OAH 5-9005-35173
Revisor R-4531

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Permanent Rules Related to Minnesota K-12 Academic Standards in the Arts	**ORDER OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON REVIEW OF RULES**

The Department of Education sought review and approval of the above-entitled rules pursuant to Minn. Stat. § 14.15, subd. 3 (2018) and Minn. R. 1400.2240, subp. 4 (2019). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule should not be approved.

On March 2, 2020, a hearing on the proposed repeal of Minn. R. 3501.0800, .0805, .0810, and .0815 (2019), and the proposed adoption of Minn. R. 3501.0820, was held before Administrative Law Judge Jim Mortenson. The record closed on March 16, 2020. On March 31, 2020, Judge Mortenson completed the Order on Review of Rules.

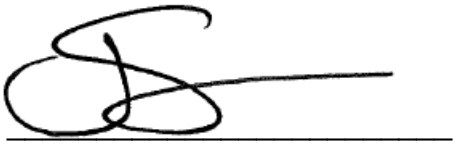
Based upon a review of the rulemaking record and the governing statutes and rules, the Chief Administrative Law Judge **CONCURS** with the disapprovals contained in Judge Mortenson's Order and issues the following:

ORDER

The findings of the Administrative Law Judge in the March 31, 2020 Order on Review of Rules, regarding the disapproval of the proposed repeal of Minn. R. 3501.0800, .0805, .0810, and .0815, and the disapproval of the proposed adoption of Minn. R. 3501.0820, are approved.

The reasons for the disapproval of the rules are as set forth in the March 31, 2020 Order.

Dated: April 9, 2020



Jenny Starr
Chief Administrative Law Judge

MEMORANDUM

The Department relies on 2016 Minn. Laws ch. 189, art. 25 § 6 for its specific statutory authority to conduct this rulemaking. This law amended Minn. Stat. § 120B.021, subd. 4, by changing the timeline for review of academic standards and benchmarks. Specifically, the law amended section 120B.021, subd. 4(c) to read as follows:

> The commissioner must implement a review of the academic standards and related benchmarks in arts beginning in the ~~2016-2017~~ 2017-2018 school year and every ten years thereafter.

The Department states that it relies on the updated timeline of review as its authority to conduct the rulemaking.

The Chief Administrative Law Judge agrees with Judge Mortenson's determination that the 2016 Session Law gave the Commissioner only the authority to review academic standards for the arts but not to amend or repeal the academic standards.

The goal of all statutory interpretation is to ascertain and effectuate the intention of the Legislature.[1] When reading a statute, we interpret words and phrases "according to rules of grammar and according to their common and approved usage." [2]

The word "review" is defined to mean "inspection, or reexamination."[3] The plain meaning of "review" does not encompass or infer the additional action of amending, repealing, or enacting rules.

The promulgation of administrative rules is a quasi-legislative function that may only be carried out pursuant to the specific requirements of the Administrative Procedure Act.[4] An agency has the power to issue binding administrative rules only if, and to the extent, the legislature has authorized it to do so.[5] This is particularly true in this matter where the legislature has expressly prohibited the Department from repealing or promulgating rules related to academic standards without specific legislative authorization.[6] Further, the legislature knows how to delegate rulemaking authority and has done so often in the area of education. [7]

---

[1] *Am. Family Ins. Grp. v. Schroedl,* 616 N.W.2d 273, 278 (Minn. 2000).
[2] Minn. Stat. § 645.08(1) (2018).
[3] Black's Law Dictionary (11th ed. 2019); *See also Review*, Webster's Unabridged Dictionary (2nd ed. 2001) (defining "review" as "to go over," "to inspect esp. formally or officially," and "to look over again").
[4] Minn. Stat. §§ 14.001 - .47 (2018)
[5] *Hirsch v. Bartley-Lindsay Co*., 537 N.W.2d 480, 485 (Minn. 1995).
[6] *See* Minn. Stat. § 120B.021, subd. 3 (2018).
[7] *See generally*, Minn. Stat. § 120B.021, subd. 3 ("The commissioner, consistent with the requirements of this section and section 120B.022, must adopt statewide rules under section 14.389 for implementing statewide rigorous core academic standards in language arts, mathematics, science, social studies, physical education, and the arts"); Minn. Stat. § 121A.04, subd. 5 (2018) ("The commissioner of education, after consultation with the commissioner of human rights must promulgate rules in accordance with chapter 14 to implement this section to prevent discrimination in elementary and secondary school athletic programs operated by educational institutions"); Minn. Stat. § 123B.42, subd. 1 (2018) ("The commissioner of

Minn. Stat. § 120B.021, subd. 4 does not provide the Department the specific legislative authority required to promulgate these rules. Therefore, as instructed by Minn. Stat. § 120B.021, subd. 3, the Department must seek and obtain specific rulemaking authority from the Legislature before initiating a new rulemaking proceeding to adopt the proposed rules. For these reasons, and for the reasons set forth in the March 31, 2020 Order, the disapproval of the proposed repeal of Minn. R. 3501.0800, .0805, .0810, and .0815, and disapproval of the proposed adoption of Minn. R. 3501.0820, are approved.

J. S.

education shall promulgate rules under the provisions of chapter 14 requiring that in each school year, based upon formal requests by or on behalf of nonpublic school pupils in a nonpublic school, the local districts or intermediary service areas must purchase or otherwise acquire textbooks, individualized instructional or cooperative learning materials, software or other educational technology, and standardized tests and loan or provide them for use by children enrolled in that nonpublic school"); Minn. Stat. § 123B.43(d) (2018) ("The commissioner of education shall promulgate rules under the provisions of chapter 14 to terminate the eligibility of any nonpublic school pupil if the commissioner determines, after notice and opportunity for hearing, that the textbooks, individualized instructional materials, or software or other educational technology, have been used in a manner contrary to the provisions of section 123B.41, subdivision 5, 123B.42, or this section or any rules promulgated by the commissioner of education").

OAH 5-9005-35173
Revisor R-4531

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Department of Education Governing the K-12 Academic Standards in the Arts, Minnesota Rules Chapter 3501.0820; Repeal of Rules 3501.0800, .0805, .0810, and .0815

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Jim Mortenson for a rulemaking hearing on March 2, 2020. The public hearing was held at the Minnesota Department of Education (Department), 1500 Highway 36, Roseville, Minnesota.

The Department proposes to repeal its rules relating to academic arts standards for kindergarten through twelfth grade and replace them with one rule. The intent of the proposed change is to make the standards for arts education consistent with the legislative requirement to employ grade-specific benchmarks and meet a legislative requirement to, according to the Department, revise the rules every ten years.[1]

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act. The Minnesota Legislature has designed this process to ensure that state agencies and regulatory boards have met all of the requirements that the legislature has established for adopting administrative rules.

The hearing was conducted to provide the Department the opportunity to give a public summary of its proposed rule repeal and replacement, to present any changes to the proposal that it may be considering, and to hear and respond to public comments and questions regarding the impact of the proposal.

The Department must establish that the proposed repeal and adoption of rules is necessary and reasonable; the rule is within the agency's statutory authority; and any modifications that the agency may have made after the proposal was initially published in the *State Register* are within the scope of the matter that was originally announced.[2]

Over one hundred written comments were received following publication of the dual notice on January 13, 2020. Most of these comments were identical or similar.

---

[1] Minn. Stat. § 120B.021, subd. 4(c) (2018) requires review of the academic standards for arts education every ten years, but as explained more fully below, the legislature has not specifically authorized a rule revision.

[2] *See* Minn. Stat. §§ 14.05 and 14.50 (2018).

On March 2, 2020, the Department's presentation was made by: Heather Mueller, Deputy Commissioner; Doug Paulson, Director of Academic Standards and Instruction; and Dr. Pam Paulson, Director of Professional Development and Resource Programs, Perpich Center for Arts Education. The hearing was attended by approximately 17 people. Eight people testified both for and against the rule. The Judge requested, and the Department then filed, an additional exhibit consisting of the related benchmarks for art education in Minnesota.[3]

After the hearing, the rulemaking record remained open until March 9, 2020, to permit interested persons and the Department to submit written comments. Eleven written comments from the public were received during this period. On March 9, 2020, the Department issued written comments responding to comments made at the hearing. Following the initial comment period, the hearing record was open an additional five business days to permit interested parties and the Department an opportunity to reply to earlier-submitted comments. On March 16, 2020, the Department filed a response to additional comments received during the post-hearing period. The hearing record closed on March 16, 2020.

SUMMARY OF DECISION

The Administrative Law Judge must **DISAPPROVE** the Department's proposed repeal of rules and adoption of the proposed rule because the Department lacks legislative authority for its proposal.

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

FINDINGS OF FACT

I. Summary of Regulatory Background to the Proposed Rule Amendment

1. Academic standards are "a summary description of student learning in a required" or elective content area.[4]

2. Since 2003, the Minnesota Legislature has required state or local academic standards for the arts in public elementary and secondary schools.[5]

3. In 2008, the legislature required the Commissioner of the Department to "revise and align the state's academic standards…in the arts to require that students satisfactorily complete the revised arts standards beginning in the 2010-2011 school year."[6] Statewide academic standards in the arts were promulgated in rule effective November 19, 2009.[7]

---

[3] Exhibit (Ex.) K5.
[4] Minn. Stat. § 120B.018, subd. 2 (2018).
[5] 2003 Minn. Laws, ch. 129, art. 1, § 3; Minn. Stat. §§ 120B.022 (2004), .021, subd. 1(a)(7) (2018).
[6] Minn. Stat. § 120B.023, subd. 2(c) (2008).
[7] Minn. R 3501.0800, 0805, 0810, .0815 (2009); https://www.revisor.mn.gov/rules/status/rule/76579.

4. The legislature also required the Commissioner to review the academic standards in the arts "beginning in the 2016-2017 school year."[8] This was changed to the 2017-2018 school year in 2016.[9]

5. The legislature also requires student achievement of academic standards to be measured using benchmarks.[10] Benchmarks supplement academic standards by specifying the "knowledge or skill that a student must master to complete part of an academic standard by the end of the grade level or grade band."[11]

6. Benchmarks are created by the Commissioner and do not require formal rulemaking.[12] Once established, the Commissioner may not "change the benchmarks [without] specific legislative authorization and after completing a review under section 120B.021, subdivision 4."[13]

7. The Commissioner has drafted benchmarks for academic standards in the arts based on the proposed revised academic standards in the arts.[14]

II. Rulemaking Authority

8. Minn. Stat. §. 120B.02, subd. 1(a) (2018) provides the Commissioner general authorization to "adopt in rule statewide academic standards."[15]

9. Minn. Stat. § 120B.021, subd. 3 (2018) requires the Commissioner to "adopt statewide rules under section 14.389 for implementing statewide rigorous core academic standards in…the arts."[16]

10. Minn. Stat. § 120B.021, subd. 3 also provides that "[a]fter the rules authorized under this subdivision are initially adopted, the commissioner may not amend or repeal these rules nor adopt new rules on the same topic without specific legislative authorization."[17] This specific requirement, which has been in place since 2003, overrides the general requirement in Minn. Stat. § 14.125 permitting amendments or the repeal of rules that have been timely promulgated.[18]

---

[8] Minn. Stat. § 120B.023, subd. 2(c) (2008).
[9] 2016 Minn. Laws, ch. 189, art. 25, § 6.
[10] Minn. Stat. §§ 120B.018, subd. 3; .023 (2018); Ex. D at ASH015.
[11] Minn. Stat. § 120B.018, subd. 3.
[12] Minn. Stat. § 120B.023.
[13] *Id*. at subd. 1(c).
[14] Ex. K5.
[15] Minn. Stat. § 120B.02, subd. 1(a).
[16] Minn. Stat. § 120B.021, subd. 3.
[17] *Id.*
[18] 2003 Minn. Laws ch. 129, art. 1, § 3. *See also* Minn. Stat. § 645.26, subd. 1 (2018) (Special provisions will be construed to be the exception to the rule made by a general provision).

11. The legislature has not provided specific authorization to repeal or revise the academic standards in arts since 2008.[19] The Department's authority to promulgate the rules expired 18 months following the effective date of the authorization.[20]

12. Minn. Stat. § 120B.021 has been amended several times since 2003. Most recently, in 2017, the legislature amended Minn. Stat. § 120B.021, subd. 4 to remove the outdated requirement that academic standards needed to be implemented beginning in the 2003-2004 and 2005-2006 school years and did not specifically address new authorization of rule-making for academic standards in the arts.[21] The amended law went into effect on August 1, 2017.[22] If it is deemed that the revision of the statute in 2017 conferred new authority on the Commissioner to repeal and adopt new academic standards in arts, the Commissioner had until February 1, 2019, to publish a notice of intent to adopt rules or a notice of hearing.[23] The Department did not publish its dual notice until January 13, 2020, nearly a year after the authority to do so expired.[24]

13. The Department believes that when the legislature amended Minn. Stat. § 120B.021, subd. 4(c) in 2016, the Department was granted specific authority to conduct rulemaking on specific content areas in certain academic years.[25] The provision the Department relies on was revised in 2016 to state: "The commissioner must implement a review of the academic standards and related benchmarks in arts beginning in the 2017-2018 school year and every ten years thereafter."[26]

14. The Department believes that its authority for rulemaking is also provided for in Minn. Stat. § 120B.023.[27] That statute states that the Department is not required to use the Minnesota Administrative Procedures Act (MAPA) to create grade-level benchmarks for academic standards.[28] It does not grant any rulemaking authority to the Department for academic standards.

III. Procedural Requirements of Chapter 14

15. Because the Department no longer has authority to repeal the prior academic standards for the arts and promulgate the proposed rule, a review of the

---

[19] Minn. Stat. § 120B.023, subd. 2(c). *See also* Minn. Stat. § 120B.023, subd. 2(c) (2012), stating the commissioner must "revise and align the arts standards in 2007-2008." *Compare* Minn. Stat. § 120B.021, subd. 4(c) (2013) requiring the commissioner to "review" the arts standards in 2016-17.

[20] Minn. Stat. § 14.125 (2018) ("An agency shall publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted, amended, or repealed. If the notice is not published within the time limit imposed by this section, the authority for the rules expires. The agency shall not use other law in existence at the time of the expiration of rulemaking authority under this section as authority to adopt, amend, or repeal these rules.")

[21] 2017 Minn. Laws 1st Spec. Sess. ch. 5, art. 2, § 3.

[22] *Id.*; Minn. Stat. § 645.02 (2018).

[23] Minn. Stat. § 14.125.

[24] Ex. F.

[25] Email from Kerstin Forsythe to Administrative Law Judge (Mar. 9, 2020) (on file with the Minn. Office of Admin. Hearings).

[26] 2016 Minn. Laws ch. 189, art. 25 § 6.

[27] Ex. D at ASH029.

[28] Minn. Stat. § 120B.023.

procedural requirements is moot. If the Department obtains authority to proceed, it will be required to follow the procedural requirements of MAPA anew in accordance with the authority the legislature may provide.[29]

IV. Rule by Rule Analysis

16. Even though the Department no longer has the authority to repeal the prior academic standards for the arts and promulgate the proposed rule, it is worthwhile to provide some advice regarding the proposal in the event the Department obtains new authority.

17. The Department's proposal seeks to repeal the current academic standards for the arts at Minn. R. 3501.0800, .0805, .0810, and .0815.[30] Those rules are identical to each other except for the grade ranges they cover.

18. The Department's proposal replaces the current academic standards for the arts with one rule, Minn. R. 3501.0820, that applies to students in kindergarten through grade 12.[31]

19. Generally, a rule must contain three elements. It must include a statement of general applicability, a statement of having future effect, and a statement designed to implement or make specific the law enforced or administered by the agency.[32]

20. Academic standards are "a summary description of student learning in a required content area."[33] Academic standards must: 1) be clear, concise, objective, measurable, and grade-level appropriate; 2) not require a specific teaching methodology or curriculum; and 3) be consistent with the state and federal constitutions.[34]

21. The proposal sets forth five "strands." The Department defines "strands" as "big concepts or practices into which standards are grouped."[35] The strands consist of: foundational knowledge and skills; creating art; performing or presenting art; responding to art; and connecting (understanding art on a personal level and in a societal context).[36] These strands are set forth as subparts of the rule.[37]

22. Within each strand are the academic standards. They are, generally:

(a) Using foundational knowledge and skills;

(b) Generating and developing original artistic ideas;

---

[29] Minn. Stat. § 14.05.
[30] Ex. C.
[31] *Id*.
[32] Minn. Stat. § 14.02, subd. 4 (2018).
[33] Minn. Stat. § 120B.018, subd. 2.
[34] Minn. Stat. § 120B.021, subd. 2(b) (2018).
[35] Ex. D at ASH041.
[36] Ex. C; Ex. D at ASH041-42.
[37] Ex. C.

(c) Creating original artwork;

(d) Revising and completing original artwork;

(e) Developing and refining artistic techniques and work;

(f) Making artistic choices in order to convey meaning;

(g) Analyzing and constructing interpretations of art;

(h) Evaluating art using criteria;

(i) Integrating knowledge and personal experiences while responding to, creating, and presenting artwork; and,

(j) Understanding that art influences and is influenced by personal, societal, cultural, and historical contexts.[38]

23. These standards apply across the five legislatively required arts areas: dance, music, theater, visual arts, and media arts.[39]

24. In Minnesota, "[p]ublic elementary and middle schools must offer at least three and require at least two" arts areas.[40] "Public high schools must offer at least three and require at least one" arts areas.[41]

25. Contrary to many public comments, the proposed rule does not attempt to alter the statutory requirements for arts. For example, the benchmarks developed for media arts in the elementary grades do not oblige public school districts to offer media arts to those grades.[42] Clarifying this, however, will bring the rule into compliance with Minn. Stat. § 120B.021, subd. 2(b).

26. The proposed rule fails to state that it is optional for local school districts that have not developed their own academic standards for the arts, or who choose to drop their own standards to apply the state standards.[43] Clarifying this will ensure public school districts know they are not required to adopt the statewide arts standards if they have their own arts standards that meet statutory requirements.

27. The proposed rule also fails to state that it is the public school district's duty to provide the instruction necessary to enable students to demonstrate they have met the

---

[38] *Id*.
[39] *Id.*; Ex. D at ASH044; Minn. Stat. § 120B.021, subd. 1(a)(7). Media arts is only applicable to high schools.
[40] Minn. Stat. § 120B.021, subd. 1(a)(7).
[41] *Id.*
[42] Ex. K5. Media arts is only required to be offered at the high school level, if a school district chooses to offer it at all. Minn. Stat. § 120B.021, subd. 1(a)(7).
[43] Minn. Stat. § 120B.021, subd 1(a)(7) provides that school districts must choose to apply "statewide or locally developed standards" for the arts.

academic standards in the arts.[44] Specifically describing the accountability of local school districts will enable them to better implement the rule in terms of providing direction to teachers who, in turn, are responsible for what is conveyed to students. Adding this clarification will also enable the state agency to hold local school districts accountable, as statute requires.

28. The proposed rule should specify that each standard applies to any of the five arts areas. While the rule is arguably concise, clarity and objectivity are sacrificed by not including a statement describing or defining what the elements of the rule mean or what they are. For example, reading a rule should not require a school board member, administrator, teacher, or judge, to research what it means. To the reader, it appears that the academic standards are: foundations, create, perform and present, respond, and connect.[45] But those are "strands," a word that does not appear and is not defined in the rule. The standards are embedded in the strands, e.g. "the student will generate and develop original artistic ideas," and "the student will evaluate artistic work by applying criteria."[46] The rule should be clear that these components are the academic standards, that they apply to any of the five arts areas (dance, music, theater, visual arts, and media arts), and that the rule does not require districts to hold students accountable for all arts areas, only the ones they are able to choose and participate in.[47]

29. Finally, the rule should define "foundational knowledge and skills." The benchmarks the Commissioner has developed to measure student mastery of the standards include a glossary that defines "foundations."[48] The benchmarks must be based on the standards and are limited to the "specific knowledge or skill that a student must master" to meet the standards.[49] Thus, whilst the benchmarks give a kind of meaning to the "big ideas" of the standards, they should not supplant or impose the meaning of the standards. The standards must go through rulemaking. A technical term or phrase that is key to a standard such as "foundational knowledge and skills" should be defined by rule to provide guidance on what the benchmarks for that academic standard should be to the Commissioner and her designees as well as to the public and those charged with implementing the rule.

V. Summary of Comments to Proposed Changes and Department Responses

A. Comments Supporting Proposal

30. The following is a summary of comments supporting the proposed repeal and proposed new rule:[50]

---

[44] The current rules do include this. *See* Minn. R. 3501.0800, .0805, .0810, .0815 (2019).
[45] Ex. C.
[46] *Id.*
[47] *See* Minn. Stat. § 120B.021, subd. 1(a)(7). The current rules do this at subp. 5.
[48] Ex. K5; file:///C:/Users/jmortenson/Downloads/Arts%20Standards%20Glossary%20Jan%202020%20(2).pdf.
[49] Minn. Stat. § 120B.018, subd. 3.
[50] Transcript (Tr.) at 48-53, 62-64, 86-91; Ex. 2 (Post-hearing comments of Betsy Leaf); and Ex. 3 (Post-hearing comments of Douglas Orzolek).

(a) The importance of arts education, generally.

(b) The new academic standards for the arts are more closely aligned with the National Core Standards of 2014.

(c) The proposed standards go beyond the basics and add creating, presenting, responding and connecting.[51]

(d) The process for formulating the proposed rule was lengthy and included many participants.

(e) The proposal improves the legitimacy of the arts as a core requirement.

B. Comments Opposed to or Critical of Proposal

31. The following is a summary of comments opposed to or critical of the proposed repeal and proposed new rule:[52]

(a) The rule is not clear and school districts will rely on the Statement of Need and Reasonableness to interpret the rule, components of which commenters objected to. There is a concern the standards require, or will be interpreted as requiring, students to meet all five arts areas, particularly in middle school.

(b) Concerns about the impact the rule will have on the types of classes that will be offered to meet the standards, the impact on teachers, and the cost to school districts.

(c) Concerns that the rule makes art a required standard.[53]

(d) Concerns that students will be required to take more art classes and then will have fewer opportunities to take other kinds of classes.

[51] In fact, "connecting" is the only new term added to the current academic standards for the arts. *Compare* Minn. R. 3501.0800, .0805, 0810, and .0815 with Ex. C.

[52] Ex. I; Tr. at 38-46, 54-62, 65-79, 93-97, 100-01; Ex. 1 (Post-hearing comments of Mike Sundblad); Post-hearing comments of Eric Vaughn (Mar. 4, 2020), Michael Nurmela (Mar. 4, 2020), Scott Pearson (Mar. 4, 2020), Art Sanbeck (Mar. 5, 2020), Kelly Nicholls (Mar. 5, 2020), William Durfey (Mar. 5, 2020), TJ Henderson (Mar. 8, 2020), and Mark Gable (Mar. 8, 2020), (SpeakUp) (eDocket No. 5-9005-35173).

[53] Art has been a required standard since 2003. 2003 Minn. Laws, ch. 129, art. 1 § 3; Minn. Stat. § 120B.022 (2004).

VI. Summary

32. The Administrative Law Judge finds that the Department did not have the legislative authority to repeal its rules and promulgate a new rule concerning the academic standards for the arts.[54]

33. If the Department is granted specific authority to proceed with rulemaking, it will have to comply with MAPA requirements, and any specific requirements set forth in the authorizing legislation.

34. If the Department is granted specific authority to proceed with rulemaking, it should consider the recommendations herein to ensure the proposed rule is clear, objective, enforceable, and does not require additional information to administer except for legislatively required benchmarks to measure student mastery of the standards.

Based on the foregoing findings of fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has authority to conduct this review and issue this report under Minn. Stat. § 14.15, .50 (2018), and Minn. R. 1400.2240 (2019).

2. When reporting on agency rulemaking, the administrative law judge must address:

> the degree to which the agency has (i) documented its statutory authority to take the proposed action, (ii) fulfilled all relevant procedural requirements of law or rule, and (iii)…demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.[55]

3. A rule must be disapproved if:

> 1) the rule "was not adopted in compliance with procedural requirements" of Minn. R. ch. 1400 (2019), Minn. Stat. ch. 14 (2018), "or other law or rule, unless the judge decides that the error must be disregarded" because it is harmless;
>
> 2) the rule "is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;"
>
> 3) the rule "is substantially different than the proposed rule, and the agency did not follow the procedures of part 1400.2110;"

[54] *In re Hubbard*, 778 N.W.2d 313, 320 (Minn. 2010) "In determining whether an administrative agency has express statutory authority, we analyze whether the relevant statute unambiguously grants authority for an administrative agency to act in the manner at issue."
[55] Minn. Stat. §§ 14.15, subd. 1, .50

4) the rule "exceeds, conflicts with, does not comply with, or grants the agency" more discretion than authorized by law;

5) the rule "is unconstitutional or illegal;"

6) the rule "improperly delegates the agency's powers to another agency, person, or group;" or,

7) the rule is not enforceable by its own terms and, therefore, "cannot have the force and effect of law."[56]

4. The Commissioner has authority to review the current academic standards for the arts but is not permitted to amend or repeal academic standards once they have been adopted without specific legislative authorization.[57]

5. When legislative authorization to proceed with rulemaking is granted and becomes effective, the Commissioner has 18 months in which to issue a notice of intent to adopt a rule or notice of a hearing before her authority expires.[58]

6. The Commissioner lacks specific legislative authorization to repeal the current academic standards for art and promulgate a new rule addressing academic standards in art because the last time specific legislative authorization was provided was in 2008 and that authority has since expired.

7. Alternatively, if it is determined that legislative authority was provided in 2017 and became effective August 1, 2017, the Commissioner's authority expired February 1, 2019, nearly a year before the Department filed its dual notice.[59]

8. When the Department had legislative authority to proceed with rulemaking, it was required to proceed with expedited rulemaking for arts standards under Minn. Stat. § 14.389.[60] The Department did not comply with this requirement and proceeded with rulemaking under Minn. Stat. §§ 14.131 to .20 (2018).

[56] Minn. R. 1400.2100; .2240, subp. 2 (2019).
[57] Minn. Stat. § 120B.021, subds. 3, 4.
[58] Minn. Stat. § 14.125.
[59] *See* 2017 Minn. Laws 1st Spec. Sess. ch. 5, art. 2, § 3, which could arguably be considered the most recent grant of legislative authorization. The Judge does not believe it is, however, because while the session law amended a portion of the relevant statute that did grant authority, the legislature did not amend or otherwise address the specific authority it had previously given to promulgate the arts standards rule.
[60] Minn. Stat. § 120B.021, subd. 3; 2017 Minn. Laws 1st Spec. Sess. ch. 5, art. 2, § 3.

9. An administrative law judge must:

> 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.[61]

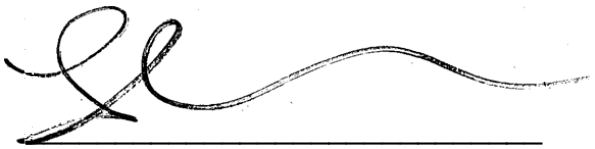
10. The Department's failure to proceed with expedited rulemaking under Minn. Stat. § 14.389 was a harmless error. Because the Department engaged a process that required far more public input and participation, the Department's failure to follow the enabling statute in this respect did not deprive any person or entity of an opportunity to meaningfully participate in the rulemaking process.

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

DETERMINATION

The proposed repeal of Minn. R. 3501.0800, .0805, .0810, and .0815, and the proposed adoption of Minn. R. 3501.0820 concerning academic standards for art is **DISAPPROVED**.

Dated: March 31, 2020



JIM MORTENON
Administrative Law Judge

NOTICE

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval.[62] If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Department of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been

[61] Minn. Stat. § 14.15, subd. 5

[62] If the Chief does not approve of the report, the report should be remanded to the Administrative Law Judge for consideration and analysis of the Department's procedural requirements under MAPA.

corrected.[63] However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Department may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Department's submission.

If the Department elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Department makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

[63] In this case, the primary defect is one of legislative authority. This defect must be corrected by the legislature and is not simply a matter of revising the rule proposal.