

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

In the Matter of Proposed Adoption
of Rules of the State Board of
Education Relating to Graduation
Standards, Minn. Rule Parts
3501.0010 to 3501.0180.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on December 12, 1995, at 9:00 a.m. in the Minneapolis Convention Center, Room 102, Minneapolis, Minnesota. The hearing was reconvened in the same location at 7:00 p.m. on that date. The hearing resumed on December 13, 1995, at 9:00 a.m. and continued until all interested persons had been heard.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Board of Education (the Board) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the Board after initial publication are impermissible, substantial changes.

Laura Sue Schlatter, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Board at the hearing. The Department's hearing panel consisted of Iris McGinnis, Director of Graduation Standards for the Department of Families, Children and Learning (DFCL); Jesse Montano, Director of the Office of State and Federal Programs for DFCL; Mary S. Pfeiffer, Director of Teaching and Learning for DFCL; Wayne Erickson, Director of the Office of Special Education for DFCL; Michael Tillman, a Teacher in the Owatonna Public Schools; and John Myers, a consultant with the firm of Augenblick, Van De Water & Myers. Forty-three persons attended the December 12 morning hearing. Seventeen persons signed the hearing register for that session. Nine persons attended the December 12 evening session. Three persons signed the hearing register for that session. Twenty-three persons attended the December 13 hearing session. Fourteen persons signed the hearing register for that day. Each hearing session continued until all interested persons, groups or associations had an opportunity to be heard at least once concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the hearing, to January 2, 1996. Pursuant to Minn. Stat. 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on January 9, 1996, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period. The Board submitted written comments

responding to matters discussed at the hearings and proposing further amendments to the rules.

The Board must wait at least five working days before the agency takes any final action on the rule(s); during that period, this Report must be made available to all interested persons upon request.

Notice

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

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements

1. On October 10, 1995, the Board filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes;
- (b) the Order for Hearing;
- (c) a copy of the proposed rules;
- (d) the Notice of Hearing proposed to be issued;
- (e) the Statement of Need and Reasonableness (SONAR); and
- (f) an estimate of the number of persons who would attend the hearing and how long the hearing is expected to last.

2. On October 19, 1995, the Board mailed the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice. The Board also mailed notice on the same date to persons who appear on a list of additional persons to receive the Notice of Hearing. The Board mailed the Notice of Hearing to all superintendents of Minnesota public schools on October 19, 1995. The Notice was also mailed to public libraries throughout the state, a

list of educational organizations, and was published in ten newspapers. A press release regarding the rule hearing was mailed to all daily and weekly newspapers in Minnesota.

3. On October 25, 1995, the Board mailed the Notice of Hearing to all public libraries in Minnesota with addresses on file with the Department.

4. On October 30, 1995, the Notice of Hearing and the proposed rules were published at 20 State Register 961.

5. On November 14, 1995, the Board filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) a copy of the State Register pages containing the Notice of Hearing and its proposed rules;
- (c) the names of agency personnel and witnesses called by the Board to testify at the hearing;
- (d) the Board's certification that its mailing list was accurate and complete as of 4:00 p.m. on October 18, 1995;
- (e) the Affidavit of Mailing the Notice to all persons on the Board's mailing list;
- (f) the Affidavits of Additional Mailing; and
- (g) all materials received pursuant to the Solicitations of Outside Information published in the State Register on November 7, 1994, and on June 19, 1995.

Task Force on Graduation Rules.

6. In 1990, the Board formed the Graduation Standards Committee to review data, solicit input from interested persons, and make recommendations to the Board on what modifications can be made to improve the performance of Minnesota students. SONAR, at 3. Twenty-three public hearings were held state-wide by the Board to obtain public input on the proposed rules. The Board established a method of considering input into revisions of the graduation standards for Minnesota high schools. The Board exchanged information with the schools and the public in developing the proposed standards.

Nature of the Proposed Rules and Statutory Authority.

7. In 1993, the Legislature adopted Minn. Stat. § 121.11, subd. 7c. That statute establishes a requirement that the Board adopt a state-wide, results-oriented graduation rule. The statute was amended in 1994 and 1995. Subdivision 7c, as finally amended, reads as follows:

(a) The legislature is committed to establishing a rigorous, results-oriented graduation rule for Minnesota's public school students. To that end, the state board shall use its rulemaking authority under subdivision 7b to adopt a statewide, results-oriented graduation rule to be implemented starting with students beginning ninth grade in the 1996-1997 school year. The board shall not prescribe in rule or otherwise the delivery system, form of instruction, or a single statewide form of assessment that local sites must use to meet the requirements contained in this rule.

(b) Assessments used to measure knowledge required by all students for graduation must be developed according to the most current version of professional standards for educational testing.

(c) The content of the graduation rule must differentiate between minimum competencies and rigorous standards. When fully implemented, the requirements for high school graduation in Minnesota, including both basic requirements and the required profile of learning, shall include a broad range of academic experience and accomplishment necessary to achieve the goal of preparing students to function effectively as purposeful thinkers, effective communicators, self-directed learners, productive group participants, and responsible citizens.

(d) The state board shall periodically review and report on the assessment process and student achievement with the expectation of raising the standards and expanding high school graduation requirements.

(e) The state board shall report to the legislature annually by January 15 on its progress in developing and implementing the graduation requirements until such time as all the graduation requirements are implemented.

Laws of Minnesota 1995, First Special Session, Chapter 3, Article 7, Section 1.

8. The rules proposed by the Board establish the standards for tests required of high school students. Under the proposed rule, making a passing grade on an approved test is required, with a limited exception, for a student to graduate from high school. Terms are defined in the proposed rule. The subjects to be tested under the proposed rules are reading and mathematics. The rules establish a state test and the option for school districts to use different tests. The application of the test requirement to students who require accommodations for disabilities or have individual education plans (IEPs) is established in the rule. Standards to meet on a graduation test in

mathematics for students with limited English proficiency (LEP) are set by the rule. The proposed rules establish passing grades for the mathematics and reading tests.

9. The proposed rules also establish requirements for schools and local school districts to give notices of test requirements, announce test results, and report district results. Standards for test administration, test security, and student recordkeeping are set in the rule. The recordkeeping required of school districts to ensure compliance with the rules is established. The Board is authorized to adopt rules governing tests required for graduation from high school by Minn. Stat. § 121.11, subd. 7c. The Administrative Law Judge concludes that the Department has general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

10. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. The proposed rules do not have an adverse impact on small businesses. The requirements of Minn. Stat. § 14.115, subd. 2, do not apply to these rules.

Fiscal Notice and the Cost of the Rules.

11. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. The proposed rules impose requirements on school districts, which are local public bodies. The reporting, recordkeeping, and test administration requirements contained in the rules will require the expenditure of money by the school districts. The Board contracted with a consulting firm to prepare an estimate of the additional spending that would be required. The estimate arrived at for additional costs incurred in the first year of the rule, statewide, was \$28.4 million. SONAR, at 105. Of that amount, the Board expected that other funds already available to school districts could be used to offset some of the new costs, resulting in a net statewide expenditure of \$10.2 million. *Id.* at 106.

12. Costs in the second year after the adoption of the rules was estimated to be \$36.1 million. The Board expects that similar offsets will be available in the second year, thereby reducing the net statewide additional cost to \$15.2 million. To give this number meaning for individual school districts, the Board broke down these figures to provide a dollar figure per average daily membership (ADM) and weighted average daily membership (WADM). The Board estimates that in the first year of the rule each district would incur \$12.18 per ADM and \$10.96 per WADM. In the second year, the estimates run to \$17.83 per ADM and \$16.05 per WADM.

13. Considerable comment was addressed to the questions of whether or not the estimate was reasonable and whether or not the cost was justified by the benefits. (See e.g. Ex. 54.) The largest number of objections concerned claimed failures of the cost study to recognize certain costs altogether -- what one speaker called "unidentified costs." These objections fell into several principal subcategories: unidentified costs to other school programs (by forcing the reallocation of existing fund sources); unidentified

costs posed by curricular modification to accommodate the testing procedures and remedial efforts called for by the proposed rules; lack of state funding in areas where the study appears to assume continuity of state-based funding; unidentified reallocation of other resources, such as personnel, to meet the requirements of districts under the proposed rules; failure of the study to account for costs beyond the two year "Phase I" implementation; and failure to identify costs for implementing other testing requirements, beyond reading and mathematics. Several objections concerned the failure to account for staff development costs both in implementing the required tests and in assessing test results. There were a few objections concerning failure in the cost study and in the rule generally to clarify costs and requirements related to informing students, parents and the community at-large about the testing procedure, test content, etc. Finally, there was some concern regarding failure to secure funds and enforcement procedures to ensure even treatment of LEP students.

14. Many of the concerns over costs were fairly met by oral responses or by stated assumptions contained in the consultants' cost report. As a preliminary matter, it should be noted that the cost report prepared for the Department of Education is a limited document in that it only purports to identify costs which will be realized over the course of two budget years comprising "Phase I" of the program as required by Minn. Stat. § 14.11. This is important to note since the "bottom line" cost estimates generated by the report are not reflective of the costs associated with the testing procedures once the district programs are fully operational and do not capture costs associated with additional testing requirements (on different subject matter) to be developed later.

15. The cost report concerns were addressed by John Myers, one of the partners of the firm that prepared the report. Mr. Myers noted that the profiles of learning referenced in the rules are not part of the Phase I implementation and was therefore not within the cost elements in the study. Mr. Myers stated that the assumption, made in cost element 1B of the report, that some costs will be met by eliminating current standardized testing was based on responses by some school representatives that certain current standardized testing would be eliminated.

16. He stated that cost element 2A relating to staff development, was based on responses by school administrators who indicated that one day of staff time would fulfill the instructional requirements posed by the rules. Moreover, cost element 2A's instructional cost allowance is in addition to other professional development costs identified in other cost elements of the report. Mr. Myers stated that the assumption of two percent of instructional staff requiring skills development was based on an estimate of how many teachers are directly associated with math and reading in the grade to be tested (ninth grade) in 1997-1998. He noted that other instructional staff costs are found in cost elements 5A and 5C, and that the 30 percent of staff represented there represents one day for those "immediately responsible for assessment" and that this was in addition to the one day allocated for all staff.

17. Mr. Myers also noted that training costs for school administrators, managers, principals, teachers aides, etc. could be found in cost element 3B and perhaps other (unspecified) elements of the cost study (presumably cost elements 2A-D). He stated that he felt the cost was principally a voluntary one and would be

absorbed by existing administrative expenditures. He stated that cost element 3B is for the limited purpose of informing students and parents about the tests. Whereas, cost element 3C deals with the costs associated with staff time spent with individual students who have not met standards under the test. Mr. Myers stated that the informing the community at large is covered under cost element 4B, which assumes no additional costs to districts because existing PER mechanisms can be used.

18. In regard to changing use of time and personnel, Mr. Myers stated that the "no cost" finding under cost element 6A is due to the lack of impact expected on existing at-risk, summer and alternative school services during the two years within the scope of the cost study. Because few students will require alternative schooling because they failed a test in the first year (ninth grade students only), existing resources will be able to absorb remediation needs that arise.

19. The Board has made a reasonable effort to estimate the costs imposed by its rule. The estimate itself appears to be a good faith attempt to arrive at a projected cost for the two-year period. While such a projection cannot be made with mathematical certainty, and individual assumptions may be arguable, the Board has provided a rational explanation of how its estimate was constructed. The fiscal notice requirement of Minn. Stat. § 14.11, subd. 1, has been satisfied by the Board.

Impact on Agricultural Land.

20. Minn. Stat. § 14.11, subd. 2, imposes additional statutory notice requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in the state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2.

Analysis of the Proposed Rule

21. The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rule has been established by the Board by an affirmative presentation of facts. The Board prepared a Statement of Need and Reasonableness ("SONAR") in support of the adoption of each of the proposed rules. At the hearing, the Board supplemented the SONAR in making its affirmative presentation of need and reasonableness for each provision. The Board also made written post-hearing comments.

22. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn. App. 1985); Blocher Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn. App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). An agency is entitled to make choices between possible standards as long as the choice it makes is rational. If commentators suggest approaches other

than that selected by the agency, it is not the proper role of the Administrative Law Judge to determine which alternative presents the "best" approach. However, the agency is obligated to consider the approaches suggested.

23. This Report is generally limited to the discussion of the portions of the proposed rule that received significant critical comment or otherwise need to be examined. Accordingly, the Report will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every submission has been read and considered. Moreover, because some sections of the proposed rule were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rule is unnecessary. The Administrative Law Judge specifically finds that the Board has demonstrated the need for and reasonableness of the provisions of the rule that are not discussed in this Report, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

24. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat. § 14.15, subd. 3. The standards to determine if the new language is substantially different are found in Minn. Rule 1400.1100. The Board suggested several modifications based on public comment. Any language proposed by the Board which differs from the rule as published in the State Register and is not discussed in this Report is found not to be substantially different.

Need for the Proposed Rule

25. Robert St. Clair, Executive Director of the Minnesota Association of Secondary School Principals (MASSP), asserted that the Board has failed to demonstrate that the "high-stakes" testing typified by the proposed graduation rule is needed. Exhibit 56. MASSP suggested that Minnesota's ranking of third in mathematics proficiency in the 1992 National Assessment of Educational Progress testing was evidence that the rule is unnecessary. MASSP suggested that the lack of an actual stake in the pilot testing (resulting in 38% of students failing the test) removed the students' incentive to perform. The commentor also criticized the diversion of funding into testing from other teaching activities as unreasonable. Gary Jocelyn objected to the imposition of testing as a graduation requirement as being no indicator of a student's competency in functioning in society as an adult. Exhibit 57, at 45.

26. A number of commentors supported the adoption of the proposed graduation rule. SciMathMN asserted that a graduation test requirement in mathematics is "an appropriate beginning point for addressing needs in the workplace." Exhibit 50, at 2. Jan Alswager, Marcia Averbook, and Rose Hermodson of the Minnesota Federation of Teachers expressed its support for the adoption of a graduation test. Exhibit 47. Faith Totushek, School Board member and Brian Abery, Ph.D.; Mary Fox Sinclair; and Terri Vandercook Ph.D. of the University of Minnesota Institute on Community Integration (ICI), expressed support for a graduation rule "in concept." Exhibits 42 and 43. Carol A. Lindenfelser, Principal of Park Elementary School in Le Sueur, supports the proposed rules as producing "students ready for the work force or for the active pursuit of post-secondary educational opportunities." Exhibit

37. Jerry Nesland, Superintendent of Schools for ISD 553; Donald Johnson, High School Principal for Dover-Eyota Schools; and Leroy J. Vetsch, an educator, expressed overall support for the rule as improving standards for students. Exhibits 1, 3, and 4. Gary Phillips, Assistant Superintendent for the Brainerd Public Schools, supports the rule as correcting the current situation, whereby a student can “occupy a desk, receive minimal grades and receive a high school diploma, without being able to read or do math anywhere near the level specified in the competency test,” Transcript Vol. I, at 67. Other supporters included the Minnesota Education Association (T. II-11) the Minnesota Elementary School Principals Association, (T. I-80), the Minnesota Business Partnership, (T. I-53), the Minneapolis Public Schools, (Ex. 58), the Anoka-Hennepin School District, (Ex. 52), the Edina School District, (T. I-75), the Minnesota High Technology Council, (Ex. 11), and the Minnesota Association of Colleges for Teacher Education. (Ex. 12).

27. Carol Simmons, Executive Director of the Minnesota Christian Coalition (MCC); Georgianne Ginder; Judy Lindsay, School Board Member, Allan Beale, a former school board member, and a number of other individuals, generally objected to the adoption of the proposed rules as an attempt to implement Outcome-Based Education (OBE) or standardized curricula (such as Goals 2000). Exhibits 41 and 45.

28. In adopting a high-stakes test requirement for graduation, the Board is carrying out the Legislature’s mandate. As discussed at Finding No. 7, above, the Board is required to adopt “a statewide, results-oriented graduation rule.” Minn. Stat. § 121.11, subd. 7c(a). The Board has no discretion to ignore this legislative directive. The finding of need for the imposition of a high-stakes test as a requirement for graduation was done at the legislative level. The record in this rule proceeding also supports the legislative determination.

Purpose of the Graduation Rule

29. Proposed rule **3501.0010** states five goals for students graduating from a Minnesota public high school. Under this rule part, each student should have the basic knowledge and ability “to function effectively as a purposeful thinker, effective communicator, self-directed learner, productive group participant, and responsible citizen.” Tom Pritchard, Executive Director of the Minnesota Family Council (Family Council), objected to these goals as “vague and subjective” as well as having the potential to “open the door for mischief.” Exhibit 10. No commentators identified what problems were potentially present from the goals as stated in the proposed rule. The goals as stated by the Board to be achieved through the imposition of a graduation test are contained in Minn. Stat. § 121.11, subd. 7c(c). The rule part is needed and reasonable as proposed.

Specifications for State Tests

30. Subpart 2 of proposed rule **3501.0060** requires the state test to include eight areas of knowledge in the use and concepts of mathematics as experienced in financial transactions, estimating time and distance, and understanding graphical presentations of numerical information. The Board anticipates that the state test will have sixty-eight questions in the mathematics portion and normally be completed within one class period. Examples given of questions that could be on the test are: calculating

change from the purchase of two items of known cost; calculating the average of five bowling scores; calculating which item constitutes the better value in a grocery purchase; estimating distance traveled from time elapsed and known speed; selecting the larger of a decimal and a fraction; measuring length with a ruler; determining the total number of boxes in a stack; and using tables of attendance data to determine which event had the highest attendance.

Difficulty Level of Proposed Tests

31. A number of commentors objected to the rule based on the anticipated level of difficulty of the proposed test. Rhonda Arkley criticized the rule as being too easy. She noted that her 5th grade daughter correctly answered a number of the questions from a pilot test. Deborah Steiskal had her 7th grade son take a sample test and he scored 86% correct. Exhibit 59, Book 1, at 2. Dick Hawley, Board Member of the Minnesota High Technology Council, urged that the mathematics standard be set higher than an 8th grade level to meet the needs of the workplace. However, Gary Joselyn suggested that making the test too hard would result in disparate impact on different populations in a school district and unreasonably deny diplomas to “otherwise qualified” students. The Board accurately identified the dilemma it faces in establishing the level of difficulty appropriate for the test.

Setting the cut score too high may result in so many failures that districts despair and stop trying to increase student achievement. Setting cut scores too low may result in complacency and failure to implement desired curricular changes.

Exhibit GG, at 6.

32. The Board has indicated that the actual test questions are in development. Jocelyn requested that the actual test questions be released to allow assessment of how the questions carry out the rule and allow a determination as to whether the test is reasonable. Some commentors suggested that their right to review educational materials under Minn. Stat. § 126.699 is being denied by the Board’s refusal to release the test questions. The Board responded that testing materials are not included in the definition of educational materials under Minn. Stat. § 126.699. Testing materials are made explicitly nonpublic data by Minn. Stat. § 13.34. Were the test questions to be made public, students would be motivated to study only the questions on the test. This outcome would render the test incapable of determining whether a student had obtained the underlying education that the test should be measuring. Under these circumstances, the actual test questions cannot be made public. For the purposes of this rulemaking, the reasonableness of the test must be assessed by the standards proposed in the rule to establish appropriate questions. The rulemaking proceeding is not rendered defective by the Board declining to release the information requested by Jocelyn.

33. As the standards are exemplified in the rule, no student would be required to answer questions that had not been presented by eighth grade. As discussed above, some commentors suggested that the test was not sufficiently difficult. Mike Lattimore of the Minnesota Business Partnership (MBP) related the results of a survey of its

members. Of the 300 employers surveyed, 52% indicated that job applicants lack basic mathematics skills and 57% indicated that applicants were not prepared for the workplace. The lack of reading, writing, and mathematics skill was cited as the reason for rejecting applicants by 36% of the respondents in the MBP survey. The experience of employers supports requiring a test to ensure that high school graduates are capable of meeting the minimum expectations of employers. The standards proposed by the Board will test that level of mathematical knowledge. The standards in subpart 2 are reasonable expectations of high school graduates. The standards address the needs identified by the MBP and the Legislature. The rules are not unreasonable for imposing the chosen standards as a qualification for high school graduation. Part of the legislative intent is to set out “minimum competencies”.

Use of Calculators

34. Representative Ness and others objected to allowing students to use calculators in taking the mathematics test as permitted by **3501.0060, subp. 2**. The commentators assert that such a practice is inconsistent with demonstrating mastery of mathematical concepts. SciMathMN viewed using calculators as relieving students of “the grunge work of mathematics” while reflecting the pervasive use of calculators in the workplace. Exhibit 50, at 9. The state test in mathematics expressly allows the use of calculators. Calculators are common in the workplace, wherever precision in mathematical calculation is required. Students are often expected to be able to use calculators in academic settings. As discussed above, local districts are given the option to eliminate calculators from their own test. Where a student lacks mastery of the concepts of mathematics, a calculator will not help, absent the occasional serendipitous answer. Allowing calculators on the state test is not unreasonable.

35. In regard to reading, **subpart 3 of 3501.0060** requires that the state test assess comprehension skills by offering passages of English nonfiction prose that are narrative or expository, that are selected from published sources commonly used as sources of information by adults, and that average at least 64 points on the Degrees of Reading Power Index of Readability (DRP). The questions are intended to require the student to answer questions specifically drawn from the text of the passages and to answer questions requiring the student to infer the correct answer from the text. The Board anticipates that 40 questions will be on the reading test. T. I-100.

36. A commentator pointed out that the state test standards fail to incorporate the requirements for tests developed by local school districts set out in proposed rule 3501.0080. Exhibit 57, at 24. The comment questions whether the state test standards will allow undue discretion in crafting the reading and mathematics tests. The Board has not indicated that it intends to adopt a form of test significantly different from that required of local option tests. In mathematics, the form of the questions is strongly suggested by the examples in subpart 2. There is no undue discretion in the rule relating to the form of the mathematics test.

Methodology of the Proposed Tests

37. Jocelyn objected to the tests’ use of multiple choice answers as not meeting the statutory directive that the test “achieve the goal of preparing students to function effectively” as adults. The commentator suggests that the use of multiple choice

examinations only tests for the ability of students to pass multiple choice tests. The commentator rhetorically asked, “How often do we adults ‘commonly encounter’ math problems in a multiple choice format in our adult lives.” Exhibit 57, at 35. However, any purchase made from among choices of different amounts and prices (e.g. at a grocery store) would qualify as such a problem. Likewise, any financial transaction chosen from between alternatives with different terms (e.g. differing terms in automobile loans) would also qualify. It is the pervasiveness of such decisions, and the need for basic mathematics to make those decisions wisely, that has led the Legislature to require that any student demonstrate an understanding of those concepts to obtain a high school diploma.

38. The Board maintains that the state-developed high-stakes test should not be constructed in a fashion that is subject to grading bias. In addition, the Board assessed the cost of grading nonmultiple choice tests and determined that the costs were substantially higher. Exhibit GG, at 4. Using a multiple choice answer format improves the understanding of what is required of students and ensures that schools have curricula that meets the needs of students taking the test. In addition, school districts have the opportunity under the proposed rule to adopt a different test with alternative answering and scoring methodologies. The proposed tests are needed and reasonable to meet the needs of school districts which choose to use a low-cost, objectively scored examination to meet the legislative requirement for testing students in minimum competencies before awarding those students high school diplomas.

Single Standard/Multiple Test Options

39. Steiskal, Jocelyn, and others asserted that the proposed rules create a single, low standard for all students and this will decrease achievement of all students. However, Bill Linder-Scholer, Executive Director of the SciMathMN, supports the testing requirements in mathematics and reading as both a “safety net” and the basis for “redesigning the education delivery system around student learning results.” Exhibit 50, at 2. The Board disagreed with the assertion that the rule creates either a single test or a single standard. The Legislature expressly prohibited the adoption of a single test that is required of all school districts. To meet the two statutory requirements of no single test and requiring some test of all students to graduate, the Board proposes two alternatives. One alternative is for the school district to use a commercially available test. The other alternative is for the school district to develop its own test. Each alternative will be discussed separately.

40. The standards regarding the state test itself demonstrate that no single standard is being adopted by these rules. Proposed rule 3501.0060 subpart 1B(4) requires school districts using the state test to adopt a passing score “no lower than the passing score given in part 3501.0170 for that basic requirement test.” A commentator pointed out that the correct citation for the passing scores was part 3501.0180 and the Board made that change. The implication of the rule language is that the Board’s passing scores are minimum standards and that school districts are free to select a more stringent passing score on the state test. The Board pointed out in its post-hearing response that setting multiple levels of competence in a test as suggested by some commentators would require significantly increased resources and is not consistent with the graduation standards legislation which seeks to require a minimum level of competence. This approach to setting passing scores is reasonable and consistent with

the legislative intent to keep substantial autonomy present in local school districts. The combination of the standards for questions with the minimum level of performance on those questions sets a needed and reasonable standard of performance for students who will receive a high school diploma.

Commercially Available Tests

41. The Board has proposed standards to validate commercially available tests for use in meeting the testing requirement of students to receive a high school diploma. Proposed rule **3501.0070 A** requires that such tests be reviewed and approved by the Department for use as a substitute for the state test. Once such a test has been approved, local school districts have the choice of setting passing scores by either comparing scores between its students on the state test and on the commercial test, or by adopting the score at the 75th percentile nationally for the commercial test as the passing score. Item B sets out the standards to be met when the comparison method is used to set the passing score.

42. Under **item B**, a local school district must, in the first year the commercial test is used, test its students with both the state test and the selected commercial test. The resulting test scores between students who took both tests must statistically correlate to at least .70. This means that the rank order of students taking the test, from best score to worst score, can vary (no variation would be 1.0), but that the variation must not exceed the .70 limit. Jocelyn criticized the correlation standard as ignoring potentially wide variations in test content and difficulty. The Board based its choice of correlation on the standard identified by National Computer System as reasonable for the testing industry. SONAR, at 56. The Board's reason for using a correlation is that the same students can perform differently on similar tests on different days. *Id.* The Board's correlative standard is reasonable for ensuring an adequate similarity between the commercial test and the state test for use as the graduation requirement.

43. At the hearing and in written comments, the Board was asked whether it would provide assistance to school districts in performing the necessary calculation for statistical correlation. The Board indicated that software would be made available without charge to school districts to ensure accurate computation of the correlation without undue cost or effort.

44. Once scores are obtained for both the commercial test and the state test, the passing score is set by comparing the percentages of students who passed the state test, and determining where the bottom score resides for the same percentage on the commercial test. This calculation creates the "curve" between the commercial test and the state test and ensures the minimum standard for a passing score on the state test is established on the commercial test. As with the state test, the local school district may choose to set a higher standard for passing the commercial test than that required under this comparative process.

45. The dual testing comparison must be repeated in any year that either the state test or the commercial test changes. Jocelyn asserts that this means that the dual testing must be done every year, since different versions of the state test will be offered every year. Exhibit 57, at 6-7. The Board indicated that different versions of the state test administered concurrently do not trigger the dual testing requirement. Further, the

Board has indicated that publication of norms adequate to reset passing scores would eliminate the need to follow the comparative process in the future. SONAR, at 57. The comparative testing process is needed and reasonable to relate differing tests to the minimum standard set by the Board for passing the state test.

46. As an alternative, under **item C**, a local school district may adopt as a passing score the score on the commercial test that equates to scores at the 75th percentile of students nationally who have taken that commercial test. The Board indicated that in its experience, such a standard would always be more stringent than the passing score arrived at through the comparative method in item B. SONAR, at 57. As an example, the Board indicated that, at the 70% passing score level in the first year of the state test, the Iowa Test of Basic Skills would have a comparative passing score at the 48th percentile of scores. *Id.* The Board indicated that the item C passing level could be used for transfer students (who have taken an established commercial test), rather than require that student to take another test. Since the percentile difference is very substantial, meaning many more students would likely not qualify for graduation, local school districts are not expected to adopt this standard as the district standard for all students. However, that is possible under the rule. Item C is needed and reasonable, as proposed.

47. Jocelyn criticized the comparative process as not providing an adequate measure of the underlying structure of the tests and that the failure to measure that structure rendered the commercial tests insufficiently similar to meet the graduation requirements. Exhibit 57, at 7-8. This comparison of underlying structure is performed by the Board under proposed rule **3501.0070 D** to determine whether the commercial test is approved. The standards for approval are: 1) 75% of the mathematics or reading specifications for the state test are met; 2) the publisher's intended use of the test conforms to the school district's use of the test; 3) published evidence the test is reliable to the degree of .80 or higher; 4) published evidence of test validity citing research and development processes supporting that validity; 5) published evidence of norming data and procedures showing that the students taking the test are within the same population from which the norms were developed; and 6) there is a current manual on the development, use, and analysis of the test.

48. The standards for approval of a commercial test are facially reasonable. Jocelyn maintains that no test will both meet the standards established in item D and result in a legally defensible test. The commentor does not cite cases to support the proposition that the approval of commercial tests is legally infirm. The asserted basis for the problem is the differences that will result between the state test and the commercial tests. Exhibit 57, at 16, and 22-23. As discussed above, the Board does not have the option of requiring a single test. Indeed, setting standards that require too much similarity between the state test and other test options could conflict with the legislative intent that alternative tests be available to local school districts. Any lawsuit brought regarding alternative tests will have to be decided on the facts of the case. As far as the standards in item D are concerned, the Board has shown them to be both needed and reasonable.

Local Test Option

49. Local school districts are authorized to adopt their own tests to meet the graduation standard by proposed rule **3501.0080**. Subpart 2 sets out the standards to be met by any school district following that option for reading and mathematics. The individual standards result in an examination that would closely resemble the state test in form. The Board anticipates that the content of the local school district test will closely resemble the state test in difficulty. Marge Goldberg, Co-director of Pacer, suggested that subpart 2(e), stating that “use of a calculator by the student may be permitted,” conflicted with proposed rule 3501.0060, subpart 2 which states “a student shall be permitted to use a calculator on the state test of mathematics.” The Board responded that there was no conflict between the two provisions. Local school districts are within their authority in creating a test that does not allow calculators. Some commentors suggested that local school districts should not have to meet standards more stringent than those imposed on approved commercial tests. The Board has specified more stringent standards on locally developed tests since there is a significant difference in measuring the suitability of an existing test and establishing a test from the bottom up. The increased amount of control that can be exercised by a local school district in formulating its own test renders reasonable the requirement that the test more closely resemble the state test. The content of that locally developed test is within the control of the local district and that is consistent with the legislative directive that local school districts have that control.

50. **Subpart 3** expressly allows the local school district to require more knowledge or answer more difficult questions than is present on the state test, if the local school district has established higher graduation standards statewide. The Board has expressed its policy of “having no interest in placing a ceiling on the accomplishment of the districts.” SONAR, at 65. The rule requirement that the local school district’s graduation standard be higher than the state minimum is based on the fundamental principle that schools must test on what they teach. Subpart 3 is needed and reasonable, as proposed.

Students with Individualized Education Plans or Section 504 Accommodation Plans

51. Students with disabilities are eligible for individualized education plans (IEPs) or accommodations under section 504. This accommodation process extends to the testing process to qualify for graduation. To both ensure compliance with the laws requiring that students not be discriminated against due to their disabilities and apply the statute requiring that a test be passed for graduation from high school, the Board’s proposed rule **3501.0090** requires consideration of the education provided to these students. Based on the education provided, subpart 1A requires identification of one of three alternatives in the student’s IEP or accommodation plan. The student may be 1) expected to complete the test, either with or without an accommodation; 2) expected to pass the test at a modified level of difficulty; or 3) exempt from the test requirement. The exemption applies only where the student’s IEP has not included the requirements on which the test is based or the IEP lacks a majority of the concepts tested.

52. ICI, the Pacer Center, and Peter Hutchinson, Superintendent of the Minneapolis Public Schools, expressed concern that remedial coursework would not be offered, and perhaps the current level of direct instruction would be reduced, for those students who are exempt because those students need not pass the graduation test. The Board responded that remediation instruction to improve test scores cannot be

done where there is no test taken. The Board also noted that the proposed rules would have no impact on what exempt students are entitled to in their education. The Board's approach to testing students with IEPs or section 504 accommodations is consistent with Minn. Stat. § 121.11, subd. 7c and has been shown to be needed and reasonable.

English as a Second Language Students

53. Pamela Rojas, M.Ed., urged that students who speak and read English as a second language be allowed to receive a high school diploma without passing the graduation test. Exhibit 7. Proposed rule **3501.0100** establishes a number of considerations for students who are learning English as a second language (ESL). These considerations include deferring from testing for up to three years and taking the mathematics test in translation. Each district must establish a process for determining if a particular ESL student will take the standard test, take the mathematics test with a language accommodation, or be temporarily exempted from testing. Subpart 4 expressly excludes language accommodations and translations to the test in reading. Some commentators suggested that the Board is being unreasonable by requiring English and suggested that the Board was attempting to establish English as an "official state language" through this rule. The Board pointed out that there were no such objections to the mathematics requirement. The stated purpose behind the legislation requiring a test for graduation was to ensure that persons with high school diploma were capable of functioning as adults in society. The Board has determined that a grasp of written English is a requirement for such functioning. The Board's determination has been supported by the record in this matter and is consistent with the intent of the Legislature in requiring a graduation test.

54. Nancy Ward, an ESL educator (Ex. 38); Neng Yang, educator and Secretary of the Hmong Parent Teacher Student Organization (Ex. 44); and MFT urged that more resources be devoted to English language education. The Board cannot dictate to local school districts how resources are allocated. Under Minn. Stat. § 121.11, subd. 7c, the Board can set standards for what a student must demonstrate in a test to graduate from high school. The Board's failure to act outside its statutory authority cannot constitute a defect in the proposed rules.

Opportunities to Learn and Remediation

55. Proposed rule **3501.0110** requires local school districts to establish a remediation curriculum to create opportunities for students failing the graduation tests to learn the basic requirements needed to pass. Jocelyn asserted that the only way to accomplish this end was to "teach to the test". Exhibit 57. The Board points out that teaching to the test may not be a bad educational practice if the tests require the students to actually perform the skills they need to demonstrate. Gary Phillips, Assistant Superintendent for Brainerd (K-12), related that it is currently "possible for a student to occupy a desk, receive minimal grades, and receive a high school diploma, without being able to read or do math anywhere near the level specified in the competency test." Transcript Volume I, at 67. The Legislature has eliminated the prospect of "seat time" creating an entitlement to a diploma. Instead, the student must now demonstrate that the student has a grasp of the academic subject matter, at least in reading and mathematics, to function as an adult.

56. For students that do not pass the graduation test, proposed rule 3501.0110 requires each local school district to establish a remediation plan. Several commentors objected to the requirement as diverting resources from students who achieve in school. The Board cited Skeen v. State, 505 N.W.2d 299 (Minn. 1993), as support for basic standards in high school education. In Skeen, the Minnesota Supreme Court stated that a local school district is acting within the bounds of the Minnesota Constitution by providing basic education and that local school districts could provide additional opportunities for superior education without violating the Minnesota Constitution. Id., at 318. The question of reasonableness, is not, in this setting, answered only by constitutional analysis.

Effect on Able Learners

57. Those commentors expressed a general concern that the implementation of the rule would have the effect of reducing or “dumbing down” educational standards as more resources are devoted to making sure that all students pass a basic competency test to qualify for a high school diploma. One commentor envisioned large resources being devoted to a narrow band of students, namely, these who are on the borderline of passing the competency test. (T. I-95-96.) Another was concerned that gifted students who are not challenged will only rise to the level expected, which will be a minimum level of competency. (T. II-32.) The concern was described in one submission as follows:

This philosophy has generated concerns among parents of able learners. There is a misunderstanding that focusing translates to lower standards and less learning for their children. While acknowledging that enrichment activities are often utilized to challenge advanced students beyond the essential outcomes, they point out that they are of uneven quality. The result, the parents contend, is a closing gap between high achievers and other students. With the emphasis on ensuring that all students will succeed, students who learn material at a faster rate have expressed frustration in having to wait for their classmates to reach the required levels of achievement. Enrichment activities are often perceived as “extra credit” or “busy work.” Students have also expressed concern that they are sometimes expected to work on enrichments without the prerequisite skills or immediate feedback from the teacher. Some enrichments are designed to be worked on outside of class. While such activities may indeed provide extension of learning, the student is sometimes left with unstructured time in the class itself.

(Ex. 34, p. 5 - See also Ex. 33.) Teachers have also expressed the concern that advanced students won't be challenged and will be provided with busy work. (Ex. 26, Ex. 29, p. 9H.)

58. In the Statement of Need and Reasonableness, in support of proposed Minn. Rule **3501.0110** (Opportunities to Learn and Remediation), the Board

acknowledges that additional efforts will be necessary to remediate students who are unsuccessful in passing the test:

Most of the efforts to remediate students at the high school level will consist of programs or classes offered to students. Such programs will be sufficient to meet the needs of most students who enroll in them. The results of the statewide pilot testing in reading show that nearly 70% of the sophomores and juniors tested were successful. But a failure rate of 30% indicates a need for schools to take further steps to assist students in achieving skills that have been declared essential. It is reasonable to doubt that continuing current practice will be effective in helping all students achieve the standard.

The provision requires a plan for remediation, but it does not require individualized instruction to be part of the plan. When the objectives which have been the primary focus of schooling have not been achieved, it is reasonable to expect districts to employ a process of focused decision-making to determine how the needs of the student can be met. The point of the provision is to determine what might be done within the resources of the district to improve achievement.

Three examples of types of students who fail may be helpful in clarifying the issue. Currently, few schools require students who do not have basic skills to complete a remediation program. The first type of student who fails is one who avoids selecting classes that require academic skills to achieve a passing grade. Therefore, during the last two years of high school a more focused approach becomes necessary, and there is a need to require those students to address their achievement in the basics.

A second common scenario occurs when students transfer during high school from schools in which basic skills were not emphasized or when they show an erratic pattern of attendance throughout school. Individualized plans may be needed to enable intensive work or personalized motivation to improve basic skills in the little time remaining.

A third type of student may be unsuccessful because usual methods of group instruction do not meet the needs of the student. Yet the profile of the student has not qualified the student for enrollment in any special education program. Continuing to offer more of what has not worked will be unfruitful. The needs of these students require a personalized approach to the problem of failure.

This provision allows time for less expensive group programs to accomplish as much as they are able to do before requiring more

expensive individualized processes. Yet it allows two years to assist students who have been unsuccessful within the usual program. If the district operates group programs effectively and counsels students appropriately, it is reasonable to assume that most students will have passed the requirements before the time when individualized attention must be applied, thus keeping costs to a minimum.

(Ex. E, p. 82.)

59. One school district, which has been testing students for minimum competency for several years, submitted a post-hearing comment in which it states that it monitors the performance of all students, including higher performing students, to investigate any decline in performance and to assure achievement. The district points to a number of opportunities it provides to college-bound students. It states that students needing remediation enroll in regular and challenge level courses while simultaneously receiving support in the basic skills through short-term, highly focused, elective offerings. It does not believe that it has had to overemphasize the low-achieving student in order to achieve minimum competency. (Ex. 55)

60. In its post-hearing comment the agency points out that under the current system of obtaining a diploma, namely 20 Carnegie Units of passing grades, the minimum passing grades are not the highest level to which students are challenged and at which students achieve. Likewise, there is no reason to believe that able students will be any less likely to achieve due to minimum competency testing which will ensure that no student graduates without minimal skills. The Board states that for the able student who demonstrates the skills in the eighth grade, there remains four years of challenges in higher skills. (Ex. GG, p. 9)

61. The agency has met its burden of demonstrating the reasonableness of a policy which requires devoting appropriate resources to remediation of students who do not demonstrate basic skills. It is not required to show in a legal sense that this is the best possible policy. As the case law cited at Finding of Fact No. 22 indicates, the agency must articulate its policy judgments and explain why its solution is not arbitrary. The agency's explanation as well as the experience of one school district show that the proposed policy is unlikely to have the potentially arbitrary result of shifting a large amount of resources to a small group of students or to have the result of causing able students to seek to achieve only to a level of minimum competency. Districts will undoubtedly face the task of keeping able learners challenged, however this is not a new task. There is nothing in the proposed rule which requires that remediation result in dead time or busywork for high achievers. Individual districts will still be responsible for providing the possibility of academic excellence.

62. Public schools serve students with different backgrounds and abilities. By operation of Minn. Stat. § 121.11, subd. 7c, local school districts must test all students to determine their grasp of fundamental reading and mathematics skills. When students do not pass this test, the local school district is left with the choice of taking action to remediate the education of the student or do nothing. The proposed rule merely formalizes the local school district's effort as a plan and requires that the remediation

efforts be included in the school's curriculum. With the demonstrated need for remediation efforts, the minimal requirements set out in proposed rule 3501.0110 are both needed and reasonable.

Notifications to Parents and Students

63. Proposed rule **3501.0120** requires local school districts to make available certain information on the graduation rules and the graduation test. Subpart 1 requires the local school district to establish a system to disseminate information generally. Subpart 2 requires notification of each student and that student's parents within 30 days of the student's entrance into 9th grade or transfer into the district during or after 9th grade. The notification shall advise the student and parents of the graduation requirements and the first opportunity the student will have to take the graduation test. The notice of the results of the graduation test must, under subpart 3, must be sent out to the student and parents within 90 days after the test. That notification must include information on retesting, accommodations, and appeal of the retesting or accommodation decision by the local school district. The additional notification beyond the test scores is only required if the student is in that student's graduating year. The notice requirements are needed and reasonable to apprise parents and students of what is required for graduation. There is no undue burden on local school districts imposed by the notice requirements.

Student Recordkeeping

64. Local school districts are required to keep certain data on individual students under proposed rule **3501.0130**. Subpart 1 requires information be kept identifying the basic requirement tests taken and the most recent test results by the student. Subpart 2 requires the student record to reflect "student progress" in the form of one of four categories. In reality, the rule requires the student record to reflect in what manner the student passed the graduation requirements test. The four categories are: pass-state level, pass-individual level, pass-translation, or exempt.

65. The notation "pass-state level" is identified as appropriate in **item A** when the student has taken the standard test for that school district and passed the test. The notation is to be applied whether or not the test was taken with an accommodation, so long as the accommodation does not change the "standard conditions" of the test. SONAR, at 86. **Item B** identifies "pass-individual level" when the student takes a test modified under an IEP or section 504 accommodation plan. "Pass-translation" is noted, under **item C**, when the student passes a mathematics graduation test that has been translated but not been validated as comparable to the state standard. **Item D** requires that the student record bear the notation "exempt," when the IEP or section 504 accommodation plan does not include the subject matter or concepts required for taking either the standard test or a modified test.

66. The Board has used this notation method for the pilot sites and indicated that the standards have been "developed with the participation of ... colleges, counselors, and employers." SONAR, at 87. The Special Education Advisory Council has participated in the formulation of the notations regarding passage of the tests modified to IEP and section 504 accommodations. *Id.* The Board stated its rationale for requiring notations on individual student records as follows:

It is possible to allow students to pass the basic requirement under different conditions so long as the record accurately indicates the differences in the conditions. Therefore, the record of students who have passed under conditions that alter the standard will have a notation on their record. This maintains the integrity of the record for the use of school officials, employers, and postsecondary admissions personnel.

SONAR, at 86.

67. The categorization of students by notations on their records raised concerns on the part of the HPTSO. HPTSO objected to the pass-translation notation as a cultural label and as a possible form of “institutional racism. Transcript 11-9. Although this information will not appear on the diploma, there is a question as to what use “colleges, counselors, and employers” will make of the information required to be on the student’s record. The potential exists that postsecondary academic and technical school admissions and employment decisions will be made based on notations in a student’s record. In its comments, the Board stated the pass-translate label was appropriate because, for example, passing the math test in an alternative language would not necessarily indicate the same level of competence required to pass the English version due to different units of measure associated with another language, or oral administration of the test. (Ex. GG, p. 17.) The student record is not a public document and is released only with the student’s request. (Ex. HH, p. 8.)

68. The Board based its distinction between pass-state level, and either pass-individual or pass-translation, on conditions that alter the standard test taken by most students in the school. The test is intended to require a student to demonstrate that the student has mastered the skills needed as an adult in society. Potential employers and admissions committees are allowed access to the student’s entire academic record by the student and therefore the proposed categories are not really necessary to supplement the grades listed in the student’s record. The Board has, however, adequately demonstrated the reasonableness of different categories of records in that they are related to an attempt to accurately describe the minimum level of competence attained by the student. The Board may wish to further consider, however, whether attaching these labels are the best policy in light of the possible consequences described by the commentators.

Passing Scores

69. Under proposed rule **3501.0180**, the Board has chosen to adopt a score of 70% correct as passing, for the first class of 9th graders taking the test in 1996. This passing score rises to 75% for 9th graders taking the test in 1997. The escalation stops with a passing score of 80% for 9th graders taking the test in 1998. The passing score of 80% is required for all students taking the test in later years. The Board arrived at this annually increasing percentage of correct answers to achieve a passing grade by gauging the need to impose a rigorous test with the need to be fair to students who were not subject to a high-stakes graduation test in earlier years of their education.

70. The Board analyzed scores for the purpose of setting a passing score by the Modified Anghoff Procedure. SONAR, at 99. A representative group of educators

used their experience to determine the percentage that borderline students would score on the test as proposed in these rules. The results were discussed, outliers eliminated, the criteria were assessed again, and the result averaged. The results were that 66% of borderline students currently in the 10th grade would get any individual question correct, and with focused education that group would rise to 73%. SONAR, at 101. That group's passing rate was estimated to rise to 77% by the end of 12th grade. Id.

71. Garnet Franklin of the Minnesota Education Association, and Jocelyn criticized the selection of the passing score as arbitrary. Without having the test questions settled, Jocelyn maintained that the determination of who were borderline students is impossible. Exhibit 57, at 41. The Board relied upon experienced educators who were apprised of the test's expectations. These educators have had the direct responsibility for teaching and are most likely to be aware of what can be expected of the students who will be required to pass this test in order to graduate. The methodology used by the Board is needed and reasonable to ensure that statewide experience is used to develop the statewide standard for graduation.

72. The Board acknowledged that some arbitrariness is present in any scoring system. Exhibit GG, at 6. The Board cited its empirical assessment and the purpose of the graduation test as requiring improved performance to justify its choice of 80% as the ultimate passing standard. Id. The Board maintained that the rule establishes a reasonable number of correct answers from material that any high school graduate should have mastered. In the Board's view, every question on the test should be within the ability of every student who is competent to function as an adult in society. Exhibit GG, at 5. The Legislature has determined that to obtain a high school diploma, a student must demonstrate that level of functioning on a test. Allowing students a margin for error is needed and reasonable to avoid increasing the level of difficulty of the test beyond the reasonable level intended by the Legislature. The passing scores adopted by the Board are based upon experience and the purpose of the rule. The scores are not arbitrary in the sense that would constitute a defect in the proposed rule.

73 The escalating passing levels are proposed to minimize the number of students failing the test without every opportunity for effective remediation. As the passage of these tests becomes an established criterion for graduation, the passing level goes up, affording those students that fail the more difficult test additional opportunity for remediation. Gradually decreasing the margin for error as students become familiar with the standard of academic achievement expected is reasonable. The 80% passing level is not so stringent, given the content of the test, as to render the rule unreasonable.

Pilot Projects/Adequate Prior Testing

74. David L. Bach, Executive Director of the Minnesota Alliance for Arts in Education (Arts Alliance), objected to the proposed rules on the basis that prior testing of students in the 3rd, 5th, and 8th grades has not been done to establish a baseline from which to measure the effect of the graduate testing requirement. Exhibit 40. Craig Bishop, Deborah Steiskal, and other commentators asserted that pilot projects have been in place since 1991 and that test scores have dropped at those schools. Exhibit 39. State Representative Robert Ness suggested that data from the pilot schools must be assimilated and feedback provided before the rule can be adopted. State

Representative David Tomassoni also suggested that writing a final rule should await results from the pilot sites. (Ex. 14.)

75. The Board points out that the pilot sites were never intended to provide data to support the rule since there is not time for the eighth graders first taking the tests to graduate before the Legislature required the rule to be final. The pilot sites were intended to develop standards and assessment models to permit implementation of the rule. For the same reason, pilot site data as to test scores cannot yet be compiled. The scores cited by commentators are from nationally normed tests unrelated to piloting. Gayle Walkowiak, Assessment Specialist for the Anoka Hennepin School District (ISD 11), related the experience ISD 11 has had with basic requirements testing as a standard for graduation. Exhibit 52. ISD 11 has had a high-stakes graduation test standard in place since 1988. Exhibit 55. Students who failed the test were not given remediation curricula. Rather, such students enroll in the normal and challenge curricula and receive short-term intensive support. *Id.* The number of students who were denied diplomas in ISD 11 was 17 in 1993, 11 in 1994, and 7 in 1995. Exhibit 52. There is sufficient evidence to show that a graduation test improves student performance at the borderline level of student achievement.

76. The statutory requirement for imposing a graduation test carries a deadline, the 9th grade class beginning in 1996. There is no provision in the statute for conducting pilot studies and deciding whether or not to adopt these rules based upon the results. Under Minn. Stat. § 121.11, subd. 7c, the Board is required to adopt a graduation test as a requirement and the Board lacks the discretion to do otherwise.

Graduation Rule as OBE

77. A number of commentators objected to the adoption of the graduation rule as outcome-based education (OBE). While definitions of OBE vary, the general concept treats students as self-directed (and self-motivated) learners who should be allowed to proceed at their own pace and are not “passed” on a subject until the student has demonstrated mastery of the subject. The Board points out that this rule does not require any demonstration of particular attitudes, values, or beliefs which might conflict with those of some parents. Instead the rules require minimum competency in reading and mathematics without any particular classroom methodology or form of curriculum such as OBE. The proposed rules do not mandate any particular form of educational system. Minn. Stat. § 121.11, subd. 7c(a) prohibits the Board from proscribing any “form of instruction.” Rather, the proposed rule merely establishes a standard that must be met for students to receive a high school diploma, in addition to whatever other standards are imposed by the Board or local school districts.

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

CONCLUSIONS

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

2. The Board has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

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

5. The additions and amendments to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

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

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated this ___ day of February, 1996.

GEORGE A. BECK

Administrative Law Judge

Reported: Taped

Reported: Michelle K. Pecharich
Gail M. Hinrichs
Kirby A. Kennedy & Associates
Two Volumes