, there were several procedural errors; and each seemed to follow from inattention to the requirements of the rulemaking process. However, it does not appear that these omissions – either individually or cumulatively – deprived “any person or entity of an opportunity to participate meaningfully in the rulemaking process....”³⁷

35. This finding follows from the particular circumstances that are present in this rulemaking. It bears emphasizing that the Board's proposed text arises out of a three-year rule development process, in which detailed discussions were undertaken with the relatively small group of stakeholders who would be directly impacted by the substance of the proposed rules. These factual circumstances are not, however, present in every rulemaking.³⁸

36. Requiring the Board to restart the rulemaking proceeding, from the point of the publication of the Notice of Hearing, was a potential response to the Board's serial failures to follow the required procedures. However, the Administrative Law Judge concludes that the number, range and detail of comments that would be received during a second round of rulemaking processes would not be measurably different from what occurred here.

37. For these reasons, the Administrative Law Judge determines that the Board's failure to meet the notice and filing requirements of Chapter 14 were “harmless errors” as those terms are used in Minn. Stat. § 14.15, subd. 5.³⁹

C. Impact on Farming Operations

38. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

³⁶ See, Minn. Stat. § 14.05, subd. 1 (“Each agency shall adopt, amend, suspend, or repeal its rules in accordance with the procedures specified in sections 14.001 to 14.69, and only pursuant to authority delegated by law and in full compliance with its duties and obligations”).

³⁷ See, Minn. Stat. § 14.15, subd. 5 (1).

³⁸ Ex. C; Ex. 0 at 1; Ex. R.

³⁹ See, Minn. Stat. § 14.15, subd. 5 (“The administrative law judge shall disregard any error or defect in the proceeding due to the agency's failure to satisfy any procedural requirement imposed by law or rule if the administrative law judge finds: (1) that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) that the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process”).

39. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Board was not required to notify the Commissioner of Agriculture.

D. Statutory Requirements for the SONAR

40. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its Statement of Need and Reasonableness.⁴⁰ Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and
- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

⁴⁰ Minn. Stat. § 14.131.

1. The Agency’s Regulatory Analysis

- (a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

41. The Board asserts that individuals who are studying to become teachers, the programs in Minnesota that prepare teacher candidates and school districts that provide clinical work opportunities to student teachers will be impacted by the proposed changes in accreditation standards.⁴¹

42. The Board maintains that among the beneficiaries of the proposed changes are teacher candidates – who will receive nationally-normed assessments of their teaching skills – and Minnesota’s schools – which will obtain “greater opportunities for collaboration and input on teacher training and candidate and program evaluation.”⁴²

- (b) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

43. The Board does not project that implementation and enforcement of the proposed rules will result in additional costs to the Board or any other state agency. The Board maintains that it “has conducted unit and program approval processes for many years,” and the key impacts of the proposed rules will be to clarify and streamline the Board’s review, thus resulting in costs for unit approval that “will remain about the same.”⁴³

- (c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

44. The Board is not aware of a program review and accreditation procedure that would be as closely-aligned to Minnesota’s statutory requirements, or as cost-effective, as the proposed rules.⁴⁴

⁴¹ Ex. O at 3-4.

⁴² *Id.*

⁴³ *Id.* at 4.

⁴⁴ *Id.* at 4-5.

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

45. Because the current accreditation standards are found in Minnesota Rules, the Board could not identify methods other than rulemaking to implement the proposed revisions and streamlining.⁴⁵

(e) The probable costs of complying with the proposed rules.

46. The Board estimates that there will be modest implementation costs – principally to higher education institutions, as they work to accurately reflect the modified accreditation standards in curricula and programs.⁴⁶

47. Additionally, the Board notes that some students may be assessed new fees, in the range of \$300, for costs associated with statutorily-required Teacher Performance Assessments and the storage of program assessment data.⁴⁷

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

48. The Board maintains that without the proposed revisions to the rules, it will be unable to fulfill its statutory mandates – principally, the requirements that teacher licensure programs reflect best practices and that program approvals follow from reliable candidate competency and program efficacy data.⁴⁸

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

49. The Board contends that the proposed state rules and existing federal requirements under Title II are wholly complimentary. It maintains that “the proposed rules support Title II data reporting requirements and thereby will achieve greater efficiency and shared use of performance data for multiple purposes. Both the program providers and the Board will benefit from this alignment.”⁴⁹

⁴⁵ *Id.*

⁴⁶ *Id.* at 5-6.

⁴⁷ *Id.*

⁴⁸ *Id.* at 6.

⁴⁹ *Id.* at 7.

(h) An assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

50. The Board did not undertake “an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule,” or made this assessment available by the date on which it published the Notice of Hearing. Minn. Stat. § 14.131 requires that this assessment accompany the SONAR and be made available 30 days prior to the start of the rulemaking hearing.⁵⁰

51. In a supplemental response to its filings, the Board did make clear that the only regulations related to the specific purpose of the proposed rules, were those that have been promulgated to implement Title II. With respect to the federal requirements, the Board maintains that the “proposed rules align directly with terms and expectations required for Title II Federal reporting by both higher education programs and the state.” Moreover, the Board maintains that the proposed rules will result in “shared use of performance data for multiple purposes ... streamlining state and federal reporting demands.”⁵¹

52. In this context, it is important to note that none of the public commentators appear to contest this claim. No commentator pointed to conflicting (or pyramiding) state and federal reporting requirements.⁵²

53. For these reasons, the Administrative Law Judge determines that while the Board’s assessment is untimely, its failure to meet requirements of Minn. Stat. § 14.131 (8) was a “harmless error,” as those terms are used in Minn. Stat. § 14.15, subd. 5.⁵³

2. Performance-Based Regulation

54. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the agency’s regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁵⁴

55. The proposed rules meet this requirement by permitting alternative methods of meeting regulatory requirements and sharpening the focus on “candidate

⁵⁰ Minn. Stat. § 14.131.

⁵¹ 1st Supplementary Filing at 5.

⁵² See *generally*, Ex. H; HEARING EXHIBITS.

⁵³ See, Minn. Stat. § 14.15, subd. 5.

⁵⁴ Minn. Stat. § 14.002.

performance outcomes and continuous improvement processes in all teacher licensure programs.”⁵⁵

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

56. Minn. Stat. § 14.131 obliges the Board to “consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

57. The SONAR notes that:

As required by Minnesota Statutes, section 14.131, the Board will consult with Minnesota Management and Budget (MMB). We will do this by sending MMB copies of the documents that we send to the Governor's Office for review and approval on the same day we send them to the Governor's office. We will do this before the Board's publishing the Notice of Intent to Adopt.

58. Notwithstanding the firm declaration in the SONAR, the Board does not have documents reflecting an early transmittal to, or reply from, MMB.⁵⁶

59. On July 14, 2014, two weeks after the hearing record closed, the Board made the required requests for an assessment from MMB.⁵⁷

60. As noted above, the risk that there will be regulatory impacts upon local units of government from the proposed rules is very low. For that reason, the Administrative Law Judge determines that the Board's failure to meet the consultation requirements of Minn. Stat. § 14.131 was a “harmless error” as those terms are used in Minn. Stat. § 14.15, subd. 5.

4. Summary

61. The Administrative Law Judge finds that, with the two exceptions noted above, the Board met the evaluation requirements of Minn. Stat. § 14.131.

E. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

62. Minn. Stat. § 14.127, requires the Board to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The

⁵⁵ Ex. O at 7.

⁵⁶ Compare, 1st Supplementary Filing at 1 with Minn. Stat. § 14.365 (8) and Minn. R. 1400.2220 (K).

⁵⁷ *Id.* at 8.

Board must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁵⁸

63. The Board determined that the cost of complying with the proposed rule changes will not exceed \$25,000 for any business or any statutory or home rule charter city.⁵⁹

64. The Administrative Law Judge finds that the Board has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

F. Adoption or Amendment of Local Ordinances

65. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁶⁰

66. The Board concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Board's proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.⁶¹

67. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.

G. Preparations for Future Rulemaking

68. As noted above in Findings 20, 22, 27, 30, 50, 66 and 67, there were a wide range of procedural errors in this rulemaking. Because of the importance of the notice, filing and assessment requirements, and the links between those processes and overall public confidence in the Board's work, the Administrative Law Judge strongly encourages Board members and staff to familiarize themselves with the rulemaking resources that are freely available to state agencies in advance of its next rulemaking.⁶²

⁵⁸ Minn. Stat. § 14.127, subs. 1 and 2.

⁵⁹ Ex. O at 8.

⁶⁰ Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subs. 2 and 3.

⁶¹ Ex. O at 8.

⁶² Minnesota Rulemaking Manual and Seminar (<http://www.health.state.mn.us/rules/manual/>); Rulemaking Manual Chapters and Forms (<http://www.health.state.mn.us/rules/manual/chapters.html>).

IV. Rulemaking Legal Standards

69. The Administrative Law Judge must whether:

- (1) the agency has statutory authority to adopt the rule;
- (2) the rule is unconstitutional or otherwise illegal;
- (3) the agency has complied with the rule adoption procedures;
- (4) the proposed rule grants undue discretion to government officials;
- (5) the rule constitutes an undue delegation of authority to another entity; and
- (6) the proposed language meets the definition of a rule.⁶³

70. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,⁶⁴ “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),⁶⁵ and the agency’s interpretation of related statutes.⁶⁶

71. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”⁶⁷ By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”⁶⁸

72. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.⁶⁹

⁶³ See, Minn. R. 1400.2100.

⁶⁴ See, *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

⁶⁵ Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

⁶⁶ See, *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

⁶⁷ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

⁶⁸ See, *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

⁶⁹ *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.⁷⁰

73. Because the Board made a series of revisions to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.

74. On June 28 and July 17, 2014, the Board detailed the revisions it would make to the proposed rules in response to the stakeholder feedback at the rulemaking hearing and during the later comment period.⁷¹

75. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

- (1) “the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice”;
- (2) the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice”; and
- (3) the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

76. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether:

- (1) “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests”;
- (2) the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing”; and
- (3) “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”⁷²

⁷⁰ *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

⁷¹ THE BOARD’S REBUTTAL COMMENTS, (June 26, 2014); 2nd Supplementary Filing (July 17, 2014).

⁷² See, Minn. Stat. § 14.05, subd. 2.

V. Rule by Rule Analysis

77. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency's regulatory choice or otherwise requires closer examination.

78. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

79. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

80. While there was active stakeholder comment on the best phrasing and structure of the proposed rules, by far the most comment was drawn to the Board's proposals to undertake heightened scrutiny of teacher programs with less than 10 enrollees and to limit accreditation of "related services programs" to those that had "national accreditation status."⁷³

A. Minn. R. 8705.2200, subp. 5

81. The Board initially proposed to subject "low-volume programs" – namely those with fewer than 10 enrollees each year – to more frequent scrutiny by the Board's program review teams.⁷⁴

82. As part of its submissions on June 26, 2014, the Board stated that it would revise its proposal so as to delete in its entirety proposed subpart 5.

83. The Board's action revising the text is needed and reasonable and would not result in a "substantially different" rule, as those terms are used in Minn. Stat. § 14.05, subd. 2.

⁷³ See generally, Hearing Testimony of Chris Helgestad; Comments of Caroline Burke (May 26, 2014); Comments of Dawnette Cigrand (May 20, 2014); Comments of Deborah R. Dillon (June 13, 2014); Comments of Amy Foell (May 30, 2014); Comments of John L. Romano, Ph.D (May 8, 2014); Comments of Nicholas Ruiz (May 26, 2014); Comments of Fernando Williamson (May 28, 2014); Comments of Patricia McCarthy Veach (May 24, 2014).

⁷⁴ Ex. N at 25.

B. Minn. R. 8705.2500

84. The Board initially proposed to limit its own accreditation for school counseling education programs to those programs that were also certified by a nationwide accreditation entity.⁷⁵

85. While acknowledging that, as to school counseling programs, there is only one national accreditation entity – the Council for Accreditation of Counseling and Related Educational Programs, known as CACREP – the Board suggested that its plan would have genuine benefits. As it reasoned, aligning state licensing standards with the approvals earlier-awarded by CACREP would provide a “uniform measure” for school counseling licensure and “would bring this field into alignment with the expectation for other related service areas.” Moreover, “[f]ive of Minnesota’s seven counseling programs already hold this type of accreditation.”⁷⁶

86. Several commentators from the University of Minnesota’s Counseling and Student Personnel Psychology Program – a long-standing program that does not now hold a CACREP accreditation – argued that the proposed rule was unduly restrictive and irrational. For example, John L. Romano, Ph.D, of the University’s program, argued that there should be more than a single pathway to school counseling licensure.⁷⁷

87. As part of its submissions on June 26, 2014, the Board stated that it would revise its proposal so as to remove CACREP accreditation as a requirement for counseling and related service licensure. Those revisions are reflected below:

Related service licensure fields set forth in parts 8710.6000 to 8710.6400 8710.6300 are not subject to the program reporting requirements in this chapter. Program approval for these ~~program fields~~ licensure fields is based on either national accreditation status for these programs or another state board licensure as cited in the respective rules of 8710.6000 to 8710.6300.⁷⁸

88. The Board’s action revising the text is needed and reasonable, and would not be a substantial change from the rule as originally proposed.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

⁷⁵ *Id.*, at 27.

⁷⁶ Ex. Q at 4; *see also*, Hearing Testimony of JoAnn Van Aernum.

⁷⁷ Comments of John L. Romano, Ph.D; *see also*, Comments of Geoffrey Maryuama (May 21, 2014); Thomas Skovholt, Ph.D (May 21, 2014).

⁷⁸ THE BOARD’S REBUTTAL COMMENTS, at 4; 2nd Supplementary Filing at 2-3.

CONCLUSIONS OF LAW

1. The Minnesota Board of Teaching gave notice to interested persons in this matter.
2. Except as noted in Findings 20, 22, 27, 30, 50, 66 and 67, the Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The Administrative Law Judge concludes that errors noted above are “harmless errors” under Minn. Stat. § 14.15, subd. 5.
4. The Administrative Law Judge concludes that the Board has fulfilled its additional notice requirements.
5. 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; 14.15, subd. 3; and 14.50 (i) and (ii).
6. Except as noted above, the Notice of Hearing, the proposed rules and SONAR complied with Minn. R. 1400.2080, subp. 5.
7. 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 and 14.50.
8. The modifications to the proposed rules suggested by the Board after publication of the proposed rules in the *State Register* are not 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.
9. As part of the public comment process, a number of stakeholders urged the Board to adopt other revisions to Parts 8700, 8705 and 8710. In each instance, the Board’s rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.
10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Board from further modification of the proposed rules – provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: July 28, 2014

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Digitally Recorded – No Transcripts

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 rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule 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 a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.