OAH 65-1300-32227
Revisor RD 4309

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Department of Education Governing Achievement and Integration, Minnesota Rules Chapter 3535

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2014), and Minn. R. 1400.2240, subp. 4 (2015). 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.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge agrees with and hereby **CONCURS** with all disapprovals contained in the Report of the Administrative Law Judge dated March 11, 2016.

The Chief Administrative Law **CONCURS** that the repeal of Minn. R. Parts 3535.0100 - .0180 is **DISAPPROVED**.

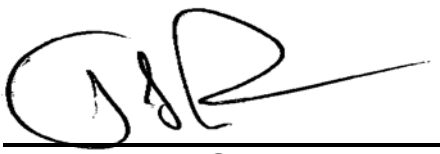
The Chief Administrative Law Judge **CONCURS** that the following proposed rules are **DISAPPROVED:**

Proposed Rule Part 3535.0010: Purpose and Interactions with Other Laws
Proposed Rule Part 3535.0020: Definitions
Proposed Rule Part 3535.0030: Eligible Districts
Proposed Rule Part 3535.0040: Achievement and Integration Plan Requirements
Proposed Rule Part 3535.0050: Incentive Revenue Criteria
Proposed Rule Part 3535.0060: Plan Evaluation

The changes or actions necessary for approval of the disapproved rules and repeals are as identified in the Administrative Law Judge's Report.

If the Department elects not to correct the defects associated with the repeal of the existing rules and the defects associated with the proposed rules, the Department must submit the repeal and proposed rules to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4.

Dated: March 21, 2016



TAMMY L. PUST
Chief Administrative Law Judge

OAH 65-1300-32227
Revisor RD 4309

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Department of Education Governing Achievement and Integration, Minnesota Rules Chapter 3535

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Ann C. O'Reilly for hearings on January 6 and 7, 2016. The hearings were held at the Department of Education in Roseville, Minnesota. The hearings commenced each day at 9:30 a.m., and continued until everyone present had an opportunity to be heard.

The hearings and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The legislature designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules.[2] Those requirements include assurances that the proposed rules are necessary and reasonable, and fulfill all relevant substantive and procedural requirements imposed on the agency by rule or law.[3] The rulemaking process also includes a hearing when 25 or more persons request one or when ordered by the agency.[4] The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.[5]

Daron Korte, Assistant Commissioner of the Department of Education, represented the Department of Education (Department) at the hearing. The members of the Department's hearing panel included Rose Hermodson, Special Assistant to the Commissioner of Education, and Dr. Anne Parks, Supervisor of the Department's Office of Equity and Innovation. Approximately 170 individuals attended the hearing.

The Department received approximately 80 written comments on the proposed rules prior to the hearing. Thirty-nine members of the public provided oral comments regarding the proposed rules during the hearing, and 23 written public exhibits were received. After the hearing, the Administrative Law Judge kept the administrative record open for an additional twenty calendar days, until January 27, 2016, to allow interested persons and the Department to submit written comments. Thereafter, the

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[1] Minn. Stat. §§ 14.131-.20 (2014 and Supp. 2015).
[2] *See* Minn. Stat. §§ 14.05-.20 (2014 and Supp. 2015); Minn. R. 1400.2000-.2240 (2015).
[3] *See* Minn. R. 1400.2100.
[4] See Minn. Stat. § 14.25 (2014).
[5] *See* Minn. Stat. § 14.14; Minn. R. 1400.2210-.2230.

record remained open for an additional five business days, until February 3, 2016**,** to allow interested persons and the Department to file written responses to any comments received during the initial comment period.[6] Fifty-nine written comments were received from members of the public after the hearing, along with two responses from the Department. To aid the public in participating in this matter, the public comments were posted on the Department's website shortly after they were received. The written comments presented after the hearing have been marked by the Administrative Law Judge as Exhibit 24 through 83.

The hearing record closed for all purposes on February 3, 2016.[7]

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before the Department takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

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. 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 corrected. 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

[6] *See* Minn. Stat. § 14.15, subd. 1.

[7] Pursuant to Minn. Stat. § 14.15, subd. 2, and Minn. R. 1400.2240, subp. 1, a one week extension was granted for the preparation of this Report.

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.

After adopting the final version of the rules, the Department must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the Department, and the Department will notify those persons who requested to be informed of their filing.

SUMMARY OF CONCLUSIONS

The Administrative Law Judge **DISAPPROVES** the repeal of Minn. R. 3535.0100-.0180 due to the Department's failure to establish the need for and reasonableness of the repeal. In addition, the Judge **DISAPPROVES** the proposed rules as a whole to the extent that they include charter schools. The inclusion of charter schools in to the achievement and integration program exceeds the Department's authority under Minn. Stat. § 124D.896, and conflicts with the Achievement and Integration for Minnesota Act, Minn. Stat. §§ 124D.861 and .862.

The Administrative Law Judge further **DISAPPROVES** Proposed Rule Parts 3535.0020, .0030, .0040 due to the Department's failure to present evidence or data as to the need for and reasonableness of those provisions The Judge **DISAPPROVES** Proposed Rule Part 3535.0050 because it conflicts with Minn. Stat. §§ 124D.861 and .862 and thus exceeds the statutory authority granted in Minn. Stat. § 124D.896. The Judge **DISAPPROVES** Proposed Rule Part 3535.0060 because it is impermissibly vague and includes none of the standards articulated by the Department for how achievement and integration plans will be evaluated by the Commissioner.

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

FINDINGS OF FACT

To understand and give context to the current rulemaking proceeding, it is helpful to review the 45 years of legislative and rulemaking history, which gave rise to the existing rules related to school integration and desegregation (Minn. R. 3535.0100 - .0180), as well as the proposed rules (Proposed Rule Parts 3535.0010 - 0060). In addition, to fully evaluate the Department's asserted claims that the existing rules are "out of alignment" and "in conflict" with the 2013 Achievement and Integration for Minnesota Act, a full comparison of the current rules, the proposed rules, and the enabling legislative authority is helpful.

I. History of Minnesota's Desegregation and Integration Rules and Legislation

A. Minnesota's First Desegregation Rules (1973)

1. While Minnesota has never engaged in the type of intentional segregation declared unlawful by the United States Supreme Court in *Brown v. the Board of Education* in 1954,[8] the issues of school desegregation[9] and integration[10] have been a part of Minnesota education policy for decades.[11]

2. In 1970, the Minnesota Board of Education (Board) issued its first formal policy on equal education entitled, "Educational Leadership Role for Department of Education and Board of Education in Providing Equal Educational Opportunity."[12] The document set forth the desegregation and integration policies that the Board sought to implement through administrative rules.[13]

3. In 1971, a federal lawsuit was filed charging the Minneapolis School District with *de jure* segregation.[14] The lawsuit was entitled, *Booker v. Special School District No. 1*. The court in *Booker* found that the Minneapolis School District acted intentionally, through a series of policy decisions, to maintain or increase racial segregation in Minneapolis schools.[15] As a result, the federal court required the implementation of a desegregation plan with a 35 percent limitation upon the proportion of "minority" students in any one school.[16] The court maintained jurisdiction in the case to oversee implementation of the desegregation plan.[17]

4. Shortly thereafter, in 1973, the Board adopted its first administrative rules related to desegregation and integration, entitled, "Regulations Relating to Equality in Educational Opportunity and School Desegregation."[18] The rules were codified in the Minnesota Code of Agency Rules (Code) and were based on the policy directives first proclaimed by the Board in the 1970 policy.[19]

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[8] 347 U.S. 483; 74 S.Ct. 868, 98 L.Ed. 873 (1954).
[9] as "[t]he abrogation of policies that separate people of different races into different institutions and facilities (such as public schools)." *Black's Law Dictionary* 511 (9th ed. 2009).
[10] Defined as "[t]he act or process of making whole or entire. Bringing together different groups (as races) as equals." *Black's Law Dictionary* 559 (abridged 6th ed. 1991); *see also Black's Law Dictionary* 880 (9th ed. 2009) ("[t]he process of making whole or combining into one").
[11] *See* 5 Minnesota Code of Agency Rules (MCAR) § 1.0620 (1973).
[12] *See id.*
[13] *Id*.
[14] *Booker v. Special School District No. 1*, 351 F. Supp. 799 (D. Minn. 1972).
[15] *Id*.
[16] *See Booker v. Special Sch. Dist. No. 1*, 451 F. Supp. 659, 660 (D. Minn. 1978), *aff'd* 585 F.2d 347 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (July 2, 1979).
[17] *Id.*
[18] SONAR at 5; *see also* MCAR ch. 31, 5 MCAR §§ 1.0620-1.0625 (1973, 1978).
[19] 5 MCAR § 1.0620 (1973).

5. When Minnesota's desegregation rules were enacted in 1973, Minneapolis was under the court-ordered desegregation plan established in *Booker*, and St. Paul and Duluth had voluntarily adopted desegregation plans that had been approved by the Board.[20] Therefore, these three districts were the only districts that had desegregation plans under the rules.

6. The early rules addressed comparisons of "minority" student enrollment among schools within the same district.[21] In 1978, the desegregation rules set forth in the Code were amended to specify that "segregation" occurred any time the "minority" student population in any "school building" exceeded the "minority racial composition of the student population for the entire district" by 15 percent.[22] The rules declared a "15 percentage point standard" for school sites in determining whether a district was segregated.[23] Schools found to be segregated were required to submit for approval a "comprehensive plan to eliminate segregation" to the Commissioner of Education.[24]

B. Re-codification into Minnesota Rules (1983)

7. In 1983, the school desegregation rules were re-codified in Minnesota Rules Chapter 3535, where they remain to this day.[25] Only minor changes were made to the rules when they were adopted into the Minnesota Rules.[26]

8. From 1973 to 1991, Minnesota's school desegregation rules remained virtually unchanged.[27] At the same time, demographics in Minnesota's schools changed significantly, especially in urban areas where students of color increased both in number and proportion.[28] These changes sparked important discussions about school desegregation and integration.[29] As a result, educators and policymakers began engaging in extensive discussions regarding how to revise Minnesota's desegregation rules.[30]

C. "Roundtable Discussions" (1990-1999)

9. In approximately 1990, the Board established a "Desegregation Policy Forum" to discuss changes to the existing desegregation rules.[31] The Board's policy

[20] SONAR at 11
[21] 5 MCAR § 1.0621C (1973; 1978).
[22] Ex. 24 (1999 SONAR).
[23] 5 MCAR § 1.0625 (1978).
[24] 5 MCAR § 1.0624 (1973; 1978).
[25] *See* Minn. R. 3535.0200 - .9950 (1983).
[26] *Compare* 5 MCAR §§ 1.0622-.0672 (1973, 1978), *with* Minn. R. 3535.0200-.9950 (1983).
[27] *Compare* 5 MCAR §§ 1.0622-.0672 (1973, 1978), *with* Minn. R. 3535.0500-.9950 (1983-1991).
[28] SONAR at 5.
[29] Ex. 24 at 2-4.
[30] SONAR at 5, Ex. 24 at 2-4.
[31] *Id.* at 2-3.

discussions continued through 1992, resulting in a preliminary draft of a new desegregation rule.[32]

10. As a result of changes made to the law in the 1993 legislative session, certain provisions of the desegregation rules were repealed.[33] In addition, the legislature also granted the Board authority to "make rules relating to desegregation" and "inclusive education."[34] The legislature noted that the Board had express authority to adopt new rules and repeal the existing rules, but could only amend the existing rules "under specific authority."[35]

11. The legislature directed the Board to convene several "roundtable" discussion meetings to address proposed changes to the desegregation rules.[36] The legislature specifically instructed the Board to discuss: standards for approving or disapproving desegregation plans; implementation and compliance issues; thresholds for requiring desegregation plans; legally permissible alternative approaches to meeting the needs of students of color; methods for preventing re-segregation in urban districts, including metropolitan-wide desegregation approaches; fiscal implications of proposed changes; housing and transportation issues relating to segregation; a review of current demographics and enrollment trends; and how all students may participate in open enrollment under a desegregation plan.[37] The legislature further directed the Board to utilize "nationally known" experts and report to the legislature before commencing rulemaking proceedings to adopt new rules.[38]

12. After conducting the "roundtable" discussions, the Board drafted proposed rules and sent those proposed rules to the legislature for review in 1994.[39]

13. In 1994, the legislature granted authority to the Board to propose new desegregation and integration rules,[40] and did so in language that acknowledged integration as well as desegregation. The 1994 enabling statute read:

> (a) The state board may make rules relating to desegregation/integration, inclusive education, and licensure of school personnel not licensed by the board of teaching.
>
> (b) In adopting a rule related to school desegregation/integration, the state board shall address the need for equal education opportunities for all students and racial balance as defined by the state board.[41]

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[32] *Id*.
[33] 1993 Minn. Laws, ch. 224, art. 12, § 39, at 1197.
[34] 1993 Minn. Laws, ch. 224, art. 12, § 5, at 1187.
[35] Minn. R. 3535.0200-.9920 (1993); 1993 Minn. Laws, ch. 224, art 12, § 3, at 1186.
[36] 1993 Minn. Laws, ch. 224, art. 9, § 46, at 1174-75.
[37] *Id*.
[38] *Id*.
[39] *See id.*
[40] 1994 Minn. Laws, ch. 647, art. 8, § 1, at 2628.

14. The legislature also established an office of "desegregation/integration" in the Department of Education, as well as an advisory committee to assist the Board in creating the new desegregation rules.[42] However, because there were no state statutes requiring desegregation or integration plans, the legislature granted the Board broad authority to establish the state policies on desegregation and integration through agency rules.[43] During this time, the Board of Education and the Department of Education co-existed, but served different functions.[44]

15. In 1995, the legislature abolished the Department of Education and created the Department of Children, Families, and Learning (DCFL).[45] For four years, the state had both a Board of Education and the DCFL involved in the drafting of a new desegregation rule.[46] Both the Board and the DCFL proposed competing language for the new rule and no consensus on a new rule could be reached.[47] At the same time, the legislature did not pass statutes declaring state laws or policies for school desegregation or integration. Instead, the legislature continued to leave such policy determinations to administrative rulemaking.[48]

D. Establishment of Integration Revenue

16. In 1995, the legislature passed the first "integration revenue" law, Minn. Stat. § 124.312, providing "targeted needs revenue" for programs established under desegregation plans mandated by the Board or court order, as well as "integration revenue" and "integration aid" for the Minneapolis, St. Paul, and Duluth school districts.[49]

17. In 1997, "integration revenue" and "integration aid" were separated from "targeted needs revenue" and separately provided for in Minn. Stat. §§ 124.313 and 124.315 (1997).[50] In addition, "integration revenue" was made available to districts other than Minneapolis, St. Paul, and Duluth. Specifically, such revenue became available to all districts "required to implement a plan" under Minn. R. "parts 3535.0200 to 3535.2200."[51] This change was made in anticipation of new desegregation and integration rules which had been proposed but not yet been adopted by the Board.[52] In 1998, Minn. Stat. § 124.312 was repealed,[53] and the integration revenue statute, Minn.

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[41] Minn. Stat. § 121.11, subd. 7d (1994).
[42] 1994 Minn. Laws, ch. 647, art. 8, § 2, at 2628-29.
[43] SONAR at 5.
[44] *See* 1995 Minn. Laws 1st Sp. Sess., ch. 3, art. 16; 1999 Minn. Laws ch. 241, art. 9, § 52.
[45] 1995 Minn. Laws, 1st Spec. Sess., ch. 3, art. 16, § 1, at 3437-38.
[46] Ex. 24 at 3-4; Minn. Stat. § 127A.60 (1998) (Placing DCFL under the direction of the Board).
[47] Ex. 24 at 3-4; Minn. Stat. § 127A.60 (1998).
[48] Minn. Stat. § 121.11 (1994-1998)
[49] Minn. Stat. § 124.312 (Supp. 1995).
[50] 1997 Minn. Laws, 1st Spec. Sess., ch. 4, art. 2, § 18, at 3246.
[51] Minn. Stat. § 124.315, subd. 3(4) (1997).
[52] SONAR at 12. Note that Minn. R. ch. 3535 did not contain a Rule 3535.2200 in 1995 or 1997. *See* Minn. R. 3535.0200-.9920 (1995, 1997).
[53] 1998 1998 Minn. Laws, ch. 397, art. 2, § 163, at 1328.

Stat. § 124.315, was renumbered as Minn. Stat. § 124D.86 (the Integration Revenue Statute).[54]

18. In addition to renumbering the Integration Revenue Statute in 1998, the legislature transferred authority to create the desegregation/integration rules from the Board to the Commissioner of the DCFL.[55] In doing so, the legislature established a deadline for the DCFL to complete the new rules.[56] The statute declared:

> (a) By January 10, 1999, the commissioner [of the DCFL] shall make rules relating to desegregation/integration and inclusive education.
>
> (b) In adopting a rule related to school desegregation/integration, the commissioner shall address the need for equal educational opportunities for all students and racial balance as defined by the commissioner.[57]

19. Using this statutory authority, the DCFL set out to adopt new school desegregation/integration rules in 1999.[58] At that time, there were no state statutes directing the DCFL as to the policies to implement or what the school desegregation/integration rules should and should not include. In essence, the legislature delegated the responsibility for establishing state law and policy on integration and desegregation to the DCFL – similar to what the legislature had done in 1973, when it initially delegated to the Board the authority to create desegregation rules.

20. An extensive rulemaking proceeding occurred in 1999 in which the DCFL set forth the law and policy reasons for its proposed rules.[59] The existing Minn. R. Parts 3535.0100-.0180 (1999 Rules) are the result of that rulemaking proceeding.

21. In the Statement of Need and Reasonableness (SONAR) for the 1999 Rules, the Department analyzed case law existing at that time related to school desegregation, integration, and achieving racial balance.[60] The SONAR explained why the Department believed the 1999 Rules were authorized, needed, and reasonable.[61] The 1999 Rules were approved by an Administrative Law Judge on March 19, 1999, and were adopted on July 6, 1999.[62]

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[54] 1998 Minn. Laws, ch. 397, art. 2, § 164, at 1328.
[55] 1998 Minn. Laws ch. 398, art. 5, § 7, at 1701.
[56] *Id*.
[57] Minn. Stat. § 124D.896 (1998).
[58] See Ex. 24.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *In re Proposed Adoption of Rules Related to Desegregation*, *Minn. R. Parts 3535.0100 to 3535.0780*, Docket No. 09-1300-10448, REPORT OF THE ADMINISTRATIVE LAW JUDGE (Mar. 19, 1999); 24 Minn. Reg. 77 (July 6, 1999).

22. The 1999 Rules have been in place and have remained unchanged since their adoption.[63]

23. In 2003, the DCFL was renamed the Minnesota Department of Education (Department).[64]

E. The Integration Revenue Statute and the 1999 Rules

24. Between 1999 and 2012, the Integration Revenue Statute, Minn. Stat. § 124D.86, was modified several times, but the 1999 Rules were not.[65] The 1999 Rules remain in effect to this day.[66]

25. In its latest form, the Integration Revenue Statute, Minn. Stat. § 124D.86 (2011), required that integration revenue be used only for programs established under a "desegregation plan" filed with the Department or required by court order.[67] The statute further explained how a district could get its integration budget approved and what components were required in a desegregation plan.[68] Moreover, section 124D.86 set forth: a formula for determining the amount of integration revenue available to a district; the percentage of the revenue that could be levied upon taxpayers; and the amount paid by the state as aid.[69] These amounts were referred to as "integration revenue," "integration aid," and an "integration levy."[70]

26. Under the statute, "integration revenue" was determined according to an adjusted per-pupil formula, depending on the type of district filing a plan.[71] Integration revenue was the total amount of monies available to a district to fund its desegregation/integration/collaborative plan.[72]

27. "Integration revenue" was made up of two parts: the "integration levy" and the "integration aid."[73] The "integration levy" was the amount that a district could levy upon its district taxpayers; whereas, "integration aid" was the amount of aid paid by the state.[74]

28. The Integration Revenue Statute was initially enacted and later modified to work in conjunction with the 1999 Rules. Section 124D.86 explained: how much a district with a plan was entitled to receive in integration revenue; the budget approval

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[63] See Minn. R. 3535.0200 – 0180 (1999-2015).
[64] 2003 Minn. Laws, ch. 130, § 1, at 1260-61.
[65] SONAR at 9.
[66] *See* Minn. R. 3535.0200 – 0180 (1999-2015).
[67] Minn. Stat. § 124D.86, subd. 1 (2011).
[68] *Id*., subds. 1a, 1b (2011).
[69] *Id*., subds. 3, 4, 5 (2011).
[70] *Id*.
[71] *Id*., subd. 3.
[72] *Id*.
[73] *Id*., subds. 3, 4, 5.
[74] *Id*., subds 4, 5.

process; and a general description of plan components required to qualify for funding.[75] In turn, the 1999 Rules established which districts were required to file a plan; how a district could voluntarily join a collaborative plan to qualify for integration revenue if it was not required to maintain a desegregation or integration plan; and how the integration revenue could be utilized by a district.

F. Description of the 1999 Rules

29. The 1999 Rules mandate that school districts collect racial identification data for students, and report annually to the Commissioner the racial composition of each school within its district and each grade level served by each of the schools.[76] Based upon this data, the Commissioner must determine: (1) whether racial segregation[77] exists; (2) whether there is a "racially identifiable school"[78] within a district; or (3) whether the district as a whole is "racially isolated."[79]

30. If the Commissioner determines that intentional segregation exists, the district is required to prepare a desegregation plan to remedy the segregation.[80] Failure to prepare or implement a desegregation plan is subject to certain remedies and penalties. Among the possible remedies are a reduction of school aid; referral to the Department of Human Rights for an investigation, and a report to the legislature with recommendations for sanctions.[81]

31. If the Commissioner determines that a district has a "racially identifiable school" in its district (which is not the result of intentional segregation), the district must develop an integration plan in cooperation with a community collaboration council, and submit this plan to the Commissioner for review and approval.[82] The rule authorizes the Commissioner to evaluate the integration plan each year to determine whether the plan was implemented and whether the goals were met.[83] The integration plan remains in

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[75] Minn. Stat. § 124D.86.
[76] Minn. R. 3535.0120 (2015).
[77] Minn. R. 3535.0150 (2015). "Segregation" is defined in Minn. R. 3535.0110, subp. 9 (2015) as "the intentional act or acts by a school district that has the discriminatory purpose of causing a student to attend or not attend particular programs or schools within the district on the basis of the student's race and that causes a concentration of protected students at a particular school."
[78] A "racially identifiable school within a district" is defined as "a school where the enrollment of protected students at the school within a district is more than 20 percentage points above the enrollment of protected students in the entire district for the grade levels served by that school." Minn. R. 3535.0110, subp. 6 (2015).
[79] Minn. R. 3535.0170 (2015). "Racially isolated district is defined as "a district where the districtwide enrollment of protected students exceeds the enrollment of protected students of any adjoining district by more than 20 percentage points." Minn. R. 3535.0110, subp. 7 (2015).
[80] Minn. R. 3535.0150, subp. 1.
[81] *Id*., subp. 4 (2015).
[82] Minn. R. 3535.0160, subp. 1 (2015).
[83] *Id*., subp. 4 (2015).

effect for three years.[84] After three years, if a district has not met its goals, a new plan must be developed.[85]

32. If the Commissioner determines that a district as a whole is "racially isolated," the district is required to collaborate with its "adjoining districts" to establish a "multidistrict collaboration counsel" and to develop an integration plan to offer cross-district (i.e., inter-district) opportunities to improve integration.[86] In this way, districts "adjoining" a racially isolated district are required to be a part of an integration plan; even if the adjoining districts are not segregated, are not racially isolated, or do not have a "racially identifiable school" in their district.[87] In addition, the rules permit non-adjoining, non-qualifying districts to voluntarily enter into collaborative plans with qualifying districts.[88] The rules require that collaborative integration plans must be renewed every four years and that the Commissioner biennially evaluate the results of the collaborative effort and determine whether the goals have been met.[89]

33. Under the 1999 Rules, all integration plans *must* include the extent of community outreach that preceded the plan; the integration issues identified; the goals of the integration effort; and how the integration goals will be accomplished.[90] The rules then provide examples of the types of uses of integration revenue that a district *may* include in its plan, including:

- Duplicating programs that have demonstrated success in improving learning;
- Transportation;
- Inter-district opportunities and collaborative efforts;
- Incentives for low-income students to transfer to non-racially isolated districts;
- Magnet programs and other schools to increase "racial balance;"
- Cooperative programs to enhance the experience of all students;
- Recruitment of teachers, teacher exchanges, parent exchanges, and staff development opportunities;
- Incentives to teachers to improve distribution of teachers of all races;
- Shared extracurricular opportunities;
- Promotion of programs to attract a wide range of students;
- Smaller class sizes and greater counseling and support services; and

[84] *Id.*, subp. 5 (2015).
[85] *Id.*, subp. 6 (2015).
[86] Minn. R. 3535.0170, subps. 1, 2, 5.
[87] *Id*.
[88] *Id.*, subp. 1A (2015).
[89] *Id.*, subp. 8; .0180 (2015).
[90] Minn. R. 3535.0160, subp. 3A, .0170, subp. 6A (2015) (emphasis added).

- American Indian language and culture programs.[91]

34. While the 1999 Rules include "American Indian" students in the definition of "protected students" for data collection, the rules exempt districts from filing plans if it is determined that a school is "racially identifiable" or a district is "racially isolated" only as a result of a concentration of enrolled American Indian students.[92]

G. Legislative Audit and Changes to the Integration Revenue Statute

35. In 2005, the Office of the Legislative Auditor (OLA) was directed to evaluate the state Integration Revenue Program (Program), which was then set forth in Minn. Stat. § 124D.68 and the 1999 Rules (Minn. R. Parts 3535.0100-.0180).[93] The OLA concluded that:

- The purpose of the Program was not clear;
- School Districts varied widely in how they used the revenue, and some expenditures were "questionable";
- Neither the state nor the school districts have adequately addressed the result of the Program;
- Racial concentration increased in some school districts that participated in the Program;
- The Department has not provided consistent or required oversight over the Program; and
- The funding formula has some unintended and potentially negative consequences.[94]

36. The OLP recommended that the legislature:

- clarify the purpose of the Program;
- authorize the Department to: (1) establish criteria against which school district must evaluate their integration plans, and (2) withhold integration revenue from those districts that fail to meet these evaluation requirements;
- require districts that want to voluntarily participate in the Program to obtain approval from the Department;
- give the Department authority to approve the integration budges of the Minneapolis, St. Paul, and Duluth school districts; and
- consider revising the Integration Funding formula.[95]

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[91] Minn. R. 3535.0160, subp. 3B; .0170, subp. 6B (2015) (emphasis added).
[92] Minn. R. 3535.0110, subp 4, .0160, subp. 1B, .0170, subp. 1B (2015).
[93] SONAR at 8.
[94] Minnesota Office of the Legislative Auditor Summary Report (Nov. 2005), available at *http://www.auditor.leg.state.mn.us/ped/2005/integrevsum.htm*.
[95] *Id*.

37. In 2011, the Minnesota legislature repealed Minn. Stat. § 124D.86, effective for fiscal year 2014.[96] In addition, the legislature established an Integration Revenue Replacement Advisory Task Force (Task Force) "to develop recommendations for repurposing the integration revenue funds to create and sustain opportunities for students to achieve improved educational outcomes."[97] In this way, the legislature expressed its intent to redirect the integration revenue monies to also combat the achievement gap, as opposed to combatting only racial segregation and integration.

II. ACHIEVEMENT AND INTEGRATION ACT OF 2013

38. In 2013, the legislature passed the Achievement and Integration for Minnesota Act, Minn. Stat. §§ 124D.861 and .862 (AIM Act or Act).[98] Unlike its predecessor, Minn. Stat. § 124D.86, which was focused on racial integration alone, the AIM Act addresses: (1) student academic achievement; (2) racial integration; and (3) economic integration.[99]

39. The AIM Act is divided into two separate parts. The first part, Minn. Stat. § 124D.861, establishes the policy reasons for the integration revenue program, including the requirements for achievement and integration plans and the processes for adoption of such plans by eligible districts. The second part, Minn. Stat. § 124D.862, establishes the funding formulas and criteria for districts' use of the integration revenue funds.

40. Prior to the passage of the AIM Act, Minnesota's integration and desegregation policies — and the requirements for integration, desegregation, and collaborative plans — were established only in Minn. R. Part 3535, not by statute (see above).

A. Part 1: Achievement and Integration Plans (Minn. Stat. § 124D.861)

41. The first part of the AIM Act, section 124D.861, sets forth the requirements for achievement and integration (A&I) plans. At its outset, Section 124D.861 declares the policy behind and purpose of the Act to: (1) pursue racial and economic integration; (2) increase student academic achievement; (3) create equitable educational opportunities; and (4) reduce academic disparities based on students' diverse racial, ethnic, and economic backgrounds.[100]

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[96] 2011 Minn. Laws, 1st Spec. Sess., ch. 11, art. 2, § 51, at 73.
[97] 2011 Minn. Laws, 1st Spec. Sess., ch. 11, art. 2, § 49, at 68-69.
[98] 2013 Minn. Laws, ch. 116, art. 3, §§ 29, 30, at 77-80; 2013 Minn. Laws, ch. 143, art. 3, § 1, at 23-24; 2013 Minn. Laws, ch. 144, § 16, at 17. The statutes were modified in 2014 and 2015. *See* 2014 Minn. Laws, ch. 272, art. 1, § 38, at 41; 2014 Minn. Laws, ch. 312, art. 16, §§ 6, 7, at 174-75; 2015 Minn. Laws, ch. 21, art. 1, § 20, at 17.
[99] Minn. Stat. § 124D.861, subd. 1 (2014).
[100] Minn. Stat. § 124D.861, subd. 1(a).

42. The Act then defines which school districts are subject to the Act by defining "eligible districts."[101] An "eligible district" is a school "district" that is either: (1) "required to submit a plan to the commissioner under Minnesota Rules governing school desegregation and integration;" or (2) "a member of a multidistrict integration collaborative that files a plan with the commissioner."[102] In this way, the legislature leaves to the Commissioner the task of determining which districts are required to submit a plan (and thus be deemed an "eligible district"), and how a district can become a member of a multidistrict integration collaborative. The Act adopts the eligibility standards set forth in the 1999 Rules, as those were the "desegregation and integration" rules in effect at the time of passage of the AIM Act.

43. Next, the statute places limitations on how a district may use integration revenue. Under section 124D.861, subd. 1(c), eligible districts are required to use integration revenue to pursue: (1) academic achievement; and (2) racial and economic integration. A district *must* pursue these objectives through any or all of the following methods:

> (1) "integrated learning environments" that prepare all students to be effective citizens and enhance school cohesion;
>
> (2) policies and curricula and trained instructors, administrators, school counselors, and other advocates to support and enhance integrated learning environments, including through magnet schools, innovative, research-based instruction, differentiated instruction, and targeted interventions to improve achievement;
>
> (3) rigorous career and college readiness programs for underserved populations, consistent with Minn. Stat. § 120B.30;
>
> (4) "integrated learning environments" to increase student academic achievement;
>
> (5) cultural fluency, competency, and interaction;
>
> (6) graduation and educational attainment rates; and
>
> (7) parental involvement.[103]

44. The statute requires that a district's A&I plan contain goals for:

> (1) reducing the disparities in academic achievement among all students and specifically "specific categories of students under section 120B.35,

[101] *Id.*, subd. 1(b).
[102] *Id.*
[103] *Id.*, subd. 1(c) (emphasis added).

subdivision 3, paragraph (b)," excluding the categories of gender, disability, and English learners;[104] and

(2) increasing racial and economic integration in schools and districts.[105]

45. However, the exact components of the plan are discretionary under the Act and *may* include:

- Innovative and integrated prekindergarten through grade 12 learning environments that offer students school enrollment choices;

- Family engagement initiatives that involve families in their students' academic life and success;

- Professional development opportunities for teachers and administrators focused on improving the academic achievement of all students;

- Increased programmatic opportunities focused on rigor and college and career readiness for underserved students, including students enrolled in alternative learning centers, public alternative programs, and contract alternative programs; and

- Recruitment and retention of teachers and administrators with diverse racial and ethnic backgrounds.[106]

46. In addition to the above requirements and suggestions, eligible districts are required to:

- Implement "effective, research-based interventions that include formative assessment practices to reduce the disparities in student academic performance among the specific categories of students as measured by student progress and growth on the state reading and math assessments;"[107]

- Incorporate and be consistent with the district's comprehensive strategic plan under the World's Best Workplace Act (Minn. Stat. § 120B.11);[108] and

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[104] Minn. Stat. § 120B.35, subd. 3(b) (2014) references the "nine student categories identified under the federal 2001 No Child Left Behind Act." Upon a cursory review of the 2001 No Child Left Behind Act, the Administrative Law Judge was unable to determine what those nine categories included.
[105] Minn. Stat. § 120B.35, subd. 2(a) (2014).
[106] *Id*. (emphasis added).
[107] *Id*., subd. 2(b) (2014).
[108] *Id*., subds. 2(a), 3(a) (2014).

- "Create efficiencies and eliminate duplicative programs and services."[109]

47. At the same time that the legislature set broad mandates on the content of the plans and the use of integration revenue, it granted the Commissioner wide authority to evaluate the efficacy of the plans in: (1) reducing disparities in academic performance "among specified categories of students"; and (2) realizing racial and economic integration.[110]

48. Finally, section 124D.861 sets forth: the deadlines for plan and budget submissions; the deadline for plan approval by the Commissioner; the term for district plans; the requirements for an annual public meeting/progress report; and the type of "longitudinal data" needed for annual progress reports.[111]

B. Part 2: Achievement and Integration Revenue (Minn. Stat. § 124D.862)

49. The second part of the Act, Minn. Stat. § 124D.862, is the funding portion of the Act; it sets forth how much revenue a district is entitled to receive and how the district may use the funding. Section124D.862 includes:

- A calculation for determining a district's "initial achievement and integration revenue";
- A formula for calculating "incentive revenue";
- A definition of "achievement and integration revenue";
- The percentages of the total A&I revenue that shall be paid by state aid and by district levies;
- Limitations on the uses of A&I revenue; and
- The Commissioner's authority to review and withhold A&I revenue when the goals identified by a district in its A&I plan are not met.[112]

50. "Achievement and integration revenue" is defined in the statute as the sum of a district's "initial achievement and integration revenue" plus its "incentive revenue."[113] Of the total achievement and integration revenue to which an eligible

[109] *Id*., subd. 2(c) (2015).
[110] *Id*., subd. 5 (2015).
[111] *Id*., subds. 3(b)-(d), 4, 5 (2014).
[112] Minn. Stat. § 124D.862 (2014).
[113] *Id*., subd. 3. The formula for "initial revenue" is convoluted and the definition of "incentive revenue" is unclear, but neither need be addressed here.

district is entitled, 70 percent is paid by the state through "achievement and integration aid," and 30 percent is paid by the district through a special levy, called an "achievement and integration levy."[114]

51. The statute provides that at least 80 percent of the total achievement and integration revenue *must* be used for: (1) "innovative and integrated learning environments";[115] (2) school enrollment choices; (3) family engagement activities; and (4) "other approved program providing direct services to students."[116] Up to 20 percent of the revenue *may* be used for professional development, staff development activities, and placement services.[117] No more than 10 percent may be spent on administrative services.[118]

52. Section 124D.862, subd. 8, authorizes the Commissioner to review a district's plan every three years and to determine if the district met the goals set forth in the plan. If the district met its goals, the district may submit a new three-year plan.[119] If the district did not meet its goals, the Commissioner must develop an improvement plan and timeline in consultation with the district, and use up to 20 percent of the A&I revenue to implement the improvement plan until the goals are reached.[120]

53. The AIM statutes do not set forth the criteria that the Commissioner must use when reviewing a district's plan or what the Commissioner may include in an improvement plan. Instead, section 124D.861, subd. 5 states, "The commissioner shall evaluate the efficacy of district plans *in reducing the disparities in student academic performance* among the specified categories of students within the district, and *in realizing racial and economic integration*."[121] The statute does not define "racial and economic integration" and does not explain exactly what the Commissioner must consider in evaluating a district's plan.

III. RULE ALIGNMENT WORKGROUP

54. Upon the passage of the AIM Act in 2013, the legislature expressly directed the Commissioner to review the 1999 Rules "for consistency with" the AIM Act, and to "make recommendations to the education committees of the legislature by February 15, 2014, for revising the rules or amending applicable statutes."[122]

55. Following the legislature's directive, the Commissioner established an Integration Rule and Statute Alignment Workgroup (Workgroup) to review both the AIM

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[114] *Id.*, subds. 4, 5.
[115] The statute does not define these terms.
[116] Minn. Stat. § 124D.862, subd. 6(a) (emphasis added).
[117] *Id.*, subd. 6(b) (emphasis added).
[118] *Id.*, subd. 6(c).
[119] *Id.*, subd. 8.
[120] *Id.*
[121] Emphasis added.
[122] 2013 Minn. Laws, ch. 116, art. 3, § 32, at 80.

Act and the 1999 Rules, and to provide recommendations on whether the rules should be amended or completely revised.[123]

56. The Workgroup consisted of 15 members, including representatives from various school districts and stakeholder groups.[124] The Workgroup met five times between November 2013 and February 2014.[125] By February 2014, the Workgroup had developed recommendations to the Commissioner as to which of the 1999 Rules should be amended and which ones should be repealed.[126] According to the Department, the Workgroup's "recommendations formed the basis for the department's proposed rule."[127]

57. In its report, the Workgroup made the following recommendations:

- Delete the purpose and policy section from the 1999 Rules, Part 3535.0100, and add a statement that "Avoiding racial isolation and promoting diversity are legitimate activities for the state to pursue."

- Amend and "clarify" the definition of "protected students" to include: American Indian/Alaskan Native; Asian/Pacific Islander; Hispanic; and Black (thereby eliminating the "self-identification" and multi-racial provisions of the definition in the 1999 Rules, Part 3535.0100, subp. 4).

- Include "Free and Reduced-Priced Lunch" in the classification of "protected class students" for purposes of plan development, implementation, reporting, and evaluation.

- Retain language about dual status of American Indian students (1999 Rules, Part 3535.0110, subp. 2).

- Define "eligible district" to include:

    - A district with an enrollment of 20 percent or more "protected class students" (a new eligibility requirement);

    - A district that has an enrollment disparity of 20 percent or more "protected class students" compared to adjacent districts, provided that the adjacent district participates in the plan;[128]

[123] SONAR at 11.
[124] *Id.*, 81-82.
[125] Ex. 82 at 2.
[126] SONAR at 76-79.
[127] *Id.*, 14.
[128] This recommendation is similar to the definition and treatment of a "racially isolated school district," in Minn. R. 3535.0110, subp. 7 (definition) and 3535.0170 (requiring plans for racially isolated school districts).

- A district with a school site with 20 percent or more protected class students compared to other school sites in the district;[129]

- A district submitting a voluntary plan.

- Eliminate or repeal provisions related to intentional segregation and desegregation plans set forth in Minn. R 3535.0110, subp. 9 (defining segregation) and Minn. R. 3535.0130-.0150 (mandatory desegregation enforcement).

- Use provisions in the Minnesota Human Rights Act and other relevant statutes to address acts of intentional discrimination (i.e., segregation) and cross-reference those statutes in the new rule or AIM Act.

- Make collaborative plans with districts adjoining eligible districts be voluntary and at the discretion of the eligible district.[130]

- Remove requirement that adjoining districts be part of a collaborative plan.[131]

- Repeal provisions related to the processes for developing integration plans, as the plan development process should align with the World's Best Workforce plan process (Minn. Stat. § 120B.11), as identified in Minn. Stat. § 124D.861.

- Repeal "plan evaluation provisions" in the 1999 Rules (Minn. R. 3535.0160, subp. 4 and Minn. R. 3535.0180) and develop, through rulemaking, "specific evaluation criteria" to determine how progress toward A&I goals are to be measured.

- Repeal rules related to community input on plans (Minn. R. 3535.0160, subp. 2; .0170, subps. 2, 3), as this process is outlined in statute.

- Add a provision requiring input from local American Indian Parent Advisory Committees in development of plans.

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[129] This recommendation is akin to the definition and treatment of "racially identifiable school within a district," set forth in Minn. R. 3535.0100, subp. 6 (definition) and Minn. R. 3535.0160 (requiring plans for districts with racially identifiable schools).

[130] This would be a significant change from Minn. R. 3535.0170, which makes collaborative plans with "adjoining districts" mandatory.

[131] This would be a significant change from Minn. R. 3535.0170, which makes collaborative plans with "adjoining districts" mandatory.

- Add criteria for the use of integration funds consistent with the new statutory requirements set forth in Minn. Stat. § 124D.862.[132]

58. Without making any specific policy recommendations on individual items, the Workgroup noted that the following additional issues needed further study and should be addressed in the rulemaking process:

- "Ethnocentric schools;"
- Language immersion schools;
- Inclusion of charters school (which are excluded from 1999 Rules);
- Counting of pupils from online schools or programs in a district's overall pupil count;
- English language sites (which are excluded from 1999 Rules);
- Special education sites (which are excluded from 1999 Rules);
- Care and treatment facilities (excluded from 1999 Rules);
- Open enrollment impact on integration plans; and
- Use of incentives to support pro-integrative establishment of attendance boundaries.[133]

59. While the Workgroup's recommendations to the Commissioner provided cursory statements as to why the group recommended the changes, the report did not explain the need for or reasonableness of each recommended change.[134] Moreover, the Workgroup's report contained no evidence, data, or other materials to support its summary recommendations.[135]

IV. ENABLING STATUTE

60. Based upon the Workgroup's report, in 2014, the legislature amended the Department's rulemaking authority as follows:

> (a) ~~By January 10, 1999, t~~The commissioner shall propose rules relating to desegregation/integration and inclusive education, consistent with section 124D.861 and 124D.862.
>
> (b) In adopting a rule related to school desegregation/integration, the commissioner shall address the need for equal educational opportunities for all students and racial balance as defined by the commissioner.[136]

61. While the legislature directed the Commissioner to propose rules consistent with the Act, the legislature did not amend paragraph (b) of the statute, which

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[132] SONAR at Appendix E.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] 2014 Minn. Laws, ch. 272, art. 3, § 48, at 83.

requires the Commissioner to "address the need for educational opportunities for all students" and define "racial balance."[137]

62. The effective date of the amendment to Minn. Stat. § 124D.896 was May 17, 2014.[138]

63. Based upon the passage of the AIM Act, and the enabling authority set forth in Minn. Stat. § 124D.896, the Department embarked on this rulemaking proceeding.

V. SUMMARY OF PROPOSED RULES

64. Under the proposed rules, a school district is required to submit an A&I plan under Minn. Stat. § 124D.861 if:

- The district's "protected student percentage" equals or exceeds 20 percent; or
- A school site within the district has an "enrollment of protected students" that is 20 percent or more than other school sites within the district.[139]

65. In addition, a charter school is required to submit a plan if:

- The charter school's "protected student percentage" equals or exceeds 20 percent;
- The charter school has an "enrollment of protected students" that is 20 percent or more than the "enrollment of protected students" at the nearest public school site serving the same but not necessarily all grade levels; or
- The charter school has an "enrollment of protected students" that is 20 percent or more lower than the "enrollment of protected students" at the nearest public school site serving the same grade levels.[140]

66. A school district or charter school that is not required to submit a plan under the proposed rules may voluntarily become part of a "collaborative" with an eligible district or charter school to receive AIM revenue.[141] To become part of a collaborative, a non-qualifying school district must be "adjacent" to a district that

[137] Minn. Stat. § 124D.896 (2014).
[138] The amendment was effective the day following final enactment. *See* Minn. Laws 2014 ch. 272, Art. 3, Sec. 48. *See also* Minn. Stat. § 645.01, subd. 2 (2014) (defining "final enactment" to mean the date the governor signed the bill). The governor signed the bill on May 16, 2014.
[139] Proposed Rule Part 3535.0030, subp. 1.
[140] *Id*.
[141] Proposed Rule Part 3535.0030, subp. 2.

qualifies for an A&I plan or must enter into a plan with a qualifying charter school.[142] Non-qualifying charter schools may voluntarily enter into a collaborative with any qualifying district or any qualifying charter school.[143]

67. The proposed rules require that an eligible district or charter school include both protected students and students that are eligible for free and reduced-price lunch in A&I plan development, implementation, reporting, and evaluation.[144] The proposed rules also require that collaborative plans align with each district or charter school's A&I goals and each district or charter's World's Best Workforce Plan.[145]

68. The proposed rules require that to qualify for "incentive revenue" provided for under Minn. Stat. § 124D.862, subd. 2, a program must provide: courses for credit; classes that meet "Minnesota adopted academic standards" at the elementary or middle school level; or summer programs that support student achievement and reduce academic disparity.[146]

69. Finally, the proposed rules provide that the Commissioner evaluate the efficacy of the district's or charter school's A&I plans by identifying the goals set by the district or charter school, and determining whether the district or charter met those goals within three years.[147] The rules provide no criteria for how the Commissioner shall evaluate the plans and no identification of any minimal goal standard that must be addressed: a district or charter school can merely set its own goals.

70. The proposed rules are materially different from the 1999 Rules in the following ways:

1999 Rules	Proposed Rules
Expressly exclude charter schools from plan requirements.[148]	Expressly include charter schools in the regulatory scheme.[149]
Only require a desegregation or integration plan for a district if: (a) the Commissioner finds intentional segregation; (b) a school site has 20 percent or more protected students than other schools in the same district; or (c) a district has 20 percent or more protected students than its adjoining districts.[150]	Require an A&I plan for all districts in Minnesota that have: (1) a protected student population of 20 percent or more; or (2) a school site with a protected student population 20 percent or more higher than other school sites within the district.[151]

[142] Proposed Rule Part 3535.0020, subp. 2.
[143] *Id*.
[144] Proposed Rule Part 3535.0040.
[145] Proposed Rule Part 3535.0040C.
[146] Proposed Rule 3535.0050.
[147] Proposed Rule Part 3535.0060.
[148] Minn. R. 3535.0110, subp. 8 (2015).
[149] Proposed Rule 3535.0010-.0060.
[150] Minn. R. 3535.0150; .0160; .0170 (2015).
[151] Proposed Rule Part 3535.0030, subp. 1.

1999 Rules	Proposed Rules
	Require an A&I plan for all charter schools that have: (1) a protected student population of 20 percent or more; (2) an enrollment of protected students that is 20 percent or more higher than the nearest public school site serving the same grade levels; or (3) an enrollment of protected students that is 20 percent or more lower than the nearest public school site serving the same grades.[152]
Require districts adjoining "racially isolated districts" to join in a collaborative plan with the qualifying district.[153]	Allow but do not require adjacent districts to join in a collaborative plan with an eligible district.[154]
Allow non-qualifying, non-adjoining districts to join a collaborative with any qualifying district.[155]	Do not allow non-qualifying, non-adjacent districts to join a collaborative.[156]
Require that school district provide annual reports of the racial composition of its schools and that the Commissioner determine whether a district has engaged in intentional segregation; is a racially isolated district; or has a racially identifiable school in its district.[157]	Do not address mandatory data collection by districts or the review of such data by the Commissioner.
Require the Commissioner to determine whether a district has engaged in intentional segregation and, if so, the district is required to have a desegregation plan.[158]	Do not address intentional segregation or mandatory desegregation.
Permit the Commissioner to initiate remedial efforts to remedy intentional segregation, if found by the Commissioner, including such measures as race-based assignments in a desegregation plan, the reduction in state aid, referral for a human rights investigation, and recommendations of sanctions to the legislature.[159]	Provide for no remedies if a district is found to have engaged in intentional segregation.
Exclude enrollment of "American Indian" students from the calculation of whether a school is "racially identifiable" or "racially isolated" for	Include "American Indian/Alaskan Native" students in the calculation of "enrollment of protected students" for purposes of determining eligibility for an A&I plan.[161]

[152] Proposed Rule Part 3535.0030, subp. 1.
[153] Minn. R. 3535.0170.
[154] Proposed Rule 3535.0020, subp. 2, .0030, subp. 2.
[155] Minn. R. 3535.0170, subp. 1.
[156] *Id.*
[157] Minn. R. 3535.0120, .0130, .0150-.0170 (2015).
[158] Minn. R. 3535.0130; .0150.
[159] Minn. R. 3535.0150.

1999 Rules	Proposed Rules
determining whether a district must file an integration plan.[160]	
Do not recognize students eligible for free and reduced-price lunch as a class of "protected students" to be included in, or used to determine eligibility for, an integration plan.[162]	Include students eligible for free and reduced-price lunch as a category of students to be included in the A&I plan development, implementation, reporting, and evaluation, but not in the category of "protected students" used to determine eligibility for an A&I plan.[163]
Require that a district establish and use community or multidistrict collaboration councils to assist in developing the district's plan.[164]	Do not provide for community or multidistrict collaboration councils to assist in developing an A&I plan.

VI. RULEMAKING PROCESS

71. The Minnesota Administrative Procedure Act[165] and the rules of the Office of Administrative Hearings[166] set forth certain procedural requirements that are to be followed during agency rulemaking.

72. The Department embarked on rulemaking in early 2015.

73. On February 3, 2015, the Department requested that the Office of Administrative Hearings approve its Additional Notice Plan.[167]

74. Under the Additional Notice Plan, the Department represented that it would provide notification of its intent to amend and repeal rules governing school desegregation and integration to: (1) individuals on the Department's official rulemaking mailing and e-mail lists; (2) individuals and entities on a "rule specific mail list" developed in consultation with the Department's integration program staff that includes persons or groups specifically affected by this rule; and (3) several Department "listserv" groups, including the Department's "Superintendents Listserv," "Charter School Listserv," "Learning Matters Listserv," "School Improvement Listserv," and its Integration E-Bulletin list. The Department also represented that it would post its Request for Comments on the Department's rulemaking website.[168]

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[161] Proposed Rule 3535.0020, subp. 4.
[160] Minn. R. 3535.0160, subp. 1B, .0170, subp. 1B.
[162] Minn. R. 3535.0110, subp. 4 (2015).
[163] Proposed Rule 3535.0040B.
[164] Minn. R. 3535.0160, subp. 2, .0170, subps. 2-5.
[165] The provisions of the Act relating to agency rulemaking are codified in Minn. Stat. §§ 14.001-.47.
[166] The rules governing rulemaking proceedings are set forth in Minnesota Rules, part 1400.2000-.2240.
[167] *See* Minn. Rule 1400.2060.
[168] *See* correspondence from Kerstin Forsythe Hahn to Chief Administrative Law Judge Tammy Pust (Feb. 3, 2015).

75. By Order dated February 5, 2015, Administrative Law Judge Jeanne M. Cochran approved the Department's Additional Notice Plan.

76. On February 9, 2015, the Department published a Request for Comments on Possible Amendment to Rules Governing School Desegregation/Integration, Minnesota Rules, Chapter 3535.[169]

77. The Request for Comments indicated that the proposed rules are needed because of "inconsistencies, omissions, and outdated language in the existing rules when compared to the new achievement and integration statute passed by the 2013 Minnesota legislature." The Request for Comments also stated that the "amendment to and repeal of the rules" would likely affect educators, school and district staff, parents, students, and relevant interest and advocacy groups.[170]

78. On October 5, 2015, the Department asked the Commissioner of Minnesota Management and Budget (MMB) to evaluate the fiscal impact and benefits of the proposed rules on local units of government, as required by Minn. Stat. § 14.131.[171]

79. In a memorandum dated October 28, 2015, Amelia Cruver, Executive Budget Officer for MMB, stated that she had reviewed the proposed rules and SONAR. Ms. Cruver concluded that the proposed rules will have both state and local fiscal impacts because the proposed rules change the eligibility criteria for the Achievement and Integration Revenue program. Ms. Cruver's analysis of the fiscal impact of the proposed rules is discussed in more detail in Section D below.[172]

80. On November 5, 2015, the Department:

- Electronically sent a copy of the Statement of Need and Reasonableness (SONAR) to the Legislative Reference Library as required by law;[173]

- Mailed copies of the Notice of Hearing and proposed rules to all persons and associations who had registered their names with the Department for purpose of receiving such notice;[174] and

- Mailed copies of the Notice of Hearing, SONAR, and proposed rules to "certain legislators" and the Legislative Coordinating Commission.[175]

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[169] Ex. A. The Request for Comments was published at 39 Minn. Reg. 1183 (Feb. 9, 2015).
[170] *Id*.
[171] Ex. S.
[172] *Id.*
[173] Ex. E.
[174] Ex. H.
[175] Ex. F. The certificate did not indicate that the Notice of Hearing was sent to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rule as required by Minn. Stat. § 14.116. However, the Department subsequently

81. On November 9, 2015, the Department published its Notice of Hearing in the *State Register* at 40 Minn. Reg. 527 (November 9, 2015).[176]

82. In its SONAR, the Department noted that it did not provide notice to its "School Improvement Listserv" as it indicated it would in its approved Additional Notice Plan. The Department explained that the "School Improvement Listserv" "was not an appropriate or necessary audience" for integration rulemaking notifications.[177]

83. Public hearings on the proposed rules were held on January 6 and 7, 2016, in Roseville, Minnesota. During the hearing, the Department submitted the following documents, which were received into the hearing record:

Exhibit A: Request for Comments as published in the *State Register*;

Exhibit B: Proposed rules dated October 2, 2015, including the Revisor's approval;

Exhibit C: SONAR;

Exhibit D: Notice of Hearing as published in the *State Register*;

Exhibit E: Certificate of Mailing a copy of the SONAR to the Legislative Reference Library on November 5, 2015;

Exhibit F: Certificate attesting that, on November 5, 2015, the Department sent copies of the Notice of Hearing, SONAR, and proposed rules to certain legislators and the Legislative Coordinating Commission;

Exhibit G: Certificates attesting to the accuracy of the Department's mailing list as of November 5, 2015;

Exhibit H: Certificate attesting that the Notice of Hearing was sent via mail or electronically to all persons and associations on the Department's rulemaking list on November 5, 2015;

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submitted copies of the transmittal emails indicating that the Department sent copies of the Notice and SONAR to the following legislators: Senator Charles Wiger, Chair, and Senator Sean Nienow, Ranking Minority Member, Senate Education Committee and Senate Finance Committee, E-12 Budget Division; Representative Jennifer Loon, Chair, and Representative Mary Murphy, Ranking Minority Leader, House Education Finance Committee; Representative Sondra Erickson, Chair, and Representative Carlos Mariani, Ranking Minority Leader, House Education Innovation Policy Committee; and Senator Patricia Torres Ray, Representative Jason Metsa, and Representative Carlos Mariani, Chief Authors of Omnibus Education Policy Bill.

[176] The Department complied with the requirement in section 14.25 that it publish the Notice of Hearing within 18 months of the effective date of the law authorizing rules to be adopted, amended, or repealed. The effective date of the law authorizing the rulemaking was May 17, 2014, and the Notice of Hearing was published on November 9, 2015.

[177] SONAR at 22.

Exhibit I: Written comments received on the proposed rule during the Request for Comments period;

Exhibit J: Written comments received on the proposed rule following the Notice of Hearing;

Exhibit K-P: Maps reflecting percentage of protected students in school districts and charter schools;

Exhibit Q: Corrected typographical error on page 23 of the SONAR;

Exhibit R: SONAR prepared in connection with the 1999 rulemaking proceeding; and

Exhibit S Correspondence between the Department and MMB.[178]

84. The Department failed to submit at the hearing a Certificate of Additional Notice or a copy of the transmittal letters as required by Minn. R. 1400.2220, subp. 1H.[179]

85. The following additional exhibits were submitted by members of the public and received into the hearing record:

Exhibit 1: Comments of Melissa Jordan, Executive Director, Northwest Suburban Integration School District;

Exhibit 2: Comments of Dr. Jean Lubke, Executive Director, East Metro Integration District.

Exhibit 3: Comments of Sabrina Williams, Founder and Executive Director of Excell Academy.

Exhibit 3A-E: Comments of Excell Academy students;

Exhibit 4: Comments of Adeola Adeleke, student, Excell Academy;

Exhibit 5: Memorandum dated January 28, 2014, from Professor Myron Orfield to Special Assistant Rose Hermodson, regarding the elimination of remedial clauses in the proposed desegregation rule.

Exhibit 6: Comments of Peter Haapala, Superintendent, Carlton Independent School District 93;

[178] Submitted by the Department after the public hearing.

[179] Following the close of the hearing record, the Department submitted a copy of its Certificate of Additional Notice. The Rulemaking Coordinator did not certify that notice was given to the "School Improvement Listserv" or the "Learning Matters Listserv" pursuant to the approved Additional Notice Plan.

Exhibit 7: Comments of Dr. Thomas Luce, Research Director, Institute on Metropolitan Opportunity, and supporting data;

Exhibit 8: Comments of Eric Anderson, Coordinator for Stillwater Area Public Schools Office of Equity and Integration;

Exhibit 9: Comments of Eugene Piccolo, Executive Director, Minnesota Association of Charter Schools;

Exhibit 10: Comments of Dr. Joe Nathan, Senior Fellow, Center for School Change, and supporting articles;

Exhibit 11: Additional written comments of Adeola Adeleke, student, Excell Academy;

Exhibit 12: Comments of Mary Bussman, Equity Consultant for Professional Development and Program Evaluation, East Metro Integration District;

Exhibit 13: Comments of Robert Erickson, Member, Integration Revenue Replacement Advisory Task Force, and supporting data;

Exhibit 14: "Dear Colleague Letter" from Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Department of Education, Office for Civil Rights, dated May 14, 2014.

Exhibit 15: Research paper from the University of California's Civil Rights Project entitled *Equity Overlooked: Charter Schools and Civil Rights Policy*, Erica Frankenberg and Genevieve Sigel-Hawley, authors, dated November 2009;

Exhibit 16: Report on "Beat the Odds" charter schools;

Exhibit 17: Report from the University of Minnesota's Institute on Metropolitan Opportunity entitled: *Charter Schools in the Twin Cities: 2013 Update*;

Exhibit 18: Report from the University of Minnesota's Institute on Race and Poverty entitled: *Failed Promises: Assessing Charter Schools in the Twin Cities*, dated November 2008;

Exhibit 19: Report from the University of Minnesota's Institute on Race and Poverty entitled: *Update of "Failed Promises: Assessing Charter Schools in the Twin Cities*," dated January 2012;

Exhibit 20: Question posed to the Department by Professor Myron Orfield regarding proposed achievement and integration rule;

Exhibit 21: Class Action Complaint entitled, *Alejandro Cruz-Guzman, et al. v. State of Minnesota,* Henn. County District Court (no file number), dated Nov. 5, 2015;

Exhibit 22: Professor Orfield's Memorandum in Support of Petition to Amend Minnesota Rule Chapter 3535, dated May 30, 2014; and

Exhibit 23: Letter to Commissioner Cassellius from Professor Orfield, dated February 14, 2014.

86. The Administrative Law Judge finds that the Department failed to meet the following procedural requirements imposed by applicable law and rules:

- The Department failed to publish its Request for Comments within 60 days of the effective date of the statutory authority to amend the rules, as required by Minn. Stat. § 14.101.[180]

- The Department did not certify that it gave notice of the proposed rules and hearing to all persons and entities identified in the Additional Notice Plan, as required by Minn. R.1400.2220, subp. 1H.

87. A procedural defect can be considered a harmless error under Minn. Stat. § 14.15, subd. 5, if the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

88. The Department published its Request for Comments approximately eight months after the effective date of the amendment to the enabling statute, Minn. Stat. § 124D.896.[181] The Request for Comments was published in February 2015 and the rule hearing took place in January 2016. Thus, interested persons and entities, including those specifically affected by the proposed rule, had nearly a year, to participate meaningfully in the rulemaking process.

89. The Administrative Law Judge concludes that the Department's failure to publish the Request for Comments within 60 days of the effective date of 2014 Minn. Laws, Ch. 272, Art. 3, Sec. 48, amending Minn. Stat. § 124D.896, did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. This procedural defect is, thus, a harmless error.[182]

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[180] The effective date of the statute granting the Department authority to adopt the proposed rules was May 17, 2014. *See* 2014 Minn. Laws, ch. 272, art. 3, § 48 at 83. The Request for Comments was not published until February 9, 2015, more than eight months following the effective date of section 124D.896. However, no consequence is specified in this statute for the Department's failure to comply. *See* Minn. Stat. § 14.101.

[181] Ex. A. The effective date of Minn. Stat. § 124D.896 was May 17, 2014. The Request for Comments was published at 39 Minn. Reg. 1183 (Feb. 9, 2015).

[182] *See* Minn. Stat. § 14.15, subd. 5(1).

A. Additional Notice

90. Minnesota Statutes sections 14.131 and 14.23 require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules.

91. The Department represented that it would notify the following individuals and entities about the proposed rules including:

- Individuals and groups on the Department's official rulemaking list;
- Approximately 50 individuals and entities identified by the Department in consultation with its integration program staff as being specifically affected by the proposed rules, including the Council on Black Minnesotans, the NAACP, the Chicano-Latino Affairs Council, the Hmong American Partnership, the Minnesota Indian Affairs Council, and the Council on Asian Pacific Minnesotans;
- Individuals and entities on the Department's listserv groups: Superintendents Listserv; Charter School Listserv; Learning Matters Listserv; School Improvement Listserv; and Integration E-Bulletin.

92. The Department also created a website dedicated to the proposed rules at http://education.state.mn.us/MDE/Welcome/Rule/ActiveRule/SchDesegInteg/.

93. In addition to publishing the Request for Comments in the *State Register* on February 9, 2015, the Department posted the Request for Comments on its website.

94. The Department's Integration Rules webpage has separate links to the proposed rules, the SONAR, the SONAR exhibits, and comments.

95. The Department also posted a copy of the Notice of Hearing, proposed rules, and SONAR on its webpage.

96. The Department did not give notice to all of the individuals and entities it represented it would notify in its approved Additional Notice Plan. The Department failed to give notice to its "School Improvement Listserv," and it failed to certify that it gave notice to its "Learning Matters Listserv."

97. The Department's failure to provide notice to all of the individuals and entities it represented it would notify in its approved Additional Notice Plan is also a defect. As noted above, the Department failed to submit a Certificate of Additional Notice at the hearing and failed to provide notice to two of the listserv groups it included in its Additional Notice Plan (i.e., the School Improvement Listserv and Learning Matters Listserv).

98. If an agency seeks and receives prior approval of its Additional Notice Plan, its notice is deemed adequate and may not be subsequently challenged.[183] Prior approval of an Additional Notice Plan is optional under Minn. R. 1400.2060. When an agency fails to provide notice as it pledged to do in its approved Additional Notice Plan, the adequacy of its notice in this rulemaking matter is reviewed *de novo*.[184] The sanction for such a failure is that the agency does not get the benefit or "safe harbor" of a final determination on the adequacy of its notice under Minn. R. 1400.2060, subp. 4.

99. The Administrative Law Judge determines, however, that the notice provided by the Department to its official and specific rulemaking lists and to the other listservs was sufficiently broad and constitutes a good faith effort on the part of the Department to reach persons or entities affected by the proposed rule.

100. As there is no evidence that any person or entity was deprived of an opportunity to participate in this rulemaking process as a result of the Department's procedural error, the Administrative Law Judge concludes that the procedural defects were harmless error under Minn. Stat. § 14.26, subd. 3(d).

B. Regulatory Analysis in the SONAR

101. Minnesota Statutes section 14.131 requires an agency adopting rules to consider eight factors in its SONAR. Each of these factors, and the Department's analysis, are discussed below.

(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.

102. The Department indicated in its SONAR that the proposed rule will affect Minnesota students, families, teachers, district staff, and educators. The Department asserted that the proposed rules will impact communities positively because it will eliminate provisions in the current integration rule that are in conflict with new statutory requirements. According to the Department, the conflict between the 1999 Rules and the AIM Act causes "confusion" and "implementation challenges" related to A&I plan requirements and timelines.[185]

103. The Department did not identify key classes that will most bear the costs of the proposed rule. These classes include: (1) charter schools;[186] (2) districts that have a protected student population of 20 percent or more, including those districts that

[183] Minn. R. 1400.2060, subp. 4.
[184] Minn. Stat. §§ 14.131, .14.
[185] SONAR at 18.
[186] Several people and groups criticized the Department's failure to identify charter schools as a class that will bear significant costs under the proposed rule. *See, e.g.*, Ex. 9; Testimony (Test.) of Eugene Piccolo (T. 231-32); Test. of Cindy Lavorato (T. 262-63).

are not currently required to file an A&I plan; and (3) non-adjacent districts currently participating in multidistrict collaboratives that will no longer qualify for collaboration and will lose their integration funding under the proposed rules.[187]

104. Despite its failure to identify specific classes of persons who will be affected by the rule, the Department asserts that it adequately addressed this regulatory factor in its SONAR. The Department maintains that nothing in Minn. Stat. § 14.131, paragraph (1), requires it to "quantify or detail the specific costs or benefits the rule will produce. It must merely identify the classes of persons who will be affected."[188]

105. However, the Department did not describe any of the classes of persons that will bear the costs of the proposed rule. While the Department did not need to quantify or detail the specific costs to each group of affected persons or entities, it did need to identify the classes of persons that will sustain the most costs as a result of the rules. Those classes include: (1) charter schools; (2) districts with a protected student population of 20 percent or more; and (3) non-adjacent, non-qualifying districts currently participating in a multi-district collaborative.

106. Despite the Department's failure to identify these groups in its SONAR, charter schools and Minnesota school districts were well represented in the hearing process and in the comments received. Moreover, the disapproval of the proposed rules negates any prejudice suffered by these groups.

107. While failing to fully identify the classes of persons who will bear the costs of the proposed rule in its analysis under section 14.131, paragraph 1 is a material error, the Administrative Law Judge finds that the error did not deprive any person or entity an opportunity to participate meaningfully in the rulemaking process. Accordingly, the Administrative Law Judge finds that the Department's error is harmless.

(2) The probable costs to the Department and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

108. The Department stated that the probable costs it will incur to implement and enforce the proposed rule will be minimal because it already has a division and program staff dedicated to managing achievement and integration plans submitted by districts and charter schools across the state. The Department also indicated that there are likely no other costs to any other agency for implementation and enforcement of the proposed rule.[189] The Department noted that 0.3 percent of achievement and integration revenue is set aside for the Department's required oversight and accountability activities.[190]

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[187] SONAR at 18.
[188] Ex. 83 at 3.
[189] SONAR at 18.
[190] *Id*., see Minn. Stat. § 124D.862.

109. The Administrative Law Judge finds that the Department satisfied the requirements of Minn. Stat. § 14.131, paragraph 2.

(3) A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

110. The Department asserts that the purposes of the rule cannot be achieved through less costly methods because the proposed rules were necessitated "to align" with current statutory requirements. The Department notes that the legislature granted the Department specific rulemaking authority to craft integration rules to align with and clarify implementation of the recently enacted achievement and integration statutes.[191]

111. The Administrative Law Judge finds that the Department sufficiently satisfied the requirements of Minn. Stat. § 14.131, paragraph 3.

(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.

112. The Department asserts in the SONAR that, because it was directed by the legislature to propose rules that align with the new achievement and integration statutes, it did not seriously pursue alternative methods. In addition, the Department claims that implementing changes in other existing programs, such as teacher diversity programs, would not fully address the policy set forth in the AIM Act and would not comply with the directive from the legislature.[192]

113. The Administrative Law Judge finds that the Department sufficiently satisfied the requirements of Minn. Stat. § 14.131, paragraph 4.

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

114. In addressing this factor, the Department estimated that the probable costs of complying with the proposed rule will not be "significantly greater than the costs borne by districts required to submit achievement and integration plans under the current rule."[193] The Department explained that it identifies program and implementation costs based on a district's budget and assigns revenue according to Section 124D.862. The Department noted that "racially isolated school districts" are already required to submit an achievement and integration plan and that revenue is

[191] SONAR at 19.
[192] *Id*.
[193] *Id*.

available to help cover these costs.[194] The Department also stated that school districts may see a decrease in costs as the number of plan submissions and public hearings required under the current rule has been reduced under the proposed rules.[195]

115. The Department did not address the probable costs to be borne by districts with a protected student population of 20 percent or more, particularly those districts that are not currently required to submit an A&I plan but will be required to submit plans and partake in the A&I program under the proposed rules. According MMB, 45 districts in Minnesota are currently required to submit integration plans under the 1999 Rules. The proposed rules will require 85 districts to file A&I plans. Accordingly, these additional 40 districts will incur new costs as a result of the rules and their taxpayers will be subject to a new levy.

116. The Department also did not address the probable costs to districts that are currently members of a multidistrict collaborative and are currently receiving A&I revenue under the Act, but will no longer qualify for A&I funding as a result of the proposed rules. Those districts include districts that are: (1) not adjacent to eligible districts; (2) do not have a protected student population of 20 percent or more; and (3) do not have a school site with a protected student population of 20 percent or more higher than other school sites within their district (i.e., non-adjacent, non-qualifying districts). These districts will lose their A&I funding and will lose their ability to join collaboratives to continue their existing programs.

117. Finally, the Department failed to address the probable costs of complying with the proposed rules that will be borne by charter schools. The 1999 Rules exclude charter schools from plan requirements. The proposed rules specifically include charter schools in the A&I program.

118. As with section 14.131, paragraph (1) above, several people criticized the Department's failure to analyze the probable costs charter schools will bear under the proposed rule.[196] The Department did not respond to these comments.[197]

119. The Administrative Law Judge concludes that the Department failed to address the probable costs of complying with the proposed rule to be borne by: (1) districts with a protected student population of 20 percent or more that are currently not required to have an A&I plan; (2) non-adjacent, non-qualifying districts that will lose their A&I funding as a result of the proposed rules; and (3) charter schools that will now be included in the AIM program. Consequently, the Department has failed to comply with the requirements of Minn. Stat. § 14.131, paragraph 5.

120. As set forth above, charter schools and public school districts were well represented at the hearing and during the comment phase of this proceeding.

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[194] *Id*. (citing Minn. Stat. § 124D.862).
[195] *Id.* at 19-20.
[196] *See, e.g*., Exs. 9, 26 at 4-5; Test. of E. Piccolo (T. 231-32).
[197] Exs. 82, 83.

Therefore, although the Department failed to identify these affected parties in its SONAR, it does not appear that the error deprived any person or entity an opportunity to participate meaningfully in this rulemaking process. Moreover, any prejudice suffered has been remedied by the disapproval of the proposed rules and repeal. Accordingly, the Administrative Law Judge finds that the Department's failure to fulfill its obligation under Minn. Stat. § 14.131, paragraph 5 is harmless error.

(6) 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.

121. In the SONAR, the Department stated that failure to adopt the proposed rules will result in continued confusion in the education community regarding the timelines for submission of required achievement and integration plans. A potential consequence of this confusion would be racially isolated districts not meeting state law requirements regarding submission of A&I plans, which, in turn, would jeopardize these districts' A&I funding.[198]

122. The Administrative Law Judge finds that the Department sufficiently addressed the requirements of Minn. Stat. § 14.131, paragraph 6.

(7) An assessment of any differences between the proposed rule and current federal regulations and a specific analysis of the need for and reasonableness of each difference.

123. In its SONAR, the Department states that the proposed rule specifically references its ability to enforce other statutes and federal regulatory provisions related to determining discrimination. The Department indicates that it inserted this reference in order to harmonize anti-discrimination efforts and to ensure that the proposed rule is not interpreted as differing from or conflicting with current federal regulations. Specifically, Proposed Rule Part 3535.0010B provides that nothing in the rules shall be construed as limiting the Commissioner's, districts', or charter schools' responsibilities and duties with respect to addressing discriminatory practices under state law and the Civil Rights Act of 1964.[199]

124. During the hearing, Will Stancil of the University of Minnesota's Institute on Metropolitan Opportunity argued that the Department failed to adequately assess the differences between the proposed rule and current federal regulations. Mr. Stancil maintained that in order to satisfy this regulatory requirement, the Department was required to include an analysis of current federal and state law regarding school desegregation and integration.[200] Mr. Stancil also asserted that the Department should have cited to treatises and case law it was relying on in the SONAR. Mr. Stancil noted

[198] SONAR at 20.
[199] *Id*.
[200] Test. of Will Stancil (T.193-97, 386-401).

that Minnesota Rules part 1400.2070 requires an agency to cite in its SONAR the treatises and case law it anticipates relying on in support of the proposed rule.[201]

125. In addition, both Mr. Stancil and Prof. Myron Orfield claimed that the Department improperly relied on its 1999 SONAR to support the need for and reasonableness of the proposed rules.[202] Mr. Stancil and Mr. Orfield maintain that the 1999 SONAR incorrectly suggests that states do not have a compelling governmental interest in integrating schools, absent proof of intentional discrimination.[203] Mr. Stancil and Prof. Orfield assert that the U.S. Supreme Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District*,[204] holds that states have always had a compelling interest in avoiding racial isolation and encouraging diversity even absent intentional discrimination.[205] Mr. Stancil and Prof. Orfield maintain that the Department should have analyzed this case, as well as new social science data, rather than merely reference the rationale for the 1999 Rules as contained in the 1999 SONAR.[206]

126. In response, the Department asserts that it fully complied with all regulatory requirements. The Department states that it did not include a list of treatises or case law because it did not need to rely on such evidence to document the need for and reasonableness of the proposed rule. Instead, the Department has relied on the legislature's directive to propose rules that conform to the AIM Act and the Workgroup's recommendations. The Department contends that because the AIM Act sets forth the policy underlying the Act and details program requirements, it did not need to conduct a scholarly analysis of current state and federal law and regulations.[207]

127. The Department also states that, contrary to Mr. Stancil's and Prof. Orfield's comments, the Department did not adopt the legal conclusions of the 1999 SONAR, nor did it rely on the 1999 SONAR in any way as evidence for the need for and reasonableness of the proposed rule. The Department emphasizes that, consistent with the holding in *Parents Involved*, it does believe there is a compelling state interest in Minnesota for integrated schools.[208] Given its position, the Department maintains there was no need for it to analyze the legal conclusions of the 1999 SONAR as part of its required assessment of whether the proposed rule conflicts with current federal regulations.[209]

128. The Administrative Law Judge finds that the Department did not rely on the 1999 SONAR to justify the need for and reasonableness of the proposed rules. Rather, the Department's reference to the 1999 SONAR in the current SONAR was only

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[201] *See* Minn. R. 1400.2070, subp. 1A, B (2015).
[202] Ex. 22.
[203] *Id*.
[204] 551 U.S. 701, 127 S. Ct. 2738 (2007).
[205] *Id*.; *see* Ex. 22.
[206] Ex. 22.
[207] Ex. 82.
[208] *Id*. at 5.
[209] *Id*.

to provide background as to how and why the 1999 Rules were enacted. The 1999 SONAR was not referenced to justify the need for or reasonableness of the proposed rules.

129. The Judge further concludes that Minn. Stat. § 14.131, paragraph 7, does not require the Department to undertake a full analysis of Supreme Court case law related to school integration and desegregation. Paragraph 7 only requires the Department to assess the differences between the proposed rule and "current federal *regulations.*"[210]

130. Neither the Department nor any commenter has identified "federal regulations" that either conflict with or apply to the subject matter of the proposed rules. While it would have been much clearer if the SONAR had just stated that no federal regulations apply or are in conflict with the proposed rules, the Administrative Law Judge finds that the Department has sufficiently satisfied the requirements of Minn. Stat. § 14.131, paragraph 7.

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

131. The Department stated in the SONAR that it researched other "federal and state requirements related to the issues covered by the [AIM Act]" and chose to reference them in the proposed rule as discussed above.[211] The Department maintains that referencing other state statutes and federal regulations will reduce conflicting interpretations of the rule and develop consistency around the integration policies.[212]

132. The Department appears to misunderstand the requirements of Minn. Stat. § 14.131, paragraph 8. It requires an assessment of the rule in relation "to other federal and state regulations" related to the same subject matter as the proposed rules.

133. In Proposed Rule Part 3535.0010B, the Department references Minn. Stat. §§ 123B.30 (classification of pupils), 124D.855 (prohibiting school segregation), 127A.42 (reduction in aid for violations of law); Minn. Stat. ch. 363A (the Minnesota Human Rights Act), and "Title IV of the Civil Rights Act of 1964." However, the Department does not analyze or even assess the cumulative effect of these statutes in the SONAR in comparison to the proposed rule.

134. Accordingly, the Administrative Law Judge finds that the Department has failed to satisfy the requirements of Minn. Stat. § 14.131, paragraph 8. However, this procedural defect is rendered moot by the disapproval of the proposed rules on substantive bases.

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[210] Minn. Stat. § 14.131(7) (emphasis added).
[211] SONAR at 20-21.
[212] *Id.*

C. Performance-Based Regulation

135. The Administrative Procedure Act requires that an agency describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems set forth in Minn. Stat. § 14.002.[213] 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.[214]

136. In its SONAR, the Department states that the proposed rule clarifies the timelines and metrics for achieving the goals set out in the AIM Act.[215] The Department also discusses efforts it made to establish a Workgroup to assist in developing the proposed rules. The Department states that it used the Workgroup's recommendations to form the framework of the proposed rule. In addition, the Department circulated drafts of the proposed rule to education groups, school district leaders, charter schools, and others, and used the feedback it received to clarify language in the proposed rule and address specific concerns.[216]

137. The Department maintains that the proposed rules meet the directive from the legislature to clarify the rule and align it with the new statutory requirements, as well as the requirements set out in the World's Best Workforce Act.[217]

138. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 related to the consideration and implementation of the legislative policy supporting performance-based regulatory systems.

D. Consultation with the Commissioner of MMB

139. Under Minn. Stat. § 14.131, the Department is required 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."

140. On October 5, 2015, the Department asked MMB to evaluate the fiscal impact and benefits of the proposed rules on local units of government, as required by Minn. Stat. § 14.131.

141. In a memorandum dated October 28, 2015, Amelia Cruver, Executive Budget Officer for MMB, stated that she had reviewed the proposed rules and SONAR and concluded that the proposed rule will have both state and local fiscal impacts

[213] Minn. Stat. § 14.131.
[214] Minn. Stat. § 14.002 (2014).
[215] SONAR at 21.
[216] *Id.* at 14-17.
[217] *Id.* at 21.

because the proposed rule changes the eligibility criteria for the A&I program in the following ways:[218]

- Some districts that are currently compelled to participate in the program due to their proximity to eligible districts will not be required to participate under the proposed rule, but may do so voluntarily. An unknown number of districts would choose to leave the program and no longer receive A&I revenue. In those districts, there would be a decrease in the local levy and a decrease in state aid coming into the district.

- Under the current rule, schools or districts that are deemed racially isolated due to a concentration of American Indian students are not eligible for the program. The Department's proposed rule would make those schools and districts eligible for A&I revenue. This would increase the total number of participating districts from 45 to 85, and would increase local levies in those districts. A preliminary estimate by the Department of the range of state and local costs shows local levies increasing by $1.1 million to $2.4 million in FY 2018 and state aid increasing by $2.8 million to $7 million in FY 2018.

- Charter schools are currently excluded from A&I revenue. Under the Department's proposed rule, if a charter school has a protected student enrollment of 20 percent or more, it is eligible to receive A&I revenue. The Department estimates that approximately 100 charter schools will be eligible to receive A&I revenue if its proposed rule is approved. Charter schools would receive an increase in state aid but, unlike school districts, charters do not have levy authority. A preliminary estimate by the Department indicates that state aid to charter schools would increase by $6.9 million in 2018, and a local match of $2.9 million would be required. In other words, charter schools receiving aid as a result of the proposed rule will need to identify a 30 percent local match of up to $2.9 million. These figures represent the maximum amount of aid that would be disbursed to charter schools. Because payment to charter schools is capped at the total cost of implementing their A&I plan, some schools will receive less than their maximum amount.[219]

142. Ms. Cruver stated that the proposed rule will increase local levies in some districts between $1.1 million and $2.4 million annually, as well as place new cost requirements on some local schools and districts. Those new cost requirements will be offset by an increase in state aid going to newly eligible charter schools and districts: an

[218] Ex. S.
[219] *Id.*

amount estimated at between $2.8 and $7 million annually. Because some non-qualifying adjacent districts may choose to opt out of the A&I program, the net impact on state expenditures is unknown.[220]

143. Ms. Cruver also noted that charter schools eligible for aid under the proposed rule will be required to identify a 30 percent local match (up to $2.9 million annually) to the state's 70 percent funding (up to $6.9 million annually) of the school's calculated A&I revenue.[221]

144. MMB did not address the impact to districts that currently receive A&I revenue but will lose such revenue because they are no longer eligible to participate in collaboratives and are not independently eligible under the rules. Nor did Ms. Cruver analyze whether expanding the AIM program to include students eligible for free or reduced-price lunch will impact the funding available for this program. This is likely because neither of these impacts affect units of "local government," as defined by Minn. Stat. § 14.128, subd. 1.

145. Despite MMB's failure to address all potential fiscal impacts of the proposed rules, the Administrative Law Judge finds that the Department satisfied its duty to consult with the MMB to help evaluate the fiscal impacts and benefits of the proposed rules on local units of government, as required by Minn. Stat. § 14.131.

E. Compliance Costs for Small Businesses and Cities

146. Under Minn. Stat. § 14.127, the Department must "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 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.

147. The Department determined that the cost of complying with the proposed rule in the first year after the rules take effect will not exceed $25,000 for any small business or small city.[222] The Department concludes that schools districts do not fall within the statute's definition of a business or city.[223]

148. The Administrative Law Judge finds the Department did not adequately analyze the costs of complying with the proposed rule that will be borne by charter schools.

149. Minnesota Statutes, section 14.127, requires that the Department determine if the cost of complying with the proposed rule in the first year will exceed

[220] *Id.*
[221] *Id*.
[222] SONAR at 24.
[223] *Id.*; Minn. Stat. § 14.127, subd. 1; SONAR at 22-24.

$25,000 "for any business that has less than 50 full-time employees." The statute defines "business" to mean "a business entity organized for profit or as a nonprofit, and includes an individual, partnership, corporation, joint venture, association, or cooperative."[224] It is likely that a number of charter schools are organized as nonprofit corporations and meet the definition of a "small business" under Minn. Stat. § 14.127. Therefore, the Department was required to analyze the cost of compliance for charter schools.

150. By failing to determine if the costs of complying with the proposed rule for charter schools in the first year will exceed $25,000, the Department has failed to comply with Minn. Stat. § 14.127.[225] The Administrative Law Judge has disapproved the proposed rules to the extent that they include charter schools. Accordingly, this procedural defect is rendered moot by the disapproval of the proposed rules with respect to the inclusion of charter schools.

F. Adoption or Amendment of Local Ordinances

151. Under Minn. Stat. § 14.128, the Department 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 Department 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.[226]

152. The Department determined that no local government will be required to adopt or amend an ordinance or other regulation to comply with the proposed rules.[227] The Department notes that the proposed rule applies to school districts and school districts do not fall within the statute' definition of "local government," which is limited to "a town, county or home rule charter or statutory city."[228]

153. The Administrative Law Judge finds that the Department has made the determination required by Minn. Stat. § 14.128.

G. Impact on Farming Operations

154. Minnesota Statutes section 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 rule in the State Register.[229]

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[224] Minn. Stat. § 14.127, subd. 1, SONAR at 22-24..
[225] *See Builders Ass'n of Twin Cities v. Minn. Dept. of Labor*, 872 N.W.2d 263, 273-74 (Minn. Ct. App. 2015).
[226] Minn. Stat. § 14.128, subd. 1.
[227] SONAR at 24.
[228] *Id.* at 24; Minn. Stat. § 14.128, subd. 1.
[229] Minn. Stat. § 14.111.

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

VII. OVERVIEW OF COMMENTS RECEIVED

156. Prehearing Comments were submitted by:

- Bruce Houck, Lynd Public Schools
- Sandra Stugelmeyer, Lafayette Charter School
- Mike Motzko, Edvisions High School
- Anastasia Martin, Minnesota Online High School
- Sue Cosgrove, Board Member, SAGE Academy
- SAGE Academy (several comments)
- David Beaulieu, University of Minnesota-Duluth
- Ruth Myers, Professor, University of Minnesota-Duluth
- Sharon Peck, Minnesota Department of Education
- Molly Schwaiger, Partnership Academy
- Ashley Leary, Partnership Academy
- Paula Letourneau, Sojourner Truth Academy
- Julie Guy, Sojourner Truth Academy
- Gwen Gmelnder, Board Chair, SAGE Academy
- Bill Wilson, Executive Director, Higher Ground Academy
- Julie Henderson, Hennepin Elementary School
- Diane Scholten, Staff Member, SAGE Academy
- Jim Hilbert, Center for Negotiation & Justice, Mitchell Hamline Law
- Jeffrey Martin, President, St. Paul NAACP
- Jane Berenz, Superintendent,Steve Troen, Director of Teaching and Learning, and Stacy Wells, Integration and Educational Equity Coordinator, ISD #196
- Alvin Abraham, Executive Director, Kipp North Star Academy
- Mike Ogorek, Dean of Students, Twin Cities International Elementary School
- Daniel Sellers, Executive Director, MinnCAN
- Brian Sweeney, Director – Public Affairs, Charter School Partners
- Al Fan, Executive Director, Minnesota Comeback
- Eugene Piccolo, Executive Director, Minnesota Association of Charter Schools
- Jama Warsame, parent
- Scott Flemming, Board Chair, Global Academy
- Abdirashid Warsame, Director, Twin Cities International Elementary School
- Twin Cities International Elementary School (several comments)
- Jennifer Christenson, Instructional Coach, Minnesota International Middle School # 277
- Rick Campion, Executive Director, Prodeo Academy
- Meghan Cavalier, Executive Director, River's Edge Academy

- Ruth Hansen, Teacher, Seven Hill Preparatory Academy
- Jim Bartholomew, Education Director, Minnesota Business Partnership
- Lisa Needham, Attorney, Education Minnesota
- Ramona Rosales, Executive Director, Academia Cesar Chavez
- Denise Rodriguez, President, St. Paul Federation of Teachers
- Melissa Jordan, Executive Director, Northwest Suburban Integration School District
- Jean Lubke, Executive Director, East Metro Integration District # 6067
- Will Stancil, Research Fellow, Institute of Metropolitan Opportunity
- Elaine Salinas, Board Chair, Bdote Learning Center
- Fred Nolan, Executive Director, Minnesota Rural Education Association
- James Bauck, Superintendent, Eastern Carver County Schools
- Ben Whitney
- Nancy Allen-Mastro, Superintendent, ISD ~~School District~~ # 197
- Joe Nathan, Director, Center for School Change
- Michelle Walker, Chief Executive Officer, ISD # 625
- Helen Fisk, Director, Global Academy
- Wendy Swanson Choi, Executive Director, Novation Education Opportunities
- Melissa Jordan, Executive Director, Northwest Suburban Integration District
- Musa Farah, Director, Ubah Medical Academy
- Cheryl Carbone, Assistant Director of Special Education, Minnesota Transitions Charter Schools
- Rob Jeppson, Personal Wellness, Chaska High School
- Myron Orfield Professor, University of Minnesota School of Law; Director, Institute on Metropolitan Opportunity
- Lynita Parks, Teacher, Achieve Language Academy
- Brenda Quaye, parent, Kipp North Star Academy
- Walt Stull, Cedar Riverside Community School
- Kevin Byrne, Executive Director, Minnesota Internship Center Charter High School
- Cara Quinn, Executive Director, Community of Peace Academy
- Val Peterson, Office Manager, Cedar Riverside Community School
- David Zelaya, Assistant Director for Academic Support Services, Multicultural Center for Academic Excellence, University of Minnesota, Office of Equity and Diversity
- Brett Fechner, Executive Director, STRIDE Academy
- Sharon Ahmed, Charter School Educator, STRIDE Academy
- Mary Kay Higgins, Office Manager, MNIC District # 4102-07
- Dalal Ahmad, Educator, Darul Uloom add title and organization]
- Susan Gottlieb, Teacher, Community of Peace Academy
- June Stewart, President, League of Women Voters

157. At the hearing, the Department's designated representatives made a presentation on the authority supporting, need for, and reasonableness of the proposed rules, and addressed issues presented in the prehearing comments received.[230]

158. In addition, oral and written comments were presented at the hearing by numerous groups and individuals, including:

- Richard Rosivach, Education Minnesota
- Myron Orfield, Professor, University of Minnesota School of Law; Director, Institute on Metropolitan Opportunity
- Kimberly Colbert, Teacher, Central High School, St. Paul, MN
- Kimberly Matier, Executive Director, West Metro Education Program
- Nekeema Levy-Pounds, Law Professor, St. Thomas University School of Law; parent of charter school students[231]
- Jada Pounds, charter school student
- Melissa Jordan, Northwest Suburban Integration District
- Rep. Carlos Mariani Rosa, Minnesota House District 65B
- Gospel Kordah, staff member, Dugsi Academy
- Scott Croonquist, Association of Metropolitan School Districts
- Jean Lubke, Executive Director of East Metro Integration District
- Kevin Byrne, Executive Director and Founder, Minnesota Internship Center
- Jeffry Martin, President, National Association for the Advancement of Colored People (NAACP) - St. Paul (correct spelling)
- Yusef Mgeni, Vice President, NAACP - St. Paul Chapter
- James Hilbert, Education Committee Chair, NAACP - St. Paul
- Alberto Monserrate, CEO of New Publico
- Sabrina Williams, Founder and Executive Director, Excel Academy for Higher Learning
- Adeolo Adeleke, student, Excel Academy
- Maya Buckner, staff member, Harvest Network of School
- Shana Ford, parent of students attending Harvest Network of Schools
- Eric Mahmoud, Chief Executive Officer Harvest Network of Schools
- Yahye Hassan, former student and staff member, Dugsi Academy
- Fred Nolam, Minnesota Rural Education Association
- Peter Haapola, Superintendent, Carlton Independent School District
- Barka Omar, student, Dugsi Academy
- Malik Bush, Co-Director, Center for School Change
- Will Stancil, Research Fellow, University of Minnesota, Institute on Metropolitan Opportunity

[230] *See* Hearing Transcript at 16-43.

[231] Ms. Levy-Pounds is also the Present of the National Association for the Advancement of Colored People (NAACP) - Minneapolis Chapter, but was presenting personal comment, not comment on behalf of the organization.

- Tom Luce, Research Director, University of Minnesota, Institute on Metropolitan Opportunity
- Eric Anderson, School Counselor, Stillwater Public Schools
- Eugene Piccolo, Executive Director, Minnesota Association of Charter Schools
- Jim Bartholomew, Education Policy Director, Minnesota Business Partnership
- Dale Swanson, Retired Attorney
- Cindy Lavorato, Attorney
- Joe Nathan, Senior Fellow, Center for School Change
- Yee Yang, Director, New Millennium Academy
- Mary Bussman, Equity Consultant, East Metro Integration District
- Robert Erickson, Lakeville Area Public Schools Board of Education
- Richard Heller

159. Post-hearing comments and rebuttal comments were submitted by the Department[232] and the following individuals and groups:

- Cindy Lavorato, Lavorato Law Offices, LLC, *et al*.[233]

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[232] Exs. 82, 83.

[233] Joe Nathan, Director of the Center for School Change; Malik Bush, Co-Director Center for School Change; John Miller, Co-Director Center for School Change; Robert Wedl, Former Commissioner of Education; Curtis Johnson, Assistant Manager, Education Evolving; Daniel Sellers, Director of MinnCAN; The Board of MinnCAN; Jim Bartholomew, Minnesota Business Partnership; Charlie Weaver, Executive Director, Minnesota Business Partnership; The Minnesota Business Partnership; Larry McKenzie, Pillsbury United Communities; Antonio Cardona, Pillsbury United Communities; The Board of Pillsbury Communities; Bill Wilson, Former Commissioner of Human Rights, and Executive Director of Higher Ground Academy; The Board of Higher Ground Academy; Cara Quinn, Executive Director, Community of Peace Academy; Elaine Salinas, Board Member, Bdote Learning Center; Doug Knick, EdD, Executive Director of DREAM; Technical Academies; Tony Simmons, Executive Director, High School for Recording Arts; The Board of DREAM Technical Academies; Patricia Brostrom, Superintendent, Minnesota Transitions Charter School; Lisa Hendricks, Executive Director, Partnership Academy; The Board of Partnership Academy; Julie Guy, Executive Director, Sojourner Truth Academy; The Board of Sojourner Truth Academy; Neal Thao, Executive Director, Noble Academy; The Board of Noble Academy; Carrie Bakken, Executive Director, Avalon Charter School; The Board of Avalon Charter School; Paul McGlynn, Executive Director, Harbor International School; The Board of Harbor International School; Ben Stegemen, Interim Executive Director, College Prep Elementary School; The Board of College Prep Elementary School; Krissy Wright, Director, Academic Arts High School; The Board of Academic Arts High School; Sabrina Williams, Chief Education Officer, Excell Academy; The Board of Excell Academy; The following Excell Academy Faculty, Staff, Students, Families and Friends: Justin Balvin, Academic Dean, Cecelia Willis, Business Manager, Community Ed. Director, Candace Dunbar, Transportation and Facilities Director, Shalonda Gordon, HR Coordinator, Tom Anderson, Research & Assessment Coordinator, Julie James, Lead Teacher, Beth Mueller, Lead Teacher, Bridget Weber, Lead Teacher, Nancy Young, Title I Teacher, Lead, Amber Merrigan, Lead Teacher, Kip Sneen, Middle School Math Teacher, Ashley Kock, Paraprofessional, Synethia Davison, Food Service Coordinator, Eddie Grant, Student Success Coach, Tiffany Grant, Daycare Teacher, Dewitt Davison, Paraprofessional, Miea Williams, Kindergarten Readiness Teacher, Pamela McDuffy, Reserve Teacher, Jennifer Uttech, School Social Worker, Amanda Walters, Teacher, Elyse Lewis, Teacher, Jennifer Schenemauer, Teacher, Kimberly Handren, ELL Teacher, Lauren Metty, Paraprofessional, Reserve

- Gary Ritter, Professor, University of Arkansas
- David Armor, Professor, George Mason University
- Christine Rossell, Professor, Boston University
- Joe Nathan, Senior Fellow, Center for School Change
- Lidia Torres, parent of children at Partnership Academy
- Celia Vergara Quintero, parent of children at Partnership Academy
- Sharmaine Russell, parent of children at Friendship Academy
- Khadar Noor, parent of children at Global Academy
- Nasteha Ali, parent of children at Higher Ground Academy
- Abdirahman, parent of children at Higher Ground Academy
- Molly Schwaiger, Director, Partnership Academy
- Lynnell Mickelsen
- Sharon Ross, Harvest Network of Schools
- Bill Wilson, Executive Director, Harvest Network of Schools
- Parent Advisory Council, New Millennium Academy
- Rozalyn Eaton-Neeb, Chair, Prairie Creek Community School Board
- Anita Alexander
- Iain Lempke, teacher, New Millennium Academy
- Tawanna Black, Executive Director, Northside Funders Group

Teacher, Sarah Kempf, Teacher, Mary Zoubek, ELL Teacher, Fay Holland, Parent Liaison, Student Success Coach, Excell Parents, Ayanna Wesson, Zakkiyya Abdulwahid, Josephin Mbiti, LaKesha Sneed, Angela Akpan, Angela Huot, Danielle House, Flexie Giddings, Tom Williams, Current Students of Excell, Araea Akpan, Abdul Akpan, Anil Autar, Fatoumata Bah, George Cooper, Olivia Deshield, Imanrenezor Ebojie, Mikai Gbayor, Tariah Gray, Anthony Halverson, Johnathan Hutchinson, Chrishara Hynes, Buindu Kamara, Kadija Koroma, Emma Manneh, Loreal Mckely, Deveyon Nix, Jahnea Porte, Gabriella Shipp, Manaka Soumahoro, Keyshawn Wiley, Jahari Winder, Frederick Yarweh, Stephanie Zakiel, Adeola Adeleke, Daevion Bellanger, Jorielle Breck, Aminata Cissoko, Antonese Conley, Amour Dickerson, Kahlil Edwards, Jordan Enders, Antrevion Ferguson, Sumel Flomo, Aazhairiyah Green, Dominique Harris, Willow Humphrey, Khawsu Ighodalo, Destany Jones, Dosia Mason, Bobby McKissic, Funmilayo Ologunde, Essence Porter, Amanda Tuonyon, Rudy Zarway, Former Excell Students, Jordan Williams, Jaccob Williams, Joshuyan Williams, Valencia Owens, Deja'nae Shipp, Jamese Robinson; Ron Berger, Chief Financial Officer, Lionsgate Academy; Barbara Novy, Executive Director, Stonebridge World School; Brandon Wait, Executive Director, Paladin Career & Technical High School; D. Chavez Russel, Executive Director, Friendship Academy; The Board of Friendship Academy; Jordan T Pollock; Agriculture Instructor/FFA Advisosr; Academy for Sciences and Agriculture; Greg Gentle, Principle, Flex Academy, The Board of Flex Academy; Amy Kock, Achieve Minnesota; Kathy Saltzman, former Senator; Amy Larsen, Executive Director, BlueSky Charter School; The Board of BlueSky Charter School; Bonnie Jorgenson, Head of School; Duluth Edison Charter School; Lynnell Mickelsen, parent/citizen advocate, Put Kids First Minneapolis ; Brad Cross, Community Board Member of AFSA Charter School; Corey Stewart, Assistant Director, Sun Academy; The Board of Sun Academy; Abdulkadier Osman, Executive Director, Dugsi Academy; The Board of Dugsi Academy; Nancy Dana, Executive Director, St. Paul City School; The Board of St. Paul City School; Kecin Byrne, Executive Director, MN Internship Center; L. Walz, Executive Director, MEFE; The Board of MEFE; Harvey Friedenson, Attorney at Law; John Gawarecki, Director, Math and Science Academy; The Board of Math and Science Academy; Katie Avina, Academic Cesar Chavez Charter School; Harvest Network of Schools; Dr. Mustafa Ibrahim, Executive Director, STEP Academy; The Board of STEP Academy; Dr. Meg Cavalier, Executive Director, River's Edge Academy.

- Stacey Stout, Director, Education & Workforce Development Policy, Minnesota Chamber of Commerce
- Jim Bartholomew, Education Policy Director, Minnesota Business Partnership
- Charlie Weaver, Executive Director, Minnesota Business Partnership
- Amy Koch, former Minnesota State Senator (2006-2012); Ember Reichgott Junge, former Minnesota State Senator (1983-2001); Gen Olson, former Minnesota State Senator (1983-2012); Kathy Saltzman, former Minnesota State Senator (2007-2010)
- Sen. Terri Bonoff, Minnesota Senate District 44
- Alberto Monserrate, CEO, New Publica
- Jenifer Loon, Chair, Minnesota House Education Finance Committee; Sondra Erickson, Chair, Minnesota House Policy Innovation Committee
- Marty Bussman, East Metro Integration District
- Paul Durand, Superintendent, Rockford Area Schools
- Scott Croonquist, Executive Director, Association of Metropolitan School Districts
- Jean Lubke, Executive Director, East Metro Integration District
- Juanita Hoskins, Director of Educational Equity, Roseville Area Public Schools
- Nancy Allen-Mastro, Superintendent, School District No. 197
- Melissa Jordan, Executive Director, Northwest Suburban Integration District
- Minnesota Rural Education Association
- Kimberly Matier, Executive Director, West Metro Education Program
- Kirk Schneidawind, Executive Director, Minnesota School Boards Association
- Michelle Walker, CEO, St. Paul Public Schools
- Michael Goar, Interim Superintendent, Minneapolis Public Schools
- Peggy Flathmann, Superintendent, Fridley Public Schools; member, Northwest Suburban Integration School District
- Melissa Jordan, Executive Director, Northwest Suburban Integration School District
- Lisa Needham, Attorney for Education Minnesota
- Will Stancil, Research Fellow, Institute on Metropolitan Opportunity
- Derek Black, Professor, University of South Carolina School of Law
- Roslyn Mickelson, Professor, University of North Carolina, Charlotte
- Linda Tropp, Professor, University of Massachusetts, Amherst; Amy Stuart Wells, Professor, Columbia University; Gary Orfield, Professor, University of California Los Angeles; Genevieve Siegel-Hawley, Assistant Professor, Virginia Commonwealth University; Roslyn Mickelson, Professor, University of North Carolina, Charlotte; Richard Valencia, Professor, University of Texas at Austin; Pedro Noguera, Professor, New York University; Susan Eaton, Professor, Brandeis University; Kara Finnigan, Associate Professor, University of Rochester; Kevin Welner, Professor,

University of Colorado – Boulder; Stephen Menendian, Assistant Director and Director of Research, Haas Institute for a Fair and Inclusive Society; Jennifer Jellison Holme, Associate Professor, University of Texas at Austin

- john powell, Professor, University of California at Berkley School of Law; Gina Chirichigno, Director, One National Indivisible; Peter Edelman, Professor, Georgetown University School of Law; Derek Black, University of South Carolina School of Law; David Hinojosa, Director, South Central Collaborative for Equity; John Brittain, Professor, University of the District of Columbia, David A. Clarke School of Law
- Derek Black, Associate Professor, Howard University School of Law
- Linda Tropp, Professor, University of Massachusetts Amherst
- Genevieve Siegel-Hawley, Assistant Professor, Virginia Commonwealth University
- Myron Orfield, Professor, University of Minnesota School of Law
- George Beck
- Barbara Bearman
- Jeffry Martin, President, NAACP – St. Paul; William Jordan, President, NAACP Minnesota-Dakotas State Conference
- Dale Swanson, Retired Attorney
- Gary Ritter, Professor, University of Arkansas; David Armor, Professor, George Mason University; and Christine Rossell, Professor, Boston University.

160. The comments received during the rulemaking comment period fall into three basic categories of interested parties: (1) desegregation advocates, including the NAACP, the St. Paul Federation of Teachers, the Institute on Metropolitan Opportunity, and professors from various universities (collectively referred to as "Desegregation Advocates");[234] (2) charter school advocates, including charter schools, charter school organizations, business organizations, academics, and charter school staff members, parents, and students (collectively referred to as "Charter School Advocates");[235] and (3) school district groups, consisting of integration districts, school districts, the

[234] *See* Exs. 5, 7, 15-23, 53-62; Test. of Myron Orfield (T. at 57-82, 349-402, 458-67); Test. of Dale Swanson (T. at 239-45, 449-58); Test. of Jeffry Martin (T. at 132-38); Test. of Yusef Mgeni (T. at 138-45); Test. of Jim Hilbert (T. at 146-50); Test. of W. Stancil (T. at 193-200, 386-402); Test. of Tom Luce (T. at 200-214).

[235] *See* Exs. 3, 4, 9-11, 25-52; Test. of Nekeema Levy-Pounds (T. at 92-99); Test. of Jada Pounds (T. at 99-100); Test. of Gospel Kordah (T. at 112-16); Test. of Kevin Byrne (T. at 127-32); Test. of Alberto Monserrate (T. at 150-53); Test. of Sabrina Williams (T. at 154-62); Test. of Maya Buckner (T. at 166-68); Test. of Shana Ford (T. at 168-71); Test. of Eric Mahmoud (T. at 172-74); Test. of Yahye Hassan (T. at 175-76); Test. of Barka Omar (T. at 184-86); Test. of Malik Bush (T. at 186-92): Test. of E. Piccolo (T. at 225-35): Test. of Jim Bartholomew (T. at 235-38); Test. of Cindy Lavorato (T. at 245-64, 416-29, 438-47); Test. of Adeola Adeleke (T. at 163-65, 266-67); Test. of Joe Nathan (T. at 273-311, 429-38, 447-49); Test. of Yee Yang (T. at 311-19).

Minnesota School Board Association, the Minnesota Rural Education Association, and Education Minnesota (collectively referred to as "School Districts").[236]

161. The Desegregation Advocates argue that the repeal of the 1999 Rules was without proper justification and that the proposed rules are arbitrary, capricious, unreasonable, unnecessary, and unconstitutional.

162. The Charter School Advocates assert that the Department exceeded its authority by including charter schools within the definition of "eligible district" and, therefore, the rules as applied to charter schools are without legal authority and are defective.

163. The School Districts generally support the proposed rules but suggest modifications and clarifications to the rules, particularly as they relate to collaborative districts.

VIII. SUMMARY OF COMMENTS RECEIVED

A. Desegregation Advocates

164. The Desegregation Advocates argue that the wholesale repeal of the 1999 Rules was without proper justification and that the proposed rules are not adequately supported by evidence, rendering them arbitrary and capricious and unconstitutional. Specifically, the Desegregation Advocates assert that the proposed rules are:

- inadequate because they eliminate all remedial measures from the 1999 Rules, including the prohibition of intentional segregation, mandatory inter-district collaborations, and ongoing monitoring and data collection for racially isolated or segregated schools;

- less effective in pursuing the stated goal of integration than the 1999 Rules;

- impermissibly vague and ineffective because they set forth no standards for integration plans, contain no enforcement mechanisms, and provide no guidance for districts;

- inadequate and fail to meet the stated need because they do not include standards by which the Commissioner will evaluate integration plans;

[236] *See* Exs. 1, 2, 6, 8, 12, 63-81; Test of Rich Rosivach (T. 51-57); Test. of Kimberly Colbert (T. 84-88); Test. of Kimberly Matier (T. 88-92); Test. of Melissa Jordan (T. 101-108); Test. of Scott Croonquist (T. 117-121); Test. of Jean Lubke (T. 121-127); Test. of Fred Nolan (T. 176-181); Test. of Peter Haapola (T. 182-184); Test. of Eric Anderson (T. 215-224); Test. of Mary Bussman (T. 319-324); Test. of Robert Erickson (T. 325-349).

- drafted in a manner that places too much discretion in school districts that have demonstrated a resistance to integration efforts and, as a result, will not serve the identified need for and purpose of the rule;

- arbitrary and capricious because there is no "reasoned determination" or rational basis for why the Department enacted the rules it did and repealed the 1999 Rules;

- ineffective and fail to meet the stated need because they contain no data collection provisions by which to measure the effectiveness of integration plans;

- not appropriate to accomplish the stated purpose of increasing achievement and integration because the proposed rules allow school districts to create and implement their own plans

- inadequately drafted in that they will not accomplish the stated purpose of increasing achievement and integration because the proposed rules provide little to no guidance on what is required in a plan and how the plan will be assessed by the Department;

- inadequate in that they fail to define the necessary terms "equal education opportunity," "integration," "racial and economic integration", "desegregation," and "segregation";

- unlawful under federal law because they repeal the remedial measures set forth in the 1999 Rules despite the fact that the Minneapolis School District has not been declared "unitary;"

- contradictory to the AIM Act with respect to evaluations of district plans because the Commissioner is only required to determine whether a district meets its own goals;

- ineffective because the proposed rules do not articulate any specific goals or requirements for integration;

- unconstitutionally vague because they fail to define "integrated learning environment"; and

- inadequate in their failure to address or define "inclusive education," "equal educational opportunity," and "racial balance," as required by Minn. Stat. § 124D.896.[237]

165. As for procedural issues, the Desegregation Advocates argue that the Department's SONAR is defective because it:

- relies on the justifications for integration set forth in the 1999 SONAR, when the 1999 SONAR does not correctly reflect current U.S. Supreme Court case law, including *Parents Involved v. Seattle School District No. 1*;[238]

- ignores research and studies that show Minnesota schools are becoming more segregated and that school integration could have positive benefits to students;

- fails to provide adequate evidence and argument in support of its proposed rules in its SONAR that the rules will actually promote integration, resulting in rules that are arbitrary and not rationally related to integration of Minnesota schools;

- fails to adequately justify the repeal of the 1999 Rules;

- fails to satisfy the requirements of Minn. R. 1400.2070 by failing to state the evidence that the Department is relying on to justify both the need for and reasonableness of the proposed rules, and how the evidence rationally relates to the choice of action taken;

- fails to satisfy the requirements of Minn. R. 1400.2070 by failing to include citations to economic, scientific, or other manuals or treatises, or any statutes or case law that the Department relied upon in drafting the proposed rules;

- fails to summarize the evidence and arguments that the Department is relying upon to justify the need for and reasonableness of the proposed rules, specially why the rules are needed and how the rules are rationally related to meeting that need;

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[237] Exs. 5, 22, 23, 53, 54, 56, 57, 58, 59, 60, 54, 65; Test. of Myron Orfield (T at 57-82, 349-402, 458-467); Test. of Dale Swanson (T. at 239-245, 449-458); Test. of Jeffry Martin (T 132-138); Test. of Yusef Mgeni (T. 138-145); Test. of Jim Hilbert (T. 146-150); Test. of Will Stancil (T: 193-200, 386-402); Test. of Tom Luce (T. 200-214).

[238] 551 U.S. 701, 127 S. Ct. 2738.

- fails to provide a description of the classes of persons who will probably be affected by the proposed rule, including who will bear the costs and who will benefit from the proposed rules;

- fails to evaluate less costly or intrusive methods for achieving the purpose of the proposed rule;

- fails to evaluate the probable costs or consequences of not adopting the rules upon protected students, families, teachers, and others;

- fails to assess differences between the proposed rule and current federal regulations and the cumulative effect of the rule with other federal and state regulations (specifically, the *Parents Involved* case); and

- fails to specifically address any "misalignment" between the 1999 Rules and the Act justifying the repeal and re-haul of the existing rules.[239]

166. With respect to authority, the Desegregation Advocates argue that the Department lacks authority from the legislature to wholly repeal the 1999 Rules because it was authorized only to modify the existing rules to conform to the AIM Act.[240] At the same time, the Desegregation Advocates argue that the Department had broad authority under Minn. Stat. § 124D.896 to wholly rewrite the integration rules to make them more effective, but failed to fulfill that duty.[241]

167. In support of its various claims, the Desegregation Advocates presented considerable academic argument and analysis that:

- school "re-segregation" has increased since the passage of the 1999 Rules and racial "segregation" exists in Minnesota schools;

- school segregation harms both white students and students of color;

- integration initiatives are most effective when part of a mandated, metropolitan-wide plan;

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[239] Exs. 5, 22, 23, 53, 54, 56, 57, 58, 59, 60, 54, 65; Test. of Myron Orfield (T. at 57-82, 349-402, 458-467); Test. of Dale Swanson (T. at 239-245, 449-458); Test. of Jeffry Martin (T 132-138); Test. of Yusef Mgeni (T. 138-145); Test. of Jim Hilbert (T. 146-150); Test. of Will Stancil (T: 193-200, 386-402); Test. of Tom Luce (T. 200-214).
[240] Ex. 54.
[241] *Id*.

- integration and diverse schools can contribute to narrowing the racial and economic gaps in educational outcomes, and to improving achievement for all students;

- "a preponderance of social science research indicates" that "integrated" schools have many benefits; and

- there is a compelling state interest in avoiding racial isolation and achieving school diversity.[242]

B. Charter School Advocates

168. The Charter School Advocates argue, among other things, that the Department lacks authority to include charter schools in the proposed rules, rendering the rules defective. The Charter School Advocates make the following arguments:

- the SONAR does not properly justify the need for and reasonableness for repealing each of 1999 Rules;

- the SONAR does not contain an adequate discussion of "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," specifically, by charter schools;

- the Department does not have authority to repeal the current exemption of charter schools from the 1999 Rules or to require charter schools to participate in the AIM Program;

- the proposed rule violate the Minnesota Human Rights Act because it discriminates against students of color at charter schools by requiring culturally-specific charter schools with a high proportion of students of color to have an A&I plan, but does not require predominantly white schools from having such plans;

- the SONAR contains no rationale regarding the need for or reasonableness of the proposed rule as it applies to charter schools;

- the proposed rules do not define "racial balance" as required by the enabling statute, Minn. Stat. § 124D.896;

[242] Ex. 7, 15, 16, 17, 18, 54, 55, 59; Test. of Myron Orfield (T. at 57-82, 349-402, 458-467);Test. of Tom Luce (T. 200-214); Test. of Will Stancil (T: 193-200, 386-402).

- the proposed rules are inadequate and unreasonably vague because they do not define "racial balance," "measurable racial and economic integration goals," or "integrated learning environment;"

- the proposed rules are inadequate and unreasonably vague because they do not identify how integration plans will be evaluated by the Commissioner; and they do not explain how a school can demonstrate that it has "realized racial and economic integration;"

- the Department has not demonstrated the need to apply the AIM Act to charter schools because charter schools serve only a small portion of the public school population;

- the proposed rules are not rationally related to the stated goals of pursuing racial and economic integration when it exempts "traditional public schools with a majority of white students;"

- the proposed rules, as applied to charter schools, are unreasonable because the means by which schools can achieve greater diversity are unavailable to charter schools in Minnesota;

- the proposed rules are contrary to the legislative policy of supporting parental choice in education;

- the record does not establish a requisite need to apply the proposed rules to charter schools when they serve only approximately five percent of the public school population; and

- the proposed rules, as applied to charter schools, are unreasonable because charters school cannot levy funds to pay for the integration plans and are therefore not eligible for achievement and integration revenue.[243]

169. In support of its claims, the Charter School Advocates presented academic argument and analysis that:

- culturally-specific charter schools can provide benefits to children of color;

[243] Exs. 9, 10, 25, 28, 29, 46, 47, 48, 49, 50, 51, 52, 52; Test. of Jim Bartholomew (T. 235-238); Test. of Cindy Lavorato (T. 245-264, 416-429, 438-447); Test. of Joe Nathan (T. 273-311, 429-438, 447-449).

- there is a lack of consensus in social science research on whether racial diversity actually has a positive, educationally significant, and consistent impact on academic outcomes;

- there is a lack of consensus in social science research on whether integration and desegregation can close the achievement gap between white children and children of color;

- the rules unnecessarily target charter schools, when the majority of students in racially segregated and isolated schools in Minnesota are in traditional public schools;

- school choices enhance the educational outcomes for children of color; and

- there are benefits of culturally-specific charter schools, including academic and social outcomes.[244]

170. In addition, numerous parents, staff members, and students presented comment and anecdotal evidence about the benefits of charter schools, particularly culturally-specific charter schools, which provide specific learning environments to students of color.[245] These commenters expressed positive experiences with charter schools and urged the Commissioner to exempt charter schools from the proposed rules, as they are exempt under the 1999 Rules.[246]

C. School Districts

171. The comments submitted by individuals and entities in the "School Districts" group generally supported the proposed rules and the Department's deference to school districts to voluntarily create their own A&I plans or join collaboratives. However, members of this group of commenters made the following suggestions for revisions or clarifications to the proposed rules:

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[244] Ex. 10, 26, 29, 30; Test. of Joe Nathan (T. 273-311, 429-438, 447-449).

[245] Exs. 3, 4, 11, 31-45, 51; Test. of Test. of Nekeema Levy-Pounds (T. 92-99); Test. of Jada Pounds (T. 99-100); Test. of Gospel Kordah (T. 112-116); Test. of Kevin Byrne (T. 127-132); Test. of Alberto Monserrate (T. 150-153); Test. of Sabrina Williams (T. 154-162); Test. of Maya Buckner (T. 166-168); Test. of Shana Ford (T. 168-171); Test. of Eric Mahmoud (T. 172-174); Test. of Yahye Hassan (T. 175-176); Test. of Barka Omar (T. 184-186); Test. of Malik Bush (T. 186-192): Test. of Eugene Piccolo (T. 225-235); Test. of Adeola Adeleke (T. 163-165, 266-267); Test. of Yee Yang (T. 311-319).

[246] Exs. 3, 4, 11, 31-45, 51; Test. of Test. of Nekeema Levy-Pounds (T. 92-99); Test. of Jada Pounds (T. 99-100); Test. of Gospel Kordah (T. 112-116); Test. of Kevin Byrne (T. 127-132); Test. of Alberto Monserrate (T. 150-153); Test. of Sabrina Williams (T. 154-162); Test. of Maya Buckner (T. 166-168); Test. of Shana Ford (T. 168-171); Test. of Eric Mahmoud (T. 172-174); Test. of Yahye Hassan (T. 175-176); Test. of Barka Omar (T. 184-186); Test. of Malik Bush (T. 186-192): Test. of Eugene Piccolo (T. 225-235); Test. of Adeola Adeleke (T. 163-165, 266-267); Test. of Yee Yang (T. 311-319).

- the proposed rules should allow districts to include professional development opportunities for teachers and administrators in their achievement and integration plans, as intended by the legislature in Minn. Stat. § 124.861, subd. 2;

- the proposed rule should contain a definition of “economic integration” to assist districts in creating their plans;

- the proposed rules should provide more guidance for what “measurable racial and economic integration goals” entails;

- to prevent disruption and loss of programming, once a district is found eligible for integration funding, the rules should allow the districts to continue to receive the funding for three years even if the district’s eligibility changes during the three-year plan;

- to provide for an orderly transition from the use of state revenue to local revenue, districts that are no longer eligible to join collaboratives should have their integration revenue “phased out” over time rather than abruptly ended;

- to prevent the loss of current programming, the proposed rules should permit non-qualifying districts that are currently voluntary members of collaboratives to be “grandfathered” into the new rules and be “held harmless,” even if a district is no longer an “eligible district” under the rules;

- the proposed rules should be amended to remove the word “adjacent” when determining collaborative partnerships, so that districts are able to partner with districts that best fit their achievement and integration goals;

- the proposed rules should expand the categories for which incentive revenue can be used so as to allow districts to pursue innovative ways to achieve racial and economic integration and reduce academic disparities, such as staff training and development, targeted school choice outreach, and other options;

- the effective date of the proposed rules should be moved to fiscal year 2018 because planning for fiscal year 2017 is already underway in many districts and fiscal year 2017 is the final year of the three-year integration plans now in effect;

- the proposed rules need to articulate the evaluation criteria that will be used by the Commissioner when reviewing A&I plans so as to ensure

that plans are reviewed consistently and that eligible districts understand what is being required of them;

- the state aid available for A&I revenue may be insufficient because A&I plans extend to students eligible for free or reduced-price lunch, a much larger category than "protected students";

- the proposed rule should consider the relative proportion of each student group rather than lump all students of color into the "protected student" category to be compared with the enrollment of white students;

- the proposed rules should be clarified to reflect that all eligible school districts, whether or not they participate in a collaborative, should be required to align their A&I plans with their World's Best Workforce Plan;

- the proposed rules should allow magnet programs to target student groups, including students of color, without being deemed a racially identifiable school;

- the proposed rules should provide for a plan development council to assist school districts in preparing their A&I plans and ensure that necessary stakeholders are included in the planning process;

- the proposed rules over-emphasize testing and de-emphasize a holistic approach to integration, and should include cooperative ways to recruit teachers of color and encourage teacher exchanges and staff development opportunities so as to address instructional segregation;

- the proposed rules should provide more guidance to districts on how to use A&I revenue, and not just leave it up to the district's discretion on how the funds should be used; and

- any district with racial or ethnic achievement disparity should be required to have an A&I plan, and any district that wants to join a cooperative should be allowed to join a cooperative.[247]

IX. STANDARD OF REVIEW FOR RULEMAKING

[247] See Exs. 1, 2, 6, 8, 12, 63-81; Test of Rich Rosivach (T. 51-57); Test. of Kimberly Colbert (T. 84-88); Test. of Kimberly Matier (T. 88-92); Test. of Melissa Jordan (T. 101-108); Test. of Scott Croonquist (T. 117-121); Test. of Jean Lubke (T. 121-127); Test. of Fred Nolan (T. 176-181); Test. of Peter Haapola (T. 182-184); Test. of Eric Anderson (T. 215-224); Test. of Mary Bussman (T. 319-324); Test. of Robert Erickson (T. 325-349).

172. Under the Minnesota Administrative Procedure Act, an agency proposing to adopt rules must:

(1) Establish its statutory authority to adopt the proposed rules;

(2) Demonstrate that it has fulfilled all relevant legal and procedural requirements; and

(3) Demonstrate the need for and reasonableness of each portion of the proposed rules with an affirmative presentation of facts.[248]

173. To establish need for and reasonableness of a rule, an agency may rely on legislative facts, including general facts concerning questions of law, policy and discretion; or it may simply rely on statutory interpretation or stated policy preferences.[249]

174. 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.[250] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[251] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[252] The Minnesota Supreme Court has further defined an 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."[253]

175. An agency is legally entitled to make choices between possible regulatory approaches so long as its choice is rationally related to the goals to be achieved. It is not the role of the Administrative Law Judge to determine which policy alternative represents the "best" approach, because this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[254]

176. A rule must be disapproved if the rule:

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[248] Minn. Stat. §§ 14.05, subd. 1, .14, subd. 2; Minn. R. 1400.2100.
[249] *Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[250] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 43 N.W.2d 281, 284 (Minn. 1950).
[251] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[252] *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minn. Dep't of Human Servs.*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[253] *Manufactured Housing,* 347 N.W.2d at 244.
[254] *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

- Was not adopted in compliance with procedural requirements of Minn. Stat. ch. 14 and Minn. R. part 1400, unless the administrative law judge decides that the error is harmless error under Minn. Stat. §§ 14.15, subd. 5 or 14.26, subd. 3(d);

- Is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;

- Is substantially different than the proposed rule, and the agency did not follow the procedures of Minn. R. 1400.2110;

- Exceeds, conflicts or does not comply with, or grants the agency discretion beyond that which is allowed by law, its enabling statutes or other applicable law;

- Is unconstitutional or illegal;

- Improperly delegates the agency's powers to another agency, person or group;

- Is not a "rule" as defined in Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; or

- Is subject to Minn. Stat. § 14.25, subd. 2, and the notice that hearing requests have been withdrawn and written response to it show that the withdrawal is not consistent with Minn. Stat. § 14.001(2), (4) and (5).[255]

177. If changes to the proposed rule are made by the agency or suggested by the administrative law judge after original publication of the rule language in the *State Register*, it is also necessary for the administrative law judge to determine if the new language is substantially different from that which was originally proposed.[256] The standards to determine whether 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 the differences are:

(1) within the scope of the matter announced in the notice of hearing and are in character with the issues raised in that notice;

(2) a logical outgrowth of the contents of the notice of hearing and the comments submitted in response to the notice; and

[255] Minn. R. 1400.2100.
[256] Minn. Stat. § 14.05, subd. 2.

(3) the notice of hearing provided fair warning that the outcome of the rulemaking proceeding could be the rule in question.[257]

178. 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.[258]

X. STATUTORY AUTHORITY

179. An agency shall adopt, amend, suspend, or repeal its rules only pursuant to authority delegated by law and in full compliance with its duties and obligations.[259] When an administrative agency's authority is questioned, the court independently reviews the enabling statute.[260] The reviewing court "shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures."[261]

180. Minnesota Statutes section 124D.896 (2014) provides that:

(a) The commissioner shall propose rules relating to desegregation/integration and inclusive education, consistent with sections 124D.861 and 124D.862.

(b) In adopting a rule related to school desegregation/integration, the commissioner shall address the need for equal educational opportunities for all students and racial balance as defined by the commissioner.

181. In this enactment, the Minnesota legislature amended Minn. Stat. § 124D.896 in 2014 to specifically authorize the Department to draft or amend the existing rules to make them "consistent" with the AIM Act.

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[257] *Id.*, subd. 2(b).
[258] *Id.*, subd. 2(c).
[259] *Id.*, subd. 1.
[260] *Weber v. Hvass*, 626 N.W.2d 426, 431 (Minn. Ct. App. 2001).
[261] Minn. Stat. § 14.45; *see Drum v. Bd of Water & Soil Res*., 574 N.W.2d 71, 73 (Minn. Ct. App. 1998).

182. The Department asserts that it "does not have the legislative authority to draft rule language that goes beyond the scope of the new state achievement and integration statute."[262]

183. While it is true that the rulemaking authority granted in Minn. Stat. § 124D.896 does not extend beyond rules relating to "desegregation/integration and inclusive education," the authority delegated to the Department for making rules related to desegregation, integration, and inclusive education is quite broad: it permits the Commissioner to repeal the 1999 Rules, amend the 1999 Rules, and/or enact completely new rules so long as the rules are related to "desegregation/integration and inclusive education" and are consistent with the AIM Act.

184. Thus, except where otherwise noted below related to charter schools and incentive revenue, the Administrative Law Judge concludes that the Department has general rulemaking authority to adopt the proposed rules and repeal the 1999 Rules. As in any rulemaking process the Department must provide an affirmative presentation of facts that the adoption of the proposed rules and the repeal of the existing rules are necessary and reasonable, and that all legal and procedural requirements have been satisfied. These additional requirements are discussed below.

A. Inclusion of Charter Schools

185. Unlike the 1999 Rules which specifically exclude charter schools from integration and desegregation plans, the proposed rules expressly include charter schools into the scope of the AIM Act. The Department's attempt to expand the scope of the AIM Act and include charter schools exceeds the rulemaking authority granted to the Department and contravenes Minnesota law. Accordingly, the proposed rules, as they relate to charter schools, must be rejected.

186. The AIM Act, at Minn. Stat. § 124D.861, states that the Act shall apply only to "eligible districts." The legislature defines "eligible district" to mean "a *district* required to submit a plan to the commissioner under Minnesota Rules governing school desegregation and integration" or "a member of a multi*district* integration collaborative that files a plan with the commissioner."[263]

187. At the time that the AIM Act was passed, the rules in effect that governed desegregation and integration plans — the 1999 Rules — expressly excluded charter schools from the requirements of such plans.[264] Therefore, the legislature was aware that the AIM Act would not be applicable to charter schools when it referenced those rules in its definition of "eligible district."

188. Despite this fact, the proposed rules include a definition of "eligible district"

[262] SONAR at 26.
[263] Minn. Stat. § 124D.861, subd. 1(b) (2015) (emphasis added).
[264] Minn. R. 3535.0110, subp. 5 (2015).

that is different from the definition in the statute. Proposed Rule Part 3535.0020, subp. 3, defines "eligible district" as a "district *or charter school* required to submit a plan" under the rules or "a member of a collaborative."[265] Proposed Rule 3535.0020, subp. 2, goes on to define "collaborative" to expressly include charter schools.

189. The Department argues that "[b]ecause the [AIM] statute incorporates the integration rule's definition of 'eligible district,' if the proposed rule is adopted, the statute will be specifically applicable to charter schools.[266] Alternatively, the district contends that charter schools can be brought into the AIM Act through agency rules so long as the Department's rules are made specifically applicable to charter schools.[267] The Department's arguments ignore the legislature's definition of "eligible district," disregard the express scope of the AIM Act, and attempt to expand the legislature's limitation on the agency's rulemaking authority.

190. In defining "eligible district," the legislature references only "districts" and "multi*district* integration collaboratives."[268] The Act specifically does not define "eligible districts" to include charter schools. Indeed, no reference to charter schools exists anywhere in Minn. Stat. §§ 124D.861 or .862.

191. Charter schools are not school districts or subsets of school districts under Minnesota law. Rather, charter schools are separate and distinct legal entities from school districts. Although they are public schools, charter schools are not: members of their local school districts; their student bodies are not determined by geographical boundaries; and they are not funded like school districts because charter schools have no taxing or levy authority.[269]

192. This distinction is made clear in Minnesota law. To highlight the legal differences between charter schools and school districts, Minn. Stat. § 124E.03, subd. 1 (2014), expressly provides:

> A charter school is exempt from all statutes and rules applicable to a school, school board, or school district unless a statute or rule is made specifically applicable to a charter school or is included in this chapter [Chapter 124E].

193. Accordingly, unless a statute, including the AIM Act, specifically states that it is applicable to charter schools, it is not. Silence in the statute means that the law does not apply to charter schools.

194. The legislature was undoubtedly aware of the requirements of Minn. Stat.

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[265] Emphasis added.
[266] Ex. 82 at 9.
[267] *Id*.
[268] Minn. Stat. § 124D.861, subd. 1b.
[269] S*ee generally* §§124E.01-.26 (2014).

§ 124E.03 when it passed the AIM Act.[270] If the legislature wanted to include charter schools in the AIM program requirements and revenue opportunities available under the Act, it could have done so by specifically including charter schools within the definition of "eligible district" or otherwise making the Act "specifically applicable" to charter schools as required by Section 124E.03. The legislature did not do that. Instead, the legislature made the AIM Act applicable only to "districts" and "multidistrict" collaboratives, not charter schools. In addition, nowhere in the charter school statutes, Minn. Stat. ch. 124E, does the legislature include charter schools in the AIM Act.[271]

195. The legislature's intent is further evidenced in other provisions in the AIM Act and commentary from the legislators who helped to pass the charter school act. First, by referencing the existing integration and desegregation rules in the definition of "eligible district," the legislature was acknowledging the express exclusion of charter schools from the Act in that he 1999 Rules (which are still in effect today) do not include charter schools within integration and desegregation plans.[272]

196. Similarly, the Act, at Minn. Stat. § 124D.862, subd. 5, requires that to receive A&I funding a "district" must provide 30 percent of the achievement and integration revenue through a levy. Charter schools have no levy authority.[273] Consequently, they cannot levy funds to receive A&I aid. It logically follows that the legislature did not intend that charter schools be included in the AIM program when it passed the Act because the legislature did not include a funding mechanism that either: (1) did not involve levies; or (2) included an alternative to a levy. By requiring a levy as a prerequisite to funding, it is clear that the legislature did not intend the Act to apply to charter schools.

197. Moreover, commentary from former and current legislators who worked to enact the charter school laws and AIM Act support a finding that the legislative intent was not to include charter schools in the Act.[274]

198. Despite the clear evidence that the legislature did not intend the AIM Act to apply to charter schools, the Department re-defines the statutory definition of "eligible district" in its Proposed Rule 3535.0020, subps. 2 and 3, to include charter schools. By doing so, the Department is attempting to do through administrative rules what the legislature affirmatively chose not to do in the AIM Act. In this way, the Department is attempting to change Minnesota law through rulemaking.

199. It is established in Minnesota law that "an administrative body can neither make nor change substantive law. It may adopt administrative rules, but in so doing

[270] *See* Minn. Stat. § 645.17 (2014).
[271] *See* Minn. Stat. §§124E.01-.26.
[272] Minn. R. 3535.0110, subp. 5.
[273] Minn. Stat. §§ 124E.20-.26.
[274] *See* Exs. 49, 50, 52.

cannot change existing or make new law."[275] An agency may adopt regulations to implement or make specific the language of a statute, but it may not adopt a rule that conflicts with statute.[276] Consequently, a rule "must be disapproved" if the rule exceeds, conflicts with, or does not comply with its enabling statute or other applicable law.[277]

200. By redefining "eligible district" to include charter schools into the AIM program – an option the legislature choose not to do – the Department is not only making law, it contradicting existing law. The tail does not wag the dog when it comes to lawmaking. Agencies are creatures of legislation and an agency's rulemaking power is only as great as the authority delegated by the legislature.[278] Consequently, an agency may neither make rules without authority nor change a statute by promulgating a conflicting and subordinate rule.

201. The legislature did not grant the Commissioner the authority to change the AIM Act or expand its scope. The enabling statute, Minn. Stat. § 124D.896, authorized the Commissioner only to amend or make rules "consistent" with the Act. By changing the scope of the AIM program and re-defining "eligible district" to include charter schools, the Department has contradicted Minnesota law and exceeded its rulemaking authority. Accordingly, all references and applicability to charter schools must be deleted from the rules.

202. In addition to the lack of authority to include charter schools in the proposed rules, the Department has failed to make an affirmative presentation of facts establishing the need for and reasonableness of including charter schools into the proposed rules, as required by Minn. Stat. § 14.14, subd. 2.

203. The Department bases its decision to repeal Minn. R. 3535.0110, subp. 5 (the exclusion of charter schools from the existing rules) and include charter schools in the proposed rules on two assertions: (1) an "assumption" by the Workgroup that the legislature intended to include charter schools into the proposed rules;[279] and (2) a conclusion that the legislature intended the AIM Act to apply to all public schools, including charter schools, due to the statement articulated in Minn. Stat. § 124D.861, subd. 1(a).[280]

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[275] *McGuire v. Viking Tool & Die Co.*, 104 N.W.2d 519, 528 (Minn. 1960) (citing *Bielke v. Am. Crystal Sugar Co.*, 206 Minn. 308, 288 N.W. 586 (1939)).
[276] *Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 486 (Minn. 1995); *J.C. Penney Co., Inc. v. Comm'r of Econ. Security*, 353 N.W.2d 243, 246 (Minn. Ct. App. 1984).
[277] Minn. R. 1400.2100.
[278] *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010).
[279] SONAR at 14-15, 25.
[280] Minn. Stat. § 124D.861, subd. 1(a) provides, "The 'Achievement and Integration for Minnesota' program is established to pursue racial and economic integration and increase student academic achievement, create equitable educational opportunities, and reduce academic disparities based on students' divers racial, ethnic, and economic backgrounds in Minnesota public schools."

204. With respect to the Department's first assertion, the record indicates that the Workgroup never expressed a recommendation that the Commissioner include charter schools in the definition of "eligible district" or anywhere else in the proposed rules.[281] In fact, the Workgroup's Report notes that the issue of charter schools were "discussed," but that "further study and consideration" was needed.[282] The Workgroup further recommended that if any of the "additional issues" raised by the Workgroup were addressed by the Commissioner in the rule, they "should take place as part of any rulemaking process."[283]

205. The Department's second assertion, that the Act was meant to apply to charter schools, is in conflict with the plain language of the Act and the presumption against inclusion of charter schools contained in Minn. Stat. § 124E.03, subd. 1. As set forth above, the evidence establishes that the legislature did not intend the AIM Act to apply to charter schools. Accordingly, the inclusion of charter schools into the proposed rules is further rejected due to the Department's failure to establish the need for and reasonableness of the rule provisions involving charter schools.

206. Because the Administrative Law Judge disapproves the proposed rules relating to charter schools on these grounds, it is unnecessary to reach the additional argument of whether the inclusion of charter schools in the proposed rules constitutes a violation of the Minnesota Human Rights Act, Minn. Stat. ch. 363A (2014).

B. Equal Educational Opportunities and Racial Balance

207. Minnesota Statutes section 124D.896(b) provides that "[i]n adopting a rule related to school desegregation/integration, the commissioner *shall* address the need for equal educational opportunities for all students and *racial balance as defined by the commissioner*."[284]

208. When it amended the enabling statute in 2014, the legislature specifically did not remove the requirement that the Commissioner "address the need for equal educational opportunities for all students and racial balance as defined by the commissioner" in any proposed rules related to integration, desegregation, and inclusive education. Consequently, as long as the Commissioner undertakes to make or amend rules related to desegregation, integration, or inclusive education, the Commissioner is statutorily required to "address equal educational opportunities for all students and racial balance," as well as to define "racial balance" in the rules.

209. The Department argues that Section 124D.896(b) "does not require the commissioner to create a definition of 'racial balance.'"[285] The Department further

[281] *See* SONAR at Appendix E.
[282] *Id.* at Appendix E at 6.
[283] *Id*.
[284] Emphasis added.
[285] Ex. 82 at 6.

argues that the proposed rules, through their provisions, implicitly "define the need for equal opportunity and racial balance through integration."[286]

210. According to the Department, Proposed Rule 3535.0010 references a host "of other state and federal statutory requirements for school districts to provide equal opportunity and racial balance."[287] In addition, the Department contends that the rule implicitly requires eligible districts to "address equal opportunity and racial balance by submitting a plan with 'measurable racial and economic integration goals that reflect *increased opportunities* and participation in program[s] and activities.'"[288] However, these provisions are insufficient to meet the requirements of the enabling statute.

211. While it is true that the implicit purpose of the AIM Act and the proposed rules is to assist school districts in providing equal educational opportunities for all Minnesota public school students, nowhere in the proposed rules does the Department explicitly define or address "equal educational opportunities for all students and racial balance." Simply referencing other statutes that address equal opportunity and racial balance is insufficient to meet the requirements of the enabling statute.

212. Moreover, requiring districts to submit a plan "setting measurable racial and economic integration goals," without explaining what that phrase means or how those plans will be judged, is unhelpful. In short, the Department's reference to other equal rights statutes and requiring plans "setting measureable racial and economic integration goals" do not meet the very specific mandate of the legislature: to "address the need for equal education opportunities for all students and racial balance."

213. Furthermore, nowhere in the proposed rules does the Department define "racial balance" and nowhere in the hearing record does the Department adequately justify why its prior definition of "racial balance" was repealed.

214. A fair reading of Minn. Stat. § 124D.896(b) is that the Department must define "racial balance." For this reason, the 1999 Rules specifically define that term. In rewriting its rules, the Department repeals Minn. R. 3535.0110, subp. 5, which defines "racial balance," but does not substitute a new definition as required by the enabling statute.

215. In addition, the Department fails to provide any affirmative presentation of facts as to why a repeal of this required definition is either reasonable or necessary. The Department's conclusory statement that a need for "flexibility" in the application of the rule renders a definition of "racial balance" unnecessary,[289] is not only unpersuasive, it ignores the legislative mandate to include the definition in any proposed rules.

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[286] *Id*.
[287] *Id.*
[288] *Id.*
[289] *Id.* at 16-17; Ex. 83 at 6-7.

216. Unless and until the legislature removes paragraph (b) from Minn. Stat. § 124D.896, the Commissioner is required to: (1) "address the need for equal educational opportunities for all students and racial balance;" and (2) include a definition of "racial balance" in any proposed rules related to desegregation/integration or inclusive education. By not including these provisions in the proposed rules, the Department has failed to comply with the specific mandates of its enabling statute, Minn. Stat. § 124D.896(b), and the rules must be disapproved.

217. These defects can be corrected in two ways. The Department can correct the first defect by adding a provision to Proposed Rule 3535.0010 to expressly declare that the rules are intended to "address the need for equal educational opportunities for all students and racial balance." The Department can correct the second defect by adding a definition of "racial balance" in the proposed rules.

218. To correct the first defect, the Administrative Law Judge recommends that the Department add the following underlined clause to proposed Rule 3535.0010:

> A. Parts 3535.0010 to 3535.0060 are intended to implement Minnesota Statutes, sections 124D.861 and 124D.862, as well as to address the need for equal educational opportunities for all students, and racial balance as defined herein.

219. To correct the second defect, the Administrative Law Judge recommends including a definition of "racial balance" consistent with that contained in the existing rules. The 1999 Rules, Minn. R. 3535.0110, subp. 5, contains the following definition:

> 'Racial balance' means the increased interaction of protected students and white students within schools and between districts that is consistent with the purposes of parts 3535.0160 to 3535.0180.

220. The Department can rectify the second defect by simply incorporating the definition of "racial balance" from its existing rules, or by incorporating a new definition of the term. To incorporate a new definition of the term, the Department must establish the need and reasonableness of the new definition. The Department risks amending the rule with a substantially different provision than was originally published in the *State Register*. Accordingly, to ensure that the incorporation of a definition of "racial balance" does not render the proposed rules substantially different from the rules published in the *State Register*, the Administrative Law Judge recommends that the Department incorporate the current definition of "racial balance" (set forth in Minn. R. 3535.0110, subp. 5) into proposed Rule 3535.0020, with the following minor changes:

> 'Racial balance' means the increased interaction of protected students and white students within schools and between districts that is consistent with the Achievement and Integration for Minnesota Act, Minnesota Statutes sections124D.861 and 124D.862.

221. Adding the provisions recommended above to the proposed rules would not render the rules substantially different from that which was originally proposed because: (1) the recommended changes are within the scope of the matter announced in the notice of hearing and in character with the issues raised in that notice; (2) the recommended changes are logical outgrowths of the content of the enabling statute, 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 the rulemaking proceeding could include these items.

XI. REPEAL OF 1999 RULES

222. In addition to proposing new rules, the Department is repealing the 1999 Rules in their entirety. While the SONAR addresses the proposed rules, it does not specifically address any of the repealed rules.

223. The Department contends that "[t]here is no requirement in statute or rule that the department undergo separate justifications of need and reasonableness for the repeal of existing rules and the adoption of new rules."[290] At the same time, the Department asserts that in justifying its proposed rules, it necessarily established the need for and reasonableness of the repeal.[291] The Administrative Law Judge disagrees with both of these assertions.

A. Administrative Procedure Act Requirements for Repeals

224. Pursuant to Minn. Stat. § 14.05, an agency shall adopt, amend, suspend, or *repeal* its rules in accordance with the procedures set out in Minn. Stat. §§ 14.001-.69.[292] Consequently, the repeal of a rule is subject to the same requirements under the Administrative Procedure Act as is the adoption of a new rule.

225. As with adopting a new rule or amending an existing rule, to repeal a rule an agency must: (1) establish its authority to repeal the rule; (2) demonstrate that it has fulfilled all relevant legal and procedural requirements for repealing the rule; and (3) establish the need for and reasonableness of the repeal with an affirmative presentation of fact.[293] The legal authority for the repeal of the 1999 Rules, and the procedural requirements for repeal of the existing rules and adoption of the proposed rules, have been discussed above (Section X above). The remaining issue, thus, is the need for and reasonableness of each repealed provision.

226. Minnesota Statutes section 14.14, subd. 2, places the burden on the Department to "make an affirmative presentation of facts establishing the need for and

[290] Ex. 82 at 2.
[291] *Id.*
[292] Emphasis added.
[293] Minn. Stat. §§ 14.05, subd. 1, .14, subd. 2; Minn. R. 1400.2100.

reasonableness of proposed rules." Inherent in this requirement is the burden to also establish the need for and reasonableness of each repeal if the need and reasonableness is not readily apparent by the justification for the new rules. In this case, it is not.

227. The requirement to establish the need for and reasonableness of repealed rules is encompassed by Minn. Stat. § 14.05, which extends all of the substantive and procedural requirements of the rulemaking process to the repeal of existing rules, including the requirements of section 14.14, subd. 2. Accordingly, the Office of Administrative Hearings has repeatedly held that an agency is required to establish the need for and reasonableness of repealed rules in the same manner as it is required to establish the need and reasonableness of new rules.[294]

228. This interpretation of administrative law is consistent with the holdings of federal courts throughout the country, including the United States Supreme Court. The Supreme Court has held that an agency rescinding a rule is required to present a "reasoned analysis" when it repeals a rule and replaces it with another:

> [A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.[295]

229. As other federal courts have noted, "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored…."[296] Failure to provide the required reasoned analysis results in a rule that lacks a rational basis or is arbitrary and capricious, or both.[297]

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[294] *See ITMO Proposed Amendments to Rules Relating to the Child Care Assistance Program,* Docket No. 15-1300-13173, REPORT OF THE ADMINISTRATIVE LAW JUDGE at *42-*43 (Apr. 25, 2001); *ITMO the Proposed Amendments to and Repeal of Rules Governing Voter Registration*, Docket No. 11-3500-12524, REPORT OF THE ADMINISTRATIVE LAW JUDGE, at *21, *24 (Aug. 11, 2000); *ITMO the Proposed Permanent Rules of the Board of Private Detective and Protective Agent Services*, Docket No. 11-2400-10475, REPORT OF THE ADMINISTRATIVE LAW JUDGE at *7, *24 (July 16, 1997) ("Under Minn. Stat. § 14.02, subd. 4, the repeal of a rule is subject to the same requirements under the Minnesota Administrative Procedure Act as the adoption of a new rule."); *ITMO the Repeal of Minn. Rules Ch. 7011, Concerning Odorous Emissions and the Adoption of Minn. Rules Ch. 7029 In Its Place*, Docket No. 3-2200-10229, REPORT OF THE ADMINISTRATIVE LAW JUDGE at *8-*11 (June 28, 1996).

[295] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42, 103 S. Ct. 2856, 2866 (1983).

[296] *Greater Boston Television Corp. v. FCC*, 44 F.2d 841. 852 (D.C. Cir. 1970) (quoting *State Farm*, 463 U.S. at 57, 103 S. Ct. at 2874); *see also Sierra Club North Star Chapter v. LaHood,* 693 F.Supp.2d 958, 973 (D. Minn. 2010).

[297] *See Builders Ass'n of the Twin Cities vs. Minn. Dep't of Labor and Industry*, 872 N.W.2d 263, 268-69 (Minn. Ct. App. 2015) (citing *Jacka v. Coca–Cola Bottling Co.,* 580 N.W.2d 27, 35 (Minn. 1998) and *Pettersen*, 347 N.W.2d at 244).

230. In a case where a new rule replaces an existing rule due to a statutory change, the presentation of affirmative facts related to need and reasonableness may be as simple as: explaining how a new statute made the existing rule provisions obsolete, unnecessary, or duplicative; how the new law preempted or replaced the existing rule; or how the new statute necessitated an entirely different rule. In each circumstance, the agency is required to address how and why the repeal of the old rule is necessary, and why it is reasonable to replace it with the new rule. Simply stating that a new statute was passed and that the old rule should be repealed — without more — is insufficient to satisfy the Department's burden to show that the action was needed and a reasonable choice among the various alternatives.

B. Department's Justifications for Repeal

231. Here, the Department's case focuses on the justifications for the new rules but entirely ignores its obligation to justify the repeal of the 1999 Rules. The following is the only explanation in the SONAR as to why a repeal of the 1999 is needed:

> The department considered whether it should draft an entirely new achievement and integration rule or amend the current integration rule because significant integration policy was now embedded in the newly enacted achievement and integration statutes, Minnesota Statutes, sections 124D.861 and 124D.862. *Due to the incorporation of integration policy in state statute,* the department decided to draft a new achievement and integration rule instead of amending the current rule. The current integration rule *does not align* with the achievement and integration statutes adopted in 2013. As a result, challenges exist for implementation, evaluation practices, definitions, timeliness and processes at both the state and local level. For these reasons, the department decided to draft a new achievement and integration rule that aligned with the new achievement and integration statutes.[298]

232. The Department expanded upon its decision to repeal the 1999 Rules in post-hearing comments. The Department explained:

> It was not practical to amend the current rule to align with statute and the recommendations of the workgroup. It is more understandable and transparent to the public to repeal the current rules and replace them with new rules that are consistent with statute and work group recommendations. By explaining the conflict between the current rule and the statutes and the recommendations of the workgroup, the SONAR demonstrates the need and reasonableness of the repeal of the current rule and replacement with the proposed rule.[299]

[298] SONAR at 25 (emphasis added).
[299] Ex. 82 at 3.

233. The Department goes on to state:

> The SONAR makes very clear that the current rule and existing statute are in conflict with each other, and the department was directed by the Legislature to undergo rulemaking to align the rule and statute. The SONAR also demonstrates that the department relied on the recommendations of [the] Rule Alignment Work Group to inform the content of the proposed rule.

234. Again and again, the Department asserts that the 1999 Rules are "out of alignment," "misaligned," and "in conflict" with the Act because the Act includes new goals related to achievement and economic integration.[300] But the Department does not explain which *particular provisions* of the 1999 Rules are "out of alignment" or "in conflict" with the AIM Act. Nor does the Department explain *how* particular provisions are "out of alignment" or "in conflict with" the AIM Act. Moreover, the Department does not explain *why* it is necessary and reasonable to repeal the 1999 Rules in their entirety to address the additional goals of economic integration and academic achievement.

C. Needed and Reasonable: the How and Why of Rulemaking

235. It is true that the legislature authorized the Department to undertake rulemaking consistent with the AIM Act. It is also true that the AIM Act extends beyond school integration to include academic achievement and economic integration, thereby necessitating changes to the 1999 Rules. The problem is that the Department failed to explain why the passage of the AIM Act renders the earlier rules unworkable and obsolete such that a full repeal is needed and reasonable. Simply declaring rules as "misaligned" or "inconsistent" does not make them so. Similarly, simply stating that the 1999 Rules do not account for achievement and economic integration does not justify a full repeal of the existing rules or a complete re-write of the existing regulatory scheme.

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[300] See SONAR at 4 ("The current integration rule does not account for this new requirement [achievement] and does not align with recently adopted achievement and integration statutes….The purpose of this rulemaking was to propose updated rules that align with the existing achievement and integration statutes…."); at 10 ("The new achievement and integration policy and revenue statutes differ significantly from the previous integration statute and[,] as a result[,] alignment issues between the new achievement integration statutes and the current integration rules became apparent….The misalignment between the current integration rule and recently adopted achievement and integration statutes make this implementation challenging for school districts."); at 14 "As stated above, the specificity of the new statutes creates misalignment with the current integration rule and requires changes to the rule…."); at 18 ("…the current integration rule is in conflict with the state achievement and integration statutes … This conflict causes confusion and implementation challenges…."); at 19 ("The existing misalignment between the current integration rule and the achievement and integration statutes is causing confusion for districts required to submit integration plans."); at 20 ("If the Department did not act … to propose integration rules that aligned with recently passed achievement and integration statutes, continued confusion would result…."; "The primary objective of this rulemaking is to align Minnesota's integration rules with the new achievement and integration statutes passed in 2013. The current integration rules are in conflict with [Minn. Stat. §§ 124D.861 and .862]."); at 25 ("The current integration rule does not align with the achievement and integration statutes adopted in 2013.").

Instead, the Department has a legal duty to explain which existing rules are inconsistent with the Act, as well as *how and why* each of the existing rules are inconsistent, no longer necessary, or no longer reasonable.

236. In support of a repeal of the 1999 Rules, the Department points to: (1) the AIM Act; (2) the expanded scope of the AIM Act to include "academic achievement" and "economic integration"; and (3) the Workgroup recommendations. But these data points alone are not sufficient justifications of need and reasonableness for either the repeal of the 1999 Rules or the enactment of the proposed rules.

237. The fact that the legislature passed the AIM Act only explains why the rulemaking proceeding was initiated in the first place and why a new regulatory scheme is being proposed. But referencing the Act alone does not explain: (1) how or why particular provisions in the 1999 Rules conflict with or are not consistent with the AIM Act; or (2) how or why a repeal of the 1999 Rules is needed and reasonable. After all, the legislature did not direct the Department to repeal its current integration scheme or rules, as the Department intimates. The legislature merely authorized the Department to "propose rules relating to desegregation/integration and inclusive education, consistent with section 124D.861 and 124D.862."[301]

238. Similarly, the inclusion of academic achievement and economic integration goals in the AIM Act does not explain why a full repeal of the 1999 Rules is necessary or reasonable. Rather than merely including achievement and economic integration into the existing regulatory scheme, the proposed rules usher in an entirely new eligibility scheme, a scheme not required by the AIM statutes. Specifically, the proposed rules completely change: (1) which districts are required to develop plans; (2) which students are counted in the determination of whether a plan is required; and (3) which students are included in the scope of the plans. These changes go well beyond merely including academic achievement and economic integration into the scope of integration plans. Accordingly, the Department is required to detail exactly why it is repealing the existing rules and replacing them with materially different ones. Summarily pointing to the expanded statutory goals of "academic achievement" and "economic integration" does not explain the need for or reasonableness of repealing the existing rules in their entirety.

239. Finally, stating that a Workgroup of 15 stakeholders prepared recommendations to the Department only explains how the Department developed some of the new provisions. It does not explain *why* the Workgroup's recommendations and new rules are needed or reasonable; *why* the 1999 Rules are no longer needed or reasonable; *why* the 1999 Rules should be repealed; or *why* the proposed rules are needed and reasonable. Moreover, it does not detail the evidence that the Workgroup relied upon in making its recommendations. Just because the Workgroup was comprised of learned individuals who made thoughtful recommendations does not make the resulting rules or repeals needed or reasonable under the rulemaking standards.

[301] Minn. Stat. § 214D.896 (2014).

240. The work group's report, upon which the Department relies, contains no evidentiary support for the recommendations; provides no facts or law to support the recommendations; and includes minimal rationale.[302] Moreover, the recommendations made by the Workgroup were not all-inclusive and were not entirely followed by the Department in drafting the proposed rules. For example, some of the rules proposed by the Department were not recommended by the Workgroup (i.e., the inclusion of charter schools into the regulatory scheme). And some of the recommendations made by the Workgroup were not included by the Department in the proposed rules (i.e., recommendations related to collaboratives and that the Commissioner "develop specific evaluation criteria" to determine how progress toward achievement and integration goals are to be measured).[303] Simply pointing to the Workgroup's recommendations, alone, is insufficient to justify the need for and reasonableness of the repeal or the proposed rules.

241. The Department has spent a great deal of time and effort explaining why it has authority to make changes and how it reached out to stakeholders to be a part of that process. But the Department does not explain *why* each of the 1999 Rules needs to be repealed; *why* the proposed rule provisions are preferred over the 1999 Rules; *how* the 1999 Rules conflict with or fail to align with the AIM Act; and *how* the proposed rules better align the with the Act. Thus, the Department has not made the showing required by the Administrative Procedure Act.

D. Examples of Specific Repeals without Proper Justification

242. In repealing the 1999 Rules, the Department is not simply reorganizing the 1999 Rules to conform to a new statutory scheme. Rather, the proposed rules are introducing an entirely new regulatory system and repealing an established, existing program. Examples of rules being repealed with justification are identified below.

(1) Existing Segregation and Desegregation Rules

243. In repealing the 1999 Rules, the Department deletes all programs related to intentional segregation and all remedial measures, including desegregation plans. (*See* Minn. R. 3535.0110, subp. 9; .0130, .0150, hereafter referred to as the "existing desegregation rules."). References to intentional segregation, desegregation, and remedial measures are not carried forward to the proposed rules. There is nothing in the AIM statutes that conflicts with or requires the rescission of the existing desegregation program or rules. In fact, the enabling statute specifically directs the Commissioner to propose rules relating to "*desegregation*/integration."[304] Thus, the Department's claim that it must repeal these provisions because the AIM statute does

[302] SONAR at Appendix E. In footnote 6 of Ex. 83, the Department references materials from the Workgroup meetings. These documents were not made a part of the hearing record and were not presented in support of either the repeal or the proposed rules.
[303] SONAR at Appendix E, p. 78.
[304] Minn. Stat. § 124D.896 (emphasis added).

not specifically mention segregation or desegregation is without merit.

244. Similarly, just because the Workgroup recommended removing these provisions and referencing other remedial statutes instead does not, by itself, render the repeal of the 1999 Rule provisions needed and reasonable. First, the referenced statutes do not perform the same function as the 1999 Rules and therefore are not replacements for the desegregation rules. Second, the Workgroup could recommend whatever it chose and whatever was popular among its members. Unlike the Department, the Workgroup did not have an obligation to justify its recommendation with an affirmative presentation of facts and evidence as to the need for and reasonableness of a repeal. The Department does.

245. It is likely that the Workgroup relied upon facts and data, and had a rational basis for its recommendations. However, that information is not contained in the Workgroup's Report and has not been included in the hearing record.

246. In the Department's only explanation of why it is repealing the desegregation rules, the Department states that "additional definitions" and "descriptions of what constitutes discriminatory practices or segregation" would "not add clarity and might cause greater confusion."[305] This vague statement (notably, not even directly addressing the desegregation rules) does not explain why a repeal of the desegregation rules are necessary and reasonable. Many questions remain. For example: How would keeping the existing desegregation rules "cause greater confusion"? Why are the desegregation rules in conflict with the AIM Act? How are the desegregation rules not in alignment with the Act? Why is it necessary and reasonable to repeal the desegregation rules? These are questions that the Department has not answered.

(2) Existing Rules on Data Collection and Review

247. Another example of the Department's failure to properly justify a repeal occurs with the repeal of Minn. R. 3535.0120 and .0130. By repealing Minn. R. Parts 3535.0120 and .0130, the Department is abrogating school districts' obligations to collect racial composition data, as well as the Commissioner's duty to review such data to determine whether there may be intentional segregation occurring in a district necessitating a remedial desegregation plan.

248. In its reply comments, the Department asserts that:

> The data currently collected from districts under Minnesota Rules, 3535.0120, will continue to be collected by the department. The department will continue to use racial composition data to identify eligible

[305] SONAR at 26.

school districts and charter schools required to submit plans.[306]

249. The Department provides no information as to how this data will be collected after Rule 3535.0120 is repealed.

250. The proposed rules require that determinations be made based upon racial composition data for each school district.[307] Yet the proposed rules and the AIM statutes have no data collection provisions. The Department fails to identify how it would obtain the data it needs for making determinations under the proposed rules once the existing rule requiring data collection is repealed. The Department's assurance that it will somehow continue to obtain this data is without support in the record.

(3) Existing Eligibility Requirements

251. Finally, the proposed rules completely change the determination of which school districts (and schools) must prepare A&I plans. The 1999 Rules require integration plans from: (1) school districts that have a school site with 20 percent or more protected students than other school sites in the same district; (2) school districts that have 20 percent or more protected students than their adjoining districts; and (3) school districts adjoining a district that has 20 percent or more protected students than its adjoining districts.[308] As set forth above, charter schools are excluded from the 1999 Rules.[309]

252. In contrast, the proposed rules require A&I plans from: (1) *all* districts *and charter schools* that have a protected student percentage of 20 percent or more; (2) school districts that have a school site with protected student enrollment that is 20 percent or more than other school sites within the district; (3) charter schools that have an enrollment of protected students that exceeds the enrollment of protected students of the nearest public school site by 20 percent or more; and (4) charter schools that have an enrollment of protected students that is 20 percent or more lower than the enrollment of protected students of the nearest public school site serving the same grade levels.[310]

253. In addition, the proposed rules *allow* but do not require adjacent districts to join a collaborative; but yet they do not allow non-adjacent, non-qualifying districts to voluntarily join a collaborative.[311] In contrast, the 1999 Rules *require* that adjacent districts join in a collaborative plan, but also allow *any* non-adjoining, non-qualifying district to voluntarily join a cooperative.[312] The Department provides no explanation for this material change.

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[306] Ex. 83 at 5. The Department goes on to state, "While it is true the department will no longer collect data currently required under Minnesota Rules, 3535.0130…."
[307] Proposed Rule 3535.0030.
[308] Minn. R. 3535.0110, subps. 6, 7; .0160, 0170.
[309] Minn. R. 3535.0110, subp. 8.
[310] Proposed Rule 3535.0030 (emphasis added).
[311] Proposed Rule 3535.0020, subp. 2; .0030, subp. 2 (emphasis added).
[312] Minn. R. 3535.0170 (emphasis added).

254. Moreover, the proposed rules now require that "American Indian/Alaskan Native" students be included in the determination of whether an A&I plan is required of a district.[313] The 1999 Rules exclude American Indian students from that determination.[314] The Department provides no explanation for this material change.

255. Consequently, the eligibility scheme under the proposed rules is significantly different from that under the 1999 Rules. Yet there is nothing in the AIM Act that requires or necessitates the Department to reconstruct the eligibility requirements for integration plans. There are no affirmative facts justifying these material changes except a Workgroup recommendation, which contains no data or evidence to support these recommendations.

(4) The Repeal is not a Mere Administrative Reorganization of the Rules

256. As the comparisons between the 1999 Rules and proposed rules demonstrate, the proposed rules are not merely a reorganization of the existing rules to "align" with a new statutory structure as the Department repeatedly claims. Moreover, none of the above-described changes are mandated by the AIM Act, as the Department represents. Thus, it is simply not sufficient that the Department justify its new rules without also justifying the repeal of the 1999 regulatory scheme.

257. This is not to say that the Department does not have authority to repeal the 1999 Rules and start over with entirely new rules. As set forth above, the Commissioner has broad authority under the enabling statute to both repeal the existing rules and re-write new rules.

258. The Commissioner and the Department owe it to stakeholders and the public to explain why the 1999 Rules must be repealed (i.e., why each provision is no longer needed or reasonable); and to explain why each of the provisions in the new regulatory regime is reasonable, necessary, and rationally related to the goals to be achieved. Claiming that the legislature necessitated the repeals and that the changes must be reasonable because the Workgroup recommends them is insufficient to satisfy the Department's burden in this rulemaking proceeding.

259. For the aforementioned reasons, the Administrative Law Judge **DISAPPROVES** the repeal of the 1999 Rules due to the Department's failure to provide a presentation of facts establishing the need for and reasonableness of the repeals, as required by Minn. Stat. §§ 14.05, subd. 1, and 14.14, subd. 2.

XII. RULE-BY-RULE ANALYSIS

[313] Proposed Rule Part 3535.0020, subp. 4.
[314] Minn. R. 3535.0160, subp. 1B; .0170, subp. 1B.

260. Although the Administrative Law Judge disapproves the proposed rules, as a whole, due to the Department's failure to provide an affirmative presentation of facts related to the need for and reasonableness of the repeal of the 1999 Rules, the Judge will analyze each of the proposed rules to give the Department some guidance in revising its proposed rules going forward.

261. This Report is limited to discussion of the portions of the proposed rules and repealed rules that received critical comment or otherwise need to be examined. Not all of the remaining comments will be addressed herein. As a result of the disapproval of the repeal and the proposed rules for the defects noted above, certain comments have been rendered moot.

A. Proposed Rule Part 3535.0010: Purpose and Interaction with Other Laws

262. Proposed Rule Part 3535.0010 states the intent of the proposed rules: "to implement" the AIM Act. Proposed Rule Part 3535.0010 essentially replaces Minn. R. 3535.0100, which articulates the policy and purpose behind the 1999 Rules. The Department asserts that no such policy statements are required for the proposed rules because the purpose and policy behind the AIM Act is clear in statute, whereas the policy and purpose of the 1999 Rules was not set forth in statute. The Administrative Law Judge agrees.

263. Minnesota Statute section 124D.861, subdivision 1, articulates the purpose of the AIM Act:

> to pursue racial and economic integration and increase state academic achievement, create equitable educational opportunities, and reduce academic disparities based on students' diverse racial, ethnic, and economic backgrounds in Minnesota public schools.

264. Because the proposed rules are intended to supplement and assist in the implementation of the AIM Act; because policy and purpose of the proposed rules is sufficiently articulated in the AIM Act; because the policy statements set forth in Minn. R. 3535.0100 are no longer needed; and because the policy statements set forth in Minn. R. 3535.0100 may conflict with or not "align" with the policy statement in the AIM Act, the Department has sufficiently established the need for and reasonableness of Proposed Rule 3535.0010, except with respect to the inclusion of charter schools in subpart B, as explained above.

265. Because of the inclusion of charter schools in subpart B, Proposed Rule Part 3535.0010 is disapproved in its entirety.

266. In addition to removing all references to charter schools in the proposed rule, the Administrative Law Judge recommends that the Department amend Proposed Rule Part 3535.0010, subpart A, as follows, to comply with the rulemaking requirements of the enabling statute, Minn. Stat. § 124D.896:

A. Parts 3535.0010 to 3535.0060 are intended to implement Minnesota Statutes, sections 124D.861 and 124D.862, as well as to address the need for equal educational opportunities for all students, and racial balance as defined herein.

267. Notwithstanding the recommendations made herein, Proposed Rule Part 3535.0010 is **DISAPPROVED.**

B. Proposed Rule Part 3535.0020: Definitions

268. Proposed Rule 3535.0020 sets forth the definitions of "collaborative," "eligible district," "enrollment of protected students," "protected student percentage," and "total enrollment."

269. For the reasons set forth above related to the Department's authority to include charter schools in the rules, the Administrative Law Judge recommends that the Department delete Subparts 2B, 2C, 6B, and amend Subparts 3, 4, and 5 to remove references to charter schools.

270. The Administrative Law Judge further recommends that the Department add a definition of "Commissioner," "adjacent," and "protected students." The definition of "protected students" can include the same four categories listed in subpart 4 and will negate the need to re-list them in the definition of "protected student percentage."

271. In addition, there are several phrases utilized in the AIM Act that are not defined by the legislature. Taking the opportunity to define these terms in administrative rules would give districts more direction in implementing the Act. Those terms include: "integration" (both racial and economic); "integrated learning environments," "underserved student populations";[315] "interventions," and "formative assessment practices." While it is the legislature that left these terms undefined and subject to various interpretations, the Department would provide better direction for districts by defining these terms in the rules.

272. Proposed Rule Part 3535.0020, subpart 1, sets forth the rules and statutes to which the definitions apply. The Administrative Law Judge recommends that the Department also include a reference to Minn. Stat. § 124D.861.

273. Proposed Rule Part 3535.0020, subpart 2, defines the term "collaborative." The definition differs from the collaboration requirements set forth in the 1999 Rules. Under this proposed subpart, to be a part of a collaborative a district must

[315] Minn. Stat. § 120B.30, subd. 1 is ambiguous with respect to this term.

independently meet eligibility requirements[316] or be "adjacent" to a qualifying district to enter into a collaborative plan and receive funding. Thus, non-adjacent, non-qualifying districts cannot join a collaborative or receive AIM funding even if they wish to do so.

274. The Department has failed to explain why the rule permits only adjacent districts to enter into collaboratives, and why non-adjacent districts are no longer permitted to voluntarily collaborate with eligible districts as is allowed under the 1999 Rules. The Department further fails to explain why collaboration is now voluntary, when it was required for adjacent districts under the 1999 Rules. Simply referencing a recommendation from the Workgroup is insufficient. Finally, the Department fails to explain how these changes are necessary to align "collaborative arrangements more closely with requirements" set forth in the AIM Act. Nothing in the Act addresses the composition or creation of collaboratives. Therefore, the Department has not established that the existing collaboration scheme is inconsistent with the AIM Act.

275. Several existing integration districts and some school districts commented that the proposed rules should contain a "hold harmless" or "grandfather" clause to allow non-adjacent, non-qualifying districts to prepare for the dramatic loss of A&I funding that would occur as a result of the proposed rules.[317] As these districts have indicated, successful programs at non-qualifying, non-adjacent districts may be in jeopardy if such districts lose their A&I funding. This is a matter that the Department will need to consider and study before the resubmission of the rules, because the Department will need to address the costs that will be borne by these districts under the proposed rules pursuant to Minn. Stat. § 14.131(1), (5). As set forth above, a discussion of the impacts to these districts has not been adequately detailed in the SONAR.

276. Proposed Rule Part 3535.0020, subpart 3, defines "eligible district." As set forth above, the Administrative Law Judge recommends that the Department remove charter schools from this definition.

277. Proposed Rule Part 3535.0020, subpart 4, defines "enrollment of protected students." As set forth above, the Administrative Law Judge recommends that the Department separately define "protected students." The same four categories contained in subpart 4 can be used for the definition of "protected student" and need not be repeated in subpart 4. However, the Department may wish to consider addressing bi-racial and multi-racial students in the definition to avoid ambiguity.

278. Notably, the Department does not provide any explanation as to how it arrived at the four categories it selected for this definition. The work group report

[316] That is, have a protected student population of 20 percent or more or have a school site within the district with protected student enrollment that is 20 percent or more higher than another school district site within the district serving the same grades. See Proposed Rule 3535.0030, subp. A.
[317] Exs. 1, 2, 6, 64-66, 68, 72, 77-79.

indicates that the categories come from the "No Child Left Behind Act."[318] However, that act has been replaced by the Every Student Succeeds Act.[319] The Department has not explained where it obtained these categories. Accordingly, the Department is advised to explain the basis for the racial categories it selected in the proposed rules and why it selected these categories over the protected class categories contained in the 1999 Rules.

279. There was no critical comment opposing the inclusion of "American Indian/Alaskan Native" into the proposed rules.[320] However, the Department did not explain the need or reasonableness for including "American Indian/Alaskan Native" into the determination of "eligible district" under the proposed rules. This is a significant change from the 1999 Rules. The 1999 Rules *exclude* "American Indian students" from the determination of whether a school district must file an integration plan.[321] The proposed rules *include* "American Indian/Alaskan Native" students into the determination of whether a district is an "eligible district" for purposes of requiring an A&I plan. Consequently, the Department should be prepared to explain and justify the need for and reasonableness of including "American Indian/Alaskan Native" students in the proposed rules.

280. Subpart 6 includes, in the definition of "total enrollment," students enrolled in alternative learning centers, public alternative programs, and contracted alternative programs. This subpart received no critical comment. Nonetheless, the Department failed to explain the need for and reasonableness of this provision other than to reference the Workgroup recommendations. This provision is a material change from the 1999 Rules and is not expressly required by the AIM Act. Therefore, further explanation as to need and reasonableness is required.

281. Notwithstanding the recommendations made herein, Proposed Rule Part 3535.0020 is **DISAPPROVED.**

C. Proposed Rule Part 3535.0030: Eligible Districts

282. Proposed Rule 3535.0030 sets forth which districts and charter schools are required to submit a plan under Minn. Stat. § 124D.861. As noted above, the Administrative Law Judge recommends that the Department remove charter schools from this rule.

283. The remaining proposed rule will require an A&I plan from *all* school

[318] Ex. 24 at Appendix E.
[319] Pub. L. No. 114-95, 129 Stat. 1802 (2015).
[320] The Administrative Law Judge notes that the classification of "American Indian/Alaskan Native" is taken directly from the classification language contained in Proposed Rule 3535.0020, subp. 4, and is not supplied by the Judge. The Judge is unclear as to the origin of these classifications for various racial and ethnic groups (i.e., "American Indian/Alaskan Native"; "Asian/Pacific Islander"; "Hispanic"; and "Black").
[321] Minn. R. 3535.0160, subp. 1 (referencing "enrolled American Indian students"), .0170, subp. 1 (referencing "enrollment of American Indian students").

districts that: (1) have a "protected student percentage" equal to or exceeding 20 percent; or (2) a school site within the district "with a protected student enrollment that is 20 percentage points or more higher than the other school sites within the district serving the same grade."[322]

284. The 1999 Rules require A&I plans from: (1) school districts that have a school site with 20 percent or more protected students than other school sites in the same district; (2) school districts that have 20 percent or more protected students *than their adjoining districts*; and (3) school districts *adjoining* a district that has 20 percent or more protected students than its adjoining districts.[323]

285. Consequently, the eligibility requirements under the proposed rules are significantly different than under the 1999 Rules. In this case, the Department has wholly failed to explain the need for or reasonableness of this change. There is nothing in the AIM statutes that requires a change in eligibility requirements from the 1999 Rules. Therefore, it is insufficient for the Department to claim that the Act necessitates these changes.

286. In addition, citing to the Workgroup recommendations is not a substitute for making an affirmative presentation of facts as to the need for and reasonableness of the proposed rules, as required in Minn. Stat. § 14.14, subd. 2. The Department has failed to explain why it is requiring a plan for *all* school districts with a protected student population of 20 percent or more, a variation from the current regulatory scheme. There is nothing in the AIM Act that requires this change to the existing rules, and there is no evidence in the hearing record to support that decision other than the recommendation of the Workgroup. The Workgroup recommendation provides no evidence or other facts upon which the group's recommendation was based. Therefore, that recommendation is without evidentiary support.

287. According to the Department, "[a]s of October 1, 2014, the state's portion of students who are non-white is 29.5 percent…."[324] Stating that the Workgroup recommended the new eligibility requirement and stating that 20 percent is a "commonly accepted benchmark" under the 1999 SONAR is not a sufficient explanation for the Department's new eligibility decision.[325]

288. A proposed rule is reasonable if an 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."[326] In contrast, a rule will be deemed "arbitrary and capricious" where the agency's choice is based upon whim, devoid of articulated reasons, or represents the

[322] Proposed Rule Part 3535.0030, subp. 1.
[323] Minn. R. 3535.0110, subps. 6, 7; .0160, 0170.
[324] SONAR at 30.
[325] *Id.* at 29.
[326] *Pettersen,* 347 N.W.2d at 244.

agency's "will and not its judgment."[327]

289. A rule is invalid when it is "not rationally related to the objective sought to be achieved."[328] While courts will defer to the agency's expertise in selection policy options, the agency must still explain what evidence it relied on and how that evidence is rationally related to the rule involved.[329] Thus, at a minimum, the Department must explain how the Workgroup came up with this recommendation or what evidence the Workgroup relied upon to make this recommendation. Under the current hearing record, the Department has not satisfied its burden.

290. Before resubmission of the proposed rules, the Administrative Law Judge recommends that Proposed Rule Part 3535.0030, subp. 1A(2) be clarified as follows:

> (2) a school site within the district with protected student enrollment that is 20 percentage points or more higher than <u>any of the</u> other school sites within the district serving the same grades.

291. Absent this change, it is unclear if the school site must have 20 percent more protected students than all other sites or more than just one other site.

292. Proposed Rule Part 3535.0030, subpart 2, states that all collaborations are voluntary. This is a substantial change from the 1999 Rules in which involvement in a collaborative is: (1) mandatory for districts adjoining a "racially isolated" district (i.e., districts having more than 20 percent protected students than their neighboring districts); and (2) voluntary for non-adjoining, non-qualifying districts.[330]

293. The Department has not explained why the mandatory collaboration by adjacent districts, as provided in the 1999 Rules, was no longer needed or reasonable. Nor did the Department explain why non-adjacent districts can no longer voluntarily join a collaborative. The Department's only explanation is that the Workgroup recommended these changes and some districts may find voluntary collaboration more beneficial.

294. The AIM Act does not provide any directives or other requirements related to collaboratives. The Act defers entirely to the Department's rules to determine which districts can be part of a multidistrict collaborative and whether collaboration is voluntary or mandatory. Therefore, there is nothing in the Act that required the Department to make a change from its existing rule or policy.

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[327] *Cf. Mammenga*, 442 N.W.2d at 789 (Minn. 1989); *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).
[328] *Jacka*, 580 N.W.2d at 35.
[329] *Minn. Chamber of Commerce v. Minn. Pollution Control Agency,* 469 N.W.2d 100, 103 (Minn. Ct. App. 1991), *review denied* (Minn. July 24, 1991).
[330] Minn. R. 3535.0110, subp. 7, .0170.

295. In the SONAR, the Department briefly explained that voluntary collaboration *may* have benefits to some school districts because it enables districts to work with districts that want to work with them instead of trying to make a forced collaboration work.[331] However, the Department provided no explanation as to why collaborations cannot occur among non-qualifying, non-adjacent districts; or why the existing rule mandating collaboration of adjoining districts is no longer needed or reasonable. Accordingly, upon resubmission, the Administrative Law Judge recommends that the Department articulate facts and evidence to support both its repeal of the 1999 Rules, as well as its proposed rules, as they relate to collaboratives.

296. Notwithstanding the recommendations made herein, Proposed Rule Part 3535.0030 is **DISAPPROVED.**

D. Proposed Rule Part 3535.0040: Achievement Integration Plans Required

297. Proposed Rule Part 3535.0040 deals with A&I plan requirements.

298. As set forth above, the rule is disapproved due to the inclusion of charter schools. With the exception of the inclusion of charter schools, the Department has established that this rule is necessary and reasonable based upon the AIM Act.

299. Proposed Rule Part 3535.0040, subpart A, establishes a three-year term for all A&I plans, consistent with the plan term required in Minn. Stat. § 124D.861, subd. 4. Accordingly, if the Department removes charter schools from this provision, subpart A may be subject to future approval upon resubmission.

300. Proposed Rule Part 3535.0040, subpart B sets forth the categories of students that must be included in the plan development, implementation, reporting, and evaluation of A&I plans. Unlike the eligibility requirements for A&I plans under the proposed rules, which are based solely on the percentage of protected students, subpart B extends the plan development, implementation, reporting, and evaluation to both "protected students" and "students eligible for free and reduced-price lunch" (SEFRPL). This is a change from the 1999 Rules, which apply solely to protected students. As the Department explains, the inclusion of SEFRPL into A&I plan development, implementation, reporting, and evaluation, was to address the AIM Act's purpose of pursuing not only racial integration but "economic integration."

301. In addition, subpart B requires that A&I plan development include "setting measurable achievement goals related to academic growth or attainment and setting measurable racial and economic integration goals that reflect increased opportunities and participation in programs and activities included in the plan."[332] These requirements are consistent with the policy and purpose articulated in Minn. Stat.

[331] SONAR at 31-32.
[332] Proposed Rule Part 3535.0040, subp. B.

§ 124D.861, subd. 1.

302. There was no critical comment objecting to the inclusion of SEFRPL into the plan requirements, except a concern as to whether state funding will be sufficient for A&I programs given the inclusion of this broader SEFRPL category.[333] In the Department's future analysis of costs, the Department may want to consider whether the funding available to districts under the AIM Act will be sufficient to include this much larger subset of students.

303. The Administrative Law Judge finds that the Department has established a rational basis between the Act's policy requirement of pursuing "economic integration" and SEFRPL. If the Department removes charter schools from this provision, subpart B may be subject to future approval upon resubmission.

304. Proposed Rule Part 3535.0040, subpart C, requires that eligible districts, charter schools, and collaborative members include inter-district programs and activities into their A&I plans. It further requires that the programs and activities "align" with each district's A&I goals and each district's World's Best Workforce Plan, set forth in Minn. Stat. § 120B.11. With the exception of the inclusion of charter schools in this provision, the Department has established that each of these requirements is required by the AIM Act. Specifically, Section 124D.861, subd. 2, requires that eligible districts develop and implement a long-term plan to be incorporated into the district's comprehensive strategic plan under the World's Best Workforce Act, Minn. Stat. § 120B.11. Therefore, subject to the removal of all references to charter schools, the Administrative Law Judge finds subpart C is needed and reasonable. If the Department removes charter schools from this provision, subpart C may be subject to future approval.

305. Proposed Rule Part 3535.0040, subpart D, requires that eligible districts with parent committees established under Minn. Stat. § 124D.78 must consult with the committees in the development of the A&I plan to address the economic integration and academic achievement issues of American Indian students. There were no critical comments on this subpart and the SONAR adequately establishes the need and reasonableness of this provision. Accordingly, subpart D may be subject to approval in the future.

306. Finally, in repealing the 1999 Rules, the Department has removed all requirements that an A&I plan be developed by a community collaboration council.[334] The Department's rationale for not carrying this requirement forward was that A&I plan development under the AIM Act must occur in conjunction with a district's Work's Best Workforce Plan under Minn. Stat. § 120B.11. According to the Department, "[b]ecause [A&I] districts must incorporate their [A&I] plan into their [World's Best Workforce] plan, input from teachers as well as community members will be part of the district's annual

[333] Ex. 74.
[334] *See* Minn. R. 3535.0160, subp. 2.

strategic process that includes [A&I] plan development."[335] The Administrative Law Judge finds this justification sufficient for the repeal of this requirement.

307. There was no critical comment related to Proposed Rule Part 3535.0040, subpart D. The Department has established the need for and reasonableness for this subpart. Accordingly, subpart D may be subject to approval in the future.

308. Notwithstanding the recommendations made herein, Proposed Rule Part 3535.0040 is **DISAPPROVED.**

E. Proposed Rule Part 3535.0050: Incentive Revenue Criteria

309. Proposed Rule Part 3535.0050 sets limitations on the use of "incentive revenue" received by eligible districts and charter schools under the AIM Act. Under the proposed rule, "incentive revenue" may only be used to fund: (1) courses for credit; (2) classes that meet Minnesota adopted academic standards at the elementary or middle school level; and (3) summer programs that support student achievement and reduce academic disparity.[336]

310. "Incentive revenue" under the Act is described as follows:

> An eligible school district's maximum incentive revenue equals $10 per adjusted pupil unit. A district's incentive revenue equals the lesser of the maximum incentive revenue or the district's expenditures for implementing a voluntary plan to reduce racial and economic enrollment disparities through intradistrict and interdistrict activities that have been approved as a part of the district's achievement and integration plan under the budget approved by the commissioner under section 124D.861, subdivision 3, paragraph (c).[337]

311. "Incentive revenue" is only one part of the total "achievement and integration revenue" available under the Act. Pursuant to Minn. Stat. § 124D.862, subd. 3, "achievement and integration revenue" is the sum of: (1) "incentive revenue" and (2) "initial achievement and integration revenue."

312. Section 124D.861, subd. 1(c), states that "[e]ligible districts *must* use *the revenue received under section 124D.862* to pursue academic achievement and racial and economic integration through:

- integrated learning environments that prepare all students to be effective citizens and enhance social cohesion;

[335] Ex. 82 at 13.
[336] Proposed Rule 3535.0050.
[337] Minn. Stat. § 124D.892, subd. 2 (2014).

- policies and curricula and trained instructors, administrators, school counselors, and other advocates to support and enhance integrated learning environments under this section, including through magnet schools, innovative, research-based instruction, differentiated instruction, and targeted interventions to improve achievement; and

- rigorous career and college readiness programs for "underserved student populations;" integrated learning environments to increase student academic achievement; cultural fluency, competency, and interaction; graduation and educational attainment rates; and parent involvement.[338]

313. In this way, the AIM Act prescribes how a district may use achievement and integration revenue. Section 124D.861, subd.1(c) does not separate out "incentive revenue" from "achievement and integration revenue" as a whole. Instead, the statute indicates that *all* revenue received under the AIM Act must be allocated to the specific uses delineated in the statute.

314. The proposed rule limits the uses of incentive revenue to: (1) courses for credit; (2) classes that meet academic standards; and (3) summary programs that support *academic* achievement and reduce *academic* disparity.[339] The proposed rule does not incorporate the uses approved for revenue contained in Section 124D.861, subd. 1(c), and instead narrows the use of incentive revenue to academic programs only.

315. The Department asserts that the rule "clarifies" the "acceptable uses of *achievement and integration revenue* set forth in Minn. Stat. § 124D.862, subd. 2."[340] However, the proposed rule only limits the use of "incentive revenue," not "achievement and integration revenue" as a whole. Furthermore, there is no need to clarify the acceptable uses of achievement and integration revenue or incentive revenue because Section 124D.861, subd. 1(c) is quite specific as to what types of programs eligible districts are able to fund with the revenue provided under the Act. The Department's attempt to "clarify" the Act functions as a limitation on the uses of "incentive revenue."

316. It is apparent that the Department is attempting to establish separate criteria for the use of incentive revenue from "initial achievement and integration revenue" so as to narrow the uses and target academic achievement. However, the statute itself delineates the acceptable uses for *all revenue* provided for under the Act – both incentive revenue and achievement and integration revenue as a whole. By narrowing the uses for incentive revenue from those authorized by statute, the proposed rule is in conflict with the AIM Act.

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[338] Minn. Stat. § 124D.861, subd. 1(c) (emphasis added).
[339] Proposed Rule 3535.0050 (emphasis added).
[340] SONAR at 35 (emphasis added).

317. An agency may adopt regulations to implement or make specific the language of statutes, but it may not adopt a conflicting rule.[341] By limiting the uses of "incentive revenue" from the uses expressly permitted for all revenue available under the AIM Act, Proposed Rule Part 3535.0050 conflicts with Minn. Stat. § 124D.861, subd. 1(c).

318. The enabling statute, Minn. Stat. § 124D.896, only authorizes the Commissioner to propose rules "consistent" with the AIM Act. By limiting the use of "incentive revenue" to uses different from those allowed for all revenue under the Act, the proposed rule is inconsistent with Minn. Stat. § 124D.861, subd. 1(c), and injects confusion and ambiguity into the A&I program as a whole.

319. Minnesota Rule Part 1400.2100 provides that a rule *must* be disapproved if the rule conflicts with the enabling statute or other applicable law. Consequently, Proposed Rule Part 3535.0050 must be **DISAPPROVED.**

F. Proposed Rule Part 3535.0060: Plan Evaluation

320. Under Minnesota Statutes section 124D.861, the school board of each eligible district must formally develop and implement a long-term plan that contains goals for: (1) reducing the disparities in academic achievement among all students and protected students; and (2) increasing racial and economic integration in schools and districts.[342]

321. Minnesota Statutes section 124D.861, subdivision 2, states that plan components may include: innovative and integrated school enrollment choice options; family engagement initiatives; professional development opportunities for teachers; and increased programmatic opportunities focused on college and career readiness for underserved students.

322. The statute requires that the Commissioner "evaluate the efficacy of district plans in reducing the disparities in student academic performance among specified categories of students within the district, and in realizing racial and economic integration."[343] The Act provides no further direction to the Commissioner as to how A&I plans should be evaluated.

323. The Department has proposed the following new provision governing the Commissioner's evaluation of A&I plans:

> The commissioner, in evaluating the efficacy of eligible district or charter school plans, shall identify the goals set by the eligible district or charter school in both achievement and integration and determine if the eligible district or charter school has met its goals in both achievement and

[341] *J.C. Penney*, 353 N.W.2d at 246.
[342] Minn. Stat. § 124D.861, subd. 2(a).
[343] *Id.*, subd. 5.

integration by the end of its three-year plan. The commissioner shall commence the evaluation process prior to the third year of the plan. The commissioner may consult with the eligible district or charter school each year of the three-year plan in order to identify progress towards meeting the eligible district or charter school's achievement and integration goals. During the evaluation process, the commissioner may approve plan and budget adjustments to aid an eligible district or charter school in meeting its achievement and integration goals during the final year of the plan.

324. The Department states in its SONAR that this section is needed to clarify the timing of the Commissioner's evaluation of A&I plans. The Department asserts that the Commissioner will evaluate each plan's effectiveness by determining the extent to which a district or charter school has made progress towards its goals in academic performance and racial and economic integration under Minn. Stat. § 124D.861. The Department notes that the Commissioner also must review the goals the district or charter school has established under the World's Best Workforce Act, Minn. Stat. § 120B.11. According to the Department, "annual reviews such as these provide districts and charter schools with additional checkpoints to review their progress towards reaching goals in their three-year achievement and integration plans."[344]

325. The Department states further that the Commissioner "will ask districts and charter schools to submit annual progress reports."[345] According to the Department, these annual reports will help districts and charter schools "track the impact of their plan's activities and support continuous improvement efforts by establishing a cycle of implementation, evaluation, and adjustment of plan activities."[346] The Department asserts that the annual assessment component to the evaluation plan will support district and charter schools' efforts to report on progress toward plan goals at their required annual public hearings under Minn. Stat. § 124D.861, subd. 3(b).[347]

326. Several people commented that the proposed rule is too vague and fails to identify the standards or criteria the Department intends to use to evaluate the districts' achievement and integration plans.[348]

327. During the hearing, Anne Parks, a supervisor at the Department, testified generally about implementation of the proposed rule.[349] With respect to evaluating the districts' A&I plans under Proposed Rule Part 3535.0060, Ms. Parks stated that the Department will use "four equity criteria" to determine the extent to which a plan results

[344] SONAR at 36.
[345] *Id*. (emphasis added).
[346] *Id*.
[347] *Id*.
[348] Test. of Jim Hilbert (T. 149); Test. of Malik Bush (T. 191); Test. of Eugene Piccolo (T. 233); Test. of Myron Orfield (T. 366).
[349] Test. of Anne Parks (T. 43).

in increased racial and economic integration.[350] The four equity criteria are: access, participation, representation and outcomes.[351]

328. With respect to "access," Ms. Parks stated that the Department will evaluate plans to determine whether protected students have equitable access to rigorous high-quality educational experiences; to decision-making processes, initiatives, and resources; and to viable school choice options.[352]

329. With respect to "participation," Ms. Parks stated that the districts will be asked to look at student enrollment and participation in academic, enrichment, and extracurricular offerings to determine whether protected students are "meaningfully engaged in high-quality educational experiences and whether they are being supported as competent learners."[353]

330. With respect to "representation," Ms. Parks stated that districts will be asked to "gauge the inclusiveness" of school culture, climate, staff, and curriculum.[354]

331. With respect to "outcomes," Ms. Parks stated that the Department will require that districts work towards measurable outcomes in access, participation and representation.[355]

332. In its response to comments criticizing the lack of plan evaluation criteria, the Department argues that it did not include extensive plan requirements in the proposed rule because the requirements are already addressed by statute.[356] According to the Department, Minn. Stat. § 124D.861, subd. 2, provides a comprehensive list of strategies that districts may include in their plans. The Department maintains that repeating these strategies in the rule would have limited districts' flexibility in creating their own plans and goals.[357] The Department contends that it tailored the rule to achieve the goals of the legislation while providing "flexibility" to the districts in meeting those goals.[358]

333. The Department also states that it identified the four equity criteria it will use to evaluate district plans during its affirmative presentation at the hearing. And it maintains that it will provide training and additional technical assistance to districts on how to use the criteria as districts develop plans and report their outcomes.[359]

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[350] *Id*. at 47-48.
[351] *Id*.
[352] *Id*.
[353] *Id*.
[354] *Id*.
[355] *Id*.
[356] Department's Post-Hearing Response at 14 (Jan. 27, 2016).
[357] *Id*.
[358] *Id*. at 14-15.
[359] *Id*. at 15.

334. According to the Department, in order to be approved by the Commissioner, an A&I plan must include the following:

- At least one goal for "reducing the disparities in academic achievement among all students and specific categories of students;"[360]
- At least one goal for "increasing racial and economic integration in schools and districts;"[361]
- A description of each plan activity clearly aligned with the activities referred to as the "plan components" which may be included in plans;[362]
- A description of the research-based interventions which include formative assessments that will be implemented under the plan;[363]
- An explanation of how the district is working to create efficiencies and eliminate duplicative programs;[364] and
- The date indicating when the school board approved the plan.[365]

335. The Department asserts that it is developing an evaluation process with a regional assistance center funded by the U.S. Department of Education. According to the Department, districts will be informed of each phase of the evaluation process through trainings, written guidance, and ongoing technical assistance.[366]

336. The Administrative Law Judge finds the proposed rule is defective because it is unduly vague and fails to provide reasonable notice of the criteria or standards the Department will use to evaluate the A&I plans.[367] In addition, the rule does not provide specific, intelligible principles by which the Commissioner will evaluate A&I plans.

337. The Administrative Law Judge notes that the Workgroup specifically recommended to the Commissioner that the Department, in its rulemaking proceeding, "develop specific evaluation criteria to be shared with districts that determine how progress toward achievement and integration goals is to be measured."[368] The

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[360] *Id.* (citing Minn. Stat. § 124D.861, subd. 2(a)).
[361] *Id*.
[362] *Id*.
[363] *Id.* (citing Minn. Stat. § 124D.861, subd. 2(b)).
[364] *Id.* at 16 (citing Minn. Stat. § 124D.861, subd. 2(c)).
[365] *Id.* (citing Minn. Stat. § 124D.861, subd. 4).
[366] *Id*. at 16.
[367] *See* Minn. R. 1400.2100 E, G.
[368] SONAR Appendix E at 78.

Department did not do this, and has instead proposed a rule without any evaluation criteria or standards.

338. The Department's identification of "four equity criteria" it plans to use to evaluate district plans, which it only revealed during its oral presentation at the rule hearing, does not cure the defect. It is not clear from the text of the proposed rule when the Commissioner will evaluate plans and what criteria will be used.

339. A rule is void for vagueness if it "fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement."[369] A rule is required to be sufficiently specific to put the public on fair notice of what its provisions require.[370]

340. A proposed rule is also impermissible if it delegates unbridled discretion to administrative officers. As the Minnesota Supreme Court has held, a law must furnish:

> A reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.[371]

341. As written, the proposed rule is unduly vague and grants unfettered discretion to the Department in evaluating district plans.

342. The defect can be corrected by adding the criteria the Department will use to evaluate A&I plans. Because the rules are disapproved, the Department can spend time to develop the criteria for review as part of its rulemaking process.

343. For the aforementioned reasons, Proposed Rule Part 3535.0060 is **DISAPPROVED.**

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

CONCLUSIONS

1. The Department gave proper notice of the hearing in this matter, pursuant to Minn. Stat. §14.14, subd. 1(a).

2. The Department has failed to fulfill the procedural requirements of Minn. Stat. §§ 14.127 and 14.131, paragraphs 1, 5, and 8. All other procedural requirements

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[369] *In re Charges of Unprofessional Conduct against N.P.*, 361 N.W.2d 386, 394 (Minn. 1985).
[370] *Colten v. Kentucky,* 407 U.S. 104, 110, 92 S. Ct. 1953, 1957 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).
[371] *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949).

of rule and law have been satisfied for both the repeal of the 1999 Rules and the adoption of the proposed rules.

3. The Department's failure to comply with Minn. Stat. §14.131, paragraphs 1 and 5, did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process, and are remedied by the disapproval of the proposed rules with respect the inclusion of charter schools. Consequently, these errors were harmless.

4. The Department's failure to comply with the requirements of Minn. Stat. §§ 14.127 and 14.131, paragraph 8, are errors that are rendered moot by the disapproval of the proposed rules on substantive grounds.

5. With respect to authority, the Department has demonstrated its general statutory authority to adopt the proposed rules and repeal the existing rules. The Department, however, has exceeded its authority with respect to Proposed Rule Part 3535.0050 and all other proposed rule parts that reference charter schools. Accordingly, Proposed Rule Part 3535.0050 is specifically **DISAPPROVED.**

6. In addition, the following proposed rule parts are specifically **DISAPPROVED** due to the inclusion of charter schools:

Proposed Rule Part 3535.0010;
Proposed Rule Part 3535.0020;
Proposed Rule Part 3535.0030;
Proposed Rule Part 3535.0040; and
Proposed Rule Part 3535.0060;

7. The Administrative Law Judge further concludes that the Department has failed to demonstrate the need for and reasonableness of the following proposed rule parts, which are specifically **DISAPPROVED**:

Proposed Rule Part 3535.0020, subparts 2 and 6;
Proposed Rule Part 3535.0030;
Proposed Rule Part 3535.0050; and
Rule 3535.0060.

8. In addition, Proposed Rule Part 3535.0060 is **DISAPPROVED** as impermissibly vague pursuant to Minn. R. 1400.2100 E and G.

9. The Administrative Law Judge has suggested actions to correct some of the defects cited herein and to improve the clarity of the proposed rules should they be resubmitted for approval in the future.

10. The Department failed to demonstrate the need for and reasonableness of its proposed repeal of Minnesota Rules 3535.0100, 3535.0110, 3535.0120, 3535.0130; 3535.0140; 3535.0150; 3535.0160; 3535.0170; and 3535.0180. Therefore, the Department's proposed repeal of the existing rules is **DISAPPROVED**.

11. Because the repeal of the 1999 Rules is disapproved, the Department should not move forward with amendment and resubmission of the proposed rules without first remedying the defects associated with the repeal. The Administrative Law Judge has expressed her recommendations as to what changes and information are necessary for future adoption of the proposed rules upon resubmission. The Judge provided this information to the Department as general guidance and in an effort to expedite the conclusion of this rulemaking process. The Judge is not, however, approving any of the proposed rules at this time. Approval of any of the proposed rules would present a conflict in light of the disapproval of the repeal. Moreover, each of the proposed rules contains defects in its current form.

12. Due to the disapproval of the proposed rules and the repeal of the existing rules, this Report has been submitted to the Chief Administrative Law Judge for her approval pursuant to Minn. Stat. § 14.15, subd. 3.

13. Any Findings that might properly be termed Conclusions, and any Conclusions that might properly be termed Findings, are hereby adopted as such.

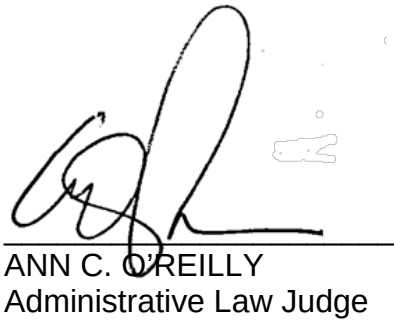
14. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Agency from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based on facts appearing in this rule hearing record and is not substantially different from the proposed rule.

Based on the Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules and proposed repeal of Minnesota Rules Parts 3535.0100 - 3535.0180 be **DISAPPROVED.**

Dated: March 11, 2016



ANN C. O'REILLY
Administrative Law Judge