

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CHILDREN, FAMILIES AND LEARNING

In the Matter of Proposed
Adoption of Rules Relating to
Desegregation, Minn. Rule Parts
3535.0100 to 3535.0180.

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha at 9:00 a.m. on January 20, 1999 in the auditorium of the Capitol View Conference Center, Roseville, Minnesota. An evening hearing was held on the same date. The hearing continued until all interested persons had been heard.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Children, Families, and Learning (the Department) 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 Department after initial publication are substantially different.

Cindy Lavorato, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Robert Wedl, former Commissioner of the Children, Families, and Learning; Jeanne Kling, former President of the Board of Education; Representative Alice Seagren; Chistine Rossell; David Beaulieu, former Director of Indian Education; Frank Bennett, Acting Chair of the West Metro Education Program; Mary Lach; Tom Melcher, Program Finance Manager for the Department; and Deputy Commissioner John Hustad.

Approximately forty persons attended the January 20, 1999 morning hearing. Approximately twenty-five persons attended the evening hearing. Thirty-nine persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for twenty calendar days following the hearing, to February 9, 1999. 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 February 17, 1999, the rulemaking record closed for all purposes. The Administrative Law Judge received nine written comments from

interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearings and proposing modifications to the rules.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt a final rule or modify or withdraw its proposed rule. If the Commissioner; makes changes in the rule other than those recommended in this report, she 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.

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

FINDINGS OF FACT

Procedural Requirements

1. On November 16, 1998, the Department requested the assignment of an Administrative Law Judge for the proposed rulemaking, requested approval of the Department's additional notice plan, and filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes;
- (b) a Dual Notice of Hearing under Minn. Stat. § 14.22, subd. 2 and a Notice of Hearing under Minn. Stat. § 14.22, subd. 1, proposed to be issued; and
- (c) a draft of the Statement of Need and Reasonableness (SONAR).

2. On November 19, 1998, Administrative Law Judge George A. Beck approved the Department's additional notice plan, provided that four participants in the 1994 Roundtable Discussion Group be added to the mailing list.

3. The SONAR was delivered to the Legislative Reference Librarian on September 17, 1998. On September 28, 1998, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. The Department also mailed notice on the same date to the persons and organizations that the Department believed would be interested in the proposed rules. The recipients included State Board of Education Members, superintendents of public school districts, state-wide educational organizations, selected state level councils, selected associations, the Commissioner's

Desegregation/Integration Advisory Council, State Multicultural Education Advisory Committee, public libraries state-wide, high school Student Council presidents state-wide, local school district parent organizations, parent advisory groups in school districts affected by the proposed rule, and Senate and House of Representatives education committees. The Department published notice in newspapers with state-wide circulation and newspapers with circulation within identified communities of color. The Department posted the Notice of Hearing and proposed rules on the Internet at <http://children.state.mn.us>.

4. On December 7, 1998, the Notice of Hearing and the proposed rules were published at 23 *State Register* 1344.

5. At the hearing in this matter, the Department filed the following documents¹ with the Administrative Law Judge:

- a. Notice of Intent to Solicit Outside Information as published at 19 *State Register* 1902, March 13, 1995 (Exhibit 51);
- b. Request for Comment on Planned Rules Governing Desegregation/Integration as published at 20 *State Register* 2323, March 18, 1996 (Exhibit 56);
- c. Request for Comment on Planned Permanent Rules Regarding Desegregation as published at 23 *State Register* 765, October 5, 1998 (Exhibit 66);
- d. affidavit of mailing the Request for Comments to all persons, associations, and other interested groups who have requested to receive notice of the proposed adoption of rules by the Department and to those who received discretionary notice (Exhibits 68 and 69);
- e. the comments received in response to the Department's Request for Comments (Exhibits 70a-n);
- f. the Notice of Hearing as mailed (Exhibit 71);
- g. the Department's request that Chief Administrative Law Judge Kenneth Nickolai assign an Administrative Law Judge to this rulemaking, along with the required procedural documents and a request that the Department's Notice Plan be approved (Exhibit 72);
- h. the Notice of Hearing as published in 23 *State Register* 1344, on December 7, 1998;

¹ Many more documents were filed at the hearing. Those documents recounted here are of particular procedural significance.

- i. the proposed rules Relating to Desegregation, with the approval of the Revisor of Statutes (Exhibit 76);
- j. the Statement of Need and Reasonableness (SONAR);
- k. the certificate of transmittal of SONAR to the Legislative Reference Library;
- l. certificate that the list of persons, associations, and other interested groups who have requested to receive notice of the proposed adoption of rules by the Department is accurate and complete (Exhibit 79);
- m. affidavit of mailing the Notice of Hearing to all persons, associations, and other interested groups who have requested to receive notice of the proposed adoption of rules by the Department and those receiving discretionary notice (Exhibits 80-91); and
- n. the comments received in response to the Department's Notice of Hearing (Exhibits 92-93).

Desegregation Rules Development Process.

6. Beginning in 1989, the Minnesota Board of Education (Board) formed an eight-member task force to review the rules regarding desegregation.² The task force was expanded in 1990 and took the name of the Desegregation Policy Forum. The Forum reported to the Board on its findings in November 1990.³ The Board conducted twelve public input meetings throughout the state to discuss the Forum's findings and reach consensus on how the existing desegregation rules should be changed. The Board drafted preliminary rule language and received public comment on that effort in 1992.⁴

7. Pursuant to legislative direction,⁵ in 1993 the Board convened the Desegregation Roundtable to develop draft rules in this area. The Board received a draft rule from the Desegregation Roundtable. The Board sought from the Legislature the required statutory authority to adopt the rule.⁶ The Legislature approved authority for some of the proposals.⁷ In 1994, the Board assessed how a rule could be adopted within the authority granted by the Legislature. The Desegregation Roundtable was consulted and made recommendations on that subject.⁸ The Department also submitted a proposal for consideration by the Board.⁹

² SONAR, at 2.

³ SONAR, at 2.

⁴ SONAR, at 3.

⁵ Laws of Minnesota 1993, Chapter 224, Article 9, Section 46.

⁶ Exhibit 38, Appendix D.

⁷ Laws of Minnesota 1994, Chapter 647, Article 8, Section 1.

⁸ Exhibit 39.

⁹ SONAR, Exhibit 7.

8. In 1995, the Board submitted a preliminary rule draft to the Attorney General's Office for "comprehensive review and legal analysis." Additional public meetings were held in May 1996, to discuss the status of the rulemaking process and the differences between the existing rule language and the Desegregation Roundtable proposal. After the proposed rule was approved for publication, the Board's rulemaking authority was transferred to the Department.¹⁰ After the Department met with the Desegregation Advisory Board¹¹ and superintendents of various school districts, the proposed rules were finalized and this proceeding was initiated.¹²

Nature of the Proposed Rules.

9. Desegregation is the term used to describe efforts to remove barriers to public participation in society based on a person's race. The term has particular meaning with respect to public schools, because segregation by race was done as a matter of public policy by school districts throughout the country. In 1954, the U.S. Supreme Court held in ***Brown v. Board of Education*** that such segregation was a denial of equal protection of the laws guaranteed under the Fourteenth Amendment to the U.S. Constitution.¹³

10. The holding in ***Brown*** was applied to the Minneapolis Public School District (MPSD) in 1972.¹⁴ At that time, the MPSD used the existing neighborhood school system to draw boundaries that would concentrate minority students in a few schools. Construction decisions were made to ensure that Caucasian students were not assigned to schools with significant minority populations. Teaching staff were hired and transferred in a fashion to ensure that minority teachers taught in minority schools. MPSD's actions were intended to ensure that student populations remained segregated. The holding in ***Booker v. Special School District No. 1*** required MPSD to transfer students between schools to reduce minority concentrations in any particular school to 35% or less.¹⁵ The Board adopted a rule addressing desegregation in 1973.¹⁶ That rule was last amended in 1978.¹⁷ Several provisions were repealed by the Legislature in 1993.¹⁸

11. Changes in the concepts of segregation and demographics, in addition to recent changes in Federal and State law, require amending the existing desegregation rule.¹⁹ The rule language proposed by the Department sets out the purpose of the

¹⁰ Laws of Minnesota 1998, Chapter 398, Article 5, Section 7.

¹¹ An advisory group created by operation of Minn. Stat. 121.1601, subd. 3 (renumbered Minn. Stat. § 124D.892, subd. 3).

¹² SONAR, at 4.

¹³ ***Brown v. Board of Education***, 347 U.S. 483 (1954)

¹⁴ ***Booker v. Special School District No. 1***, 351 F.Supp. 799 (D.Minn. 1972); see also ***Booker v. Special School District No. 1***, 585 F.2d 347 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979).

¹⁵ ***Booker***, 351 F.Supp. at 810. Minority students in the MPSD at that time comprised approximately 14.5 percent of the total population of students. Exhibit 5, at 1.

¹⁶ SONAR, at 5.

¹⁷ *Id.*

¹⁸ Laws of Minnesota 1993, Chapter 224, Article 12, Section 39.

¹⁹ SONAR, at 4-5.

rules, defines terms, and establishes duties of school districts and the Department. Where segregation is found to exist within a school district, the proposed rules establish requirements for the affected school district. Where conditions of racially isolated schools exist that are not the result of intentional segregation, different standards are proposed. A similar analysis is proposed for entire school districts to determine whether they might be racially isolated. If a school district is racially isolated, the proposed rules provide a list of responses available to school districts to address the racial isolation issue.

12. Proposed rule part 3535.0100 delineates the purpose of the proposed rule, recognizing the benefits of integration, as well as the difficulties of implementation. The agency's stated purpose is also to prevent segregation and to encourage districts to maintain racial balance in schools relative to others in the same district. The rule also seeks to identify racially isolated districts, to encourage districts to cooperatively integrate while preserving choices for parents and students. The rule addresses academic achievement through equal access to resources.

Statutory Authority.

13. The Department cites Minn. Stat. § 121.11, Subd. 7d (1994) as the source of its authority to adopt these rules. Section 121.11 originally gave the State Board of Education (Board) the authority to "make rules relating to desegregation/integration and inclusive education," and in doing so, the Board was to "address the need for equal educational opportunities for all students and racial balance as defined by the state Board." In 1998, the legislature transferred this authority from the Board to the Commissioner of the Department, effective January 10, 1999. The statute, now codified as Minn. Stat. § 124D.896 reads as follows:

Desegregation/integration and inclusive education rules.

- (a) By January 10, 1999, the commissioner 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.

14. The Administrative Law Judge finds that the Department has the statutory authority to adopt the proposed rules. The Department's stated purposes are all within the legislature's broad grant of authority to the Commissioner to promote integration.

Assessment of Impact and Cost of the Rules.

15. Minn. Stat. § 14.131 makes certain requirements of an agency proposing a rule for adoption. The statute states:

Before the agency orders the publication of a rulemaking notice required by section 14.14, subdivision 1a, the agency must prepare, review, and make available for public review a statement of the need for and reasonableness of the rule. The statement of need and reasonableness must be prepared under rules adopted by the chief administrative law judge and must include the following to the extent the agency, through reasonable effort, can ascertain this information:

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

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

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

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

(5) the probable costs of complying with the proposed rule; and

(6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

16. The Department has identified the classes of persons likely to be affected by the proposed rules with a probable increase in costs to school districts and the Department. The Department has identified no cost increases to other state agencies, and no significant impact on state revenues.²⁰ With respect to the issue of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule, the Department points out that because the remedies in the proposed rules are for the most part voluntary, it would be difficult to be less intrusive.²¹ The Department also reviewed an analysis of the costs related to three separate sets of triggers; 15%, 20% and 25% and determined to use the 20% trigger, in part because it was less costly.²² The triggering percentage is used by the Department to determine when a school is racially identifiable, and when a district is racially isolated. The more

²⁰ SONAR, at 98-99.

²¹ SONAR, at 99.

²² *Id.*

sites and districts that are required to organize and implement integration plans, the more the rule will cost.²³

17. There is a significant amount of federal law on the issues surrounding desegregation in public education. The Department's motivation in proposing the proposed rule scheme was its desire to comply with existing federal standards. The only differences between the proposed rules and the federal law are in the category names for racial identification.²⁴ The Department has explained in its SONAR the reasons for these differences.²⁵

18. The Department cited the extensive rule development process to support its view that it has complied with the requirement that the agency consider alternative methods for achieving the purpose of the proposed rules.²⁶ The Department as an alternative considered the Roundtable proposal in detail. The Department's detailed reasons for not following that proposal are set out in an attachment to the SONAR.²⁷ The Department has complied with the statutory mandate to consider alternatives and has met the requirements of Minn. Stat. § 14.131.

Analysis of the Proposed Rule

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

20. 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.²⁸ 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."²⁹ 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

²³ *Id.*

²⁴ The Department has combined a category of protected class students and includes a "multiracial" category for collecting racial and ethnic data. The Department has also combined the categories of Asian and Pacific Islander and has not kept a separate category for Native Hawaiian. SONAR, at 102

²⁵ *Id.*

²⁶ SONAR, at 99.

²⁷ SONAR, Appendix B.

²⁸ **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).

²⁹ **Manufactured Housing Institute v. Pettersen**, 347 N.W.2d 238, 244 (Minn. 1984).

Administrative Law Judge to determine which alternative presents the "best" approach. However, the agency is obligated to consider the approaches suggested.

21. 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 (including every comment submitted before the hearing) 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 Department 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.

22. 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.³⁰ The standards to determine if the new language is substantially different are found in Minn. Rule 1400.1100. The Department made modifications to the proposed rule through this rulemaking process. Any substantive language, which differs from the rule as published in the *State Register*, will be assessed to determine whether the language is substantially different.

³⁰ Minn. Stat. § 14.15, subd. 3.

Impact on Agricultural Land.

23. Minn. Stat. § 14.111, imposes an additional notice requirement when rules are proposed that affect farming operations. The Administrative Law Judge finds that the proposed rule change will not impact farming operations in Minnesota, and finds that no additional notice is required.

Proposed Rule 3535.0100 - Purpose.

24. Proposed rule 3535.0100 identifies the purposes for which the rules are adopted. As proposed, the rule would encourage recognition of the benefits of integration, prevention of segregation, provision of educational opportunities that are racially balanced, identification and amelioration of racially isolated school districts, and coordination with academic achievement standards. The School Board for St. Paul Public Schools (St. Paul Board) urged that the rule begin with a reaffirmation of "the educational benefits of racial integration and the harms of racial segregation in schools."³¹ The School Board for Minneapolis Public Schools (Minneapolis Board) identified student achievement, racial/cultural/economic diversity, citizenship preparation, and enlistment of the community-at-large as matters of importance that should be included in the rules.³²

25. Based on the comments received, the Department modified the proposed rule as follows:

A. recognize that the primary goal of public education is to enable all students to have opportunities to achieve academic success;

B. reaffirm the State of Minnesota's commitment to the importance of integration in its public schools;

C. recognize that while there are societal benefits from schools that are racially balanced, there are many factors which can impact the ability of school districts to provide racially balanced schools, including housing, jobs and transportation;

D. recognize that providing parents a choice regarding where their children should attend school is an important component of Minnesota's education policy;

E. recognize that there are parents for whom having their children attend integrated schools is an essential component of their children's education;

F. prevent segregation, as defined in part 3535.0110, subp. 9, in public schools;

³¹ Exhibit 100, at 7.

³² Exhibit 95, cover letter, at 1-2.

Є. G. encourage districts to provide opportunities for students to attend schools that are racially balanced when compared to other schools within the district;

∅. H. provide a system that identifies the presence of racially isolated districts and encourage adjoining districts to work cooperatively to improve cross-district integration, while giving parents and students meaningful choices; and

Є. I. work with rules that address academic achievement, including graduation standards under chapter 3501 and inclusive education under part 3500.0550, by providing equitable access to resources.

26. The effect of the modifications is to recognize and reaffirm the importance of academic success, integration, sources of racial imbalance in schools, and parental choice in education settings.³³ The new language reflects the Department's intent to propose rules that will provide guidance to the public as to how the rules are to be applied. Part 3535.0100 is needed and reasonable, as modified. The new language is not substantially different from the language originally published in the *State Register*.

Proposed Rule 3535.0110 - Definitions.

27. Eight terms are defined in proposed rule 3535.0110. The Minneapolis Board objected to the manner in which multiracial students are brought under the definition of "protected students" in subpart 4.B. As proposed, the item identifies multiracial students as students whose backgrounds include more than one of the listed minority groups in item A. Darcia Narvaez, Assistant Professor in the College of Education and Human Development of the University of Minnesota indicated that the proposed definition would exclude students who consider themselves multiracial when their backgrounds include one listed minority and Caucasian.³⁴ The ALJ agrees with the commentator. Such an outcome is inconsistent with the common understanding of "multiracial" and is not supported by the record in this matter.

28. In response to the comment, the Department modified the definition of "protected students" to read:

³³ Department Reply, at 1.

³⁴ Exhibit 112.

Multiracial students who self-identify or are identified as having origins in more than one of the categories described in item A. or as having origins in one of the categories described in item A. and in the category of Caucasian.

29. The new language is needed and reasonable to conform the rule definition to the general understanding of the term "multiracial." The modification is not substantially different from the language originally published in the *State Register*.

30. Subparts 6 and 7 identify "racially identifiable school within a district" and "racially isolated school district," respectively. In each definition, the enrollment of protected students at the school within a district is compared to the enrollment of protected students in the entire district. Where the protected student enrollment in a school is more than 20 percent higher than the district, the definition for racially identifiable school is met. A district is racially isolated when the protected student enrollment in a district is more than 20 percent higher than that of adjoining districts.

31. The Minneapolis Board and St. Paul Board objected to these definitions because they ignore the racial isolation that occurs when schools or school districts have predominantly Caucasian students.³⁵ Dr. Gary Orfield asserted that the rule leads to absurd results because completely segregated schools would meet the desegregated standard while schools with lower percentages of protected students would be classified as segregated.³⁶ The Department responded as follows:

The 20% trigger is used first to determine whether concentrations of students of color at certain schools are the result of intentional, discriminatory conduct, and whether schools with those concentrations have equitable resources. This is based on years of federal court decisions. Given the history of race relations in this country, the presence of a high concentration of white students at a school simply does not raise the presumption that students are there because a district has discriminatorily assigned them to the school, or that they are receiving inequitable resources. However, if such were the case, the Department of Human Rights could investigate under Minn. Stat. §363.03 subd. 5 (1998).

Addressing concentrations of Caucasian students in the metropolitan suburbs raises a problem as well, given the limits of the agency's authority. The Roundtable group and Dr. Orfield suggested that a metro wide average of protected students enrolled be used, which in the case of Minneapolis and its surrounding suburbs would be approximately 33%. Without using quotas, and without the ability to order cross-district busing, how is Edina, with a student of color population of 6%, going to increase the student of color enrollment of in its predominantly Caucasian schools to the metropolitan average for students of color? It is unreasonable to

³⁵ Exhibit 95, Joint Statement, at 8.

³⁶ Orfield Testimony, Transcript, at 146.

establish a mandate that cannot be met; that is why the similar recommendations of the Roundtable were not accepted.³⁷

32. The Department's response clearly sets out the dual standards of statutory authority and federal law that set the parameters of the Department's authority in this rulemaking. The 20% trigger is needed to identify disparate concentrations of students in a school or a district. The level proposed is an increase over the existing 15% trigger. The increase is reasonable due to the changes in demographics since 1973 (when that rule was adopted). Including percentages of Caucasian students in the rule would add nothing to the operation or impact of the rule because the percentage is simply the difference between the percentage of students of color and 100%. The "absurd results" objected to by commentators arise only when the measure is changed to include Caucasian students.³⁸ The Department has demonstrated that the definitions of "racially identifiable school within a district" and "racially isolated school district" are needed and reasonable, as proposed.

33. Subpart 9 defines "segregation" as intentional acts by a school district for the purpose of causing students to make attendance decisions based on race, causing a concentration of protected students at a school. The subpart also contains two clarifying items. The first item indicates that concentrations of white students or protected students are not segregation if: a) such concentrations are not intentional and motivated by a discriminatory purpose, b) equitable educational opportunities are provided, and c) the concentration of protected students has occurred due to choices by students and parents. The Department supported the exemption as needed to allow for ethnocentric classes and magnet schools designed to improve educational outcomes for students of color.³⁹ The second item expressly allows for concentrations of American Indian students when such concentrations are the result of programs to meet the unique needs of those students.

34. Limiting defined segregation to that arising from intentional acts was criticized by the St. Paul Board and Dr. Orfield as making segregation almost impossible to prove. Further, the commentators assert that the rule is not addressing the substantial amount of *de facto* segregation that exists. The St. Paul Board and Minneapolis Board pointed out that federal cases (including **Booker**) "have held that school enrollments may be tainted by *de jure* segregation as a result of intentional acts by non-school officials."⁴⁰ The *de jure* segregation discussed in **Booker** was intentional action by the MPSD. The *de facto* segregation in the case was primarily the then-common practice of steering racial minorities away from primarily Caucasian neighborhoods. The Court stated:

³⁷ Department Reply, at 6.

³⁸ The example provided by Dr. Orfield at the hearing does not accurately reflect the rule as proposed.

Only if you include Caucasian students as a measured class in districts with large populations of students of color would a school, classified as substantially desegregated, have the potential to be classified as racially isolated.

³⁹ Department Comment, at 5.

⁴⁰ Exhibit 95, Joint Statement, at 8.

It is clear that, as the terms have been used by most courts, "de facto" segregation clearly is present in Minneapolis. However, this decision is in no part based on findings of "de facto" segregation. It has been unnecessary to reach the question of whether "de facto" segregation is constitutionally prohibited here, since the defendant has acted in a manner which was intended to create and/or increase segregation, and thus "de jure" segregation also exists in Special School District #1.⁴¹

35. No commentator has cited a federal or state decision holding that *de facto* segregation alone violates the constitution. There has been no citation of a case holding that a wider population than the individual school district can be examined to determine if *de facto* segregation exists. To the contrary, school districts have been declared "unitary" and court supervision has ended even when significant concentrations of minority students have existed after 1960.⁴² The standard applied is whether *de jure* segregation has been removed.⁴³ Geographic factors or demographic changes, which allow *de facto* segregation to continue within a school system, do not prevent the courts from declaring a school system to be "unitary."

Proposed Rule 3535.0120 - Duties of Districts.

36. Proposed rule 3535.0120 sets out the duties of school districts to provide information to the Department regarding the racial composition of each school site. The Department described the obligation to report as "a continuation of the data collection and reporting which districts have been providing for the past several years . . ."⁴⁴ Professor Narvaez objected to one provision that required "sight counting" as a method to determine racial composition of a school. The use of sight counting was criticized as stereotypic, invasive, and inaccurate.⁴⁵ Lindy Grell made a similar objection to sight counts.⁴⁶ The Department responded that sight counting was to be used as a last resort and that having a significant number of students listed as unknown regarding racial background would undermine the effort to determine racial isolation of schools and districts.⁴⁷ The use of sight counting as a last resort to determine racial composition has been shown to be appropriate to make the measurements that are vital to meeting the rule's objectives. The rule is needed and reasonable, as proposed.

Proposed Rule 3535.0130 - Duties of Commissioner.

37. The obligations of the Commissioner of Children, Families and Learning upon receipt of school district reports are set out in proposed rule 3535.0130. The data must be reviewed within 60 days under subpart 1, and if a racially identifiable school is

⁴¹ *Booker*, 351 F.Supp. at 807, footnote 2.

⁴² *Ross v. Houston Indep. Sch. Dist.*, 699 F.2d 218 (5th Cir. 1983)(nearly 10% of the schools in the district had been 90% or more African-American since 1960).

⁴³ *Missouri v. Jenkins*, 515 U.S. 70 (1995).

⁴⁴ SONAR, at 33.

⁴⁵ Exhibit 112.

⁴⁶ Exhibit 111, at 6.

⁴⁷ Department Comment, at 9-10.

identified from that data, further investigation must be conducted. Specifically, the Commissioner must inquire into the historical background of the racial composition of the school, whether any specific event resulting in that school's composition reveals a discriminatory purpose, and whether any unusual decisionmaking by officials reveals a discriminatory purpose. Additionally, the impact of race-conscious decisions and the likely outcomes of policies can be considered, but these factors cannot alone form the basis of a finding of discriminatory purpose.

38. Subpart 2 sets out the specific information that must be provided by districts containing racially identifiable schools. That information includes the method of assigning students, attendance zone information, transfer options, comparisons of racial composition between the district population and the attendance zone, curricular and extracurricular offerings, teacher assignments cross-referenced by race and school, a comparison of the qualifications of teachers assigned to the racially identifiable school and teachers district-wide, the provision of financial resources, a comparison of facilities, materials and equipment available to schools, information on the racial composition of students who are bused, and any circumstances to explain the school's status as racially identifiable. The Department relied upon information identified in a variety of federal desegregation cases to arrive at the rule requirements.⁴⁸

39. Subpart 3 requires information from a district when a school's enrollment of protected students exceeds 90 percent, or is more than 25 percent above the number of protected students in the entire district. The district must provide information to the Department that demonstrates that its students have the option to attend other schools with enrollments of protected students comparable to the district average. After the hearing, the Department modified subpart 3 as follows:

Subp. 3. Integrated alternatives. If the enrollment of protected students at a school is more than 25 percent above the enrollment of protected students in the entire district, or if the enrollment of protected students exceeds 90 percent at any given school, whichever is less, the district must provide affirmative evidence to the commissioner that all students in that school have alternatives to attend schools with a protected student enrollment that is comparable to the districtwide average.

40. The new language clarifies that the option to attend other schools must be afforded to all students, not only protected students. The Department's modification complies with the governmental obligation to not discriminate against any person on the basis of race⁴⁹ and is both needed and reasonable. The new language is not substantially different from the language published in the *State Register*.

Proposed Rule 3535.0140 - Response of Districts.

⁴⁸ SONAR, at 39-41.

⁴⁹ ***Adarand Constructors, Inc. v. Pena***, 515 U.S. 200 (1995); ***City of Richmond v. J.A. Croson Co.***, 488 U.S. 469 (1989); Minn. Stat. Chapter 363.

41. Where the Commissioner has requested additional information from a district under part 3535.0130, proposed rule 3535.0140 requires the district to respond within 60 days. If the Commissioner requests supplemental information, the rule part requires that the district respond within 30 days. Richard J. Anderson, Executive Director of the Minnesota School Boards Association (MSBA), suggested that at least 90 days be provided to collect the information and include the hardship extension language of part 3535.0150, subp. 2.⁵⁰ The Department responded that the need to investigate intentional conduct supports a short time frame to gather the information and require supplemental information. Based on the Department's past experience with this issue, the 60-day and 30-day time periods are sufficient.⁵¹ The rule is needed and reasonable, as proposed.

Proposed Rule 3535.0150 - Development of Plan for Mandatory Desegregation; Enforcement.

42. When the Commissioner determines that segregation exists, proposed rule 3535.0150 requires the district to develop a plan to remedy the situation. Subpart 1 sets out the timeline for plan development, including the option of the Commissioner to reject and replace the plan. Subpart 2 expressly allows student assignments based on race, so long as the assignments are narrowly tailored. Subpart 2 conforms to the constitutional limitations on race-conscious governmental action.⁵² At the suggestion of the MSBA,⁵³ the Department modified subpart 1 to read:

Subpart 1. **District plan.** If the commissioner determines that segregation exists, the district shall provide a plan within 60 days that proposes how it shall remedy the segregation. The plan shall address the specific actions that were found by the commissioner to contribute to the segregation. The plan shall be developed in consultation with the commissioner. If the commissioner rejects any or all of the plan, the commissioner shall provide technical assistance to help the district revise the plan. However, if the district and the commissioner cannot agree on a plan within 45 days after the original plan was rejected, the commissioner shall develop a revised plan to remedy the segregation that the district shall implement in the time frame specified by the commissioner. A finding of segregation, or a finding that the district's initial plan is inadequate shall be based on written Findings of Fact and Conclusions of Law issued by the Commissioner.

43. The new language adds the requirement that the Commissioner's determination that segregation exists be made in written findings of fact and conclusions of law. The new language ensures disclosure of the reasons for the Commissioner's decision and comports with due process requirements for such an agency action. The

⁵⁰ Exhibit 113, at 5.

⁵¹ Department Comment, at 20; SONAR, at 35.

⁵² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁵³ Exhibit 113, at 5.

rule is needed and reasonable, as modified, and the new language is not substantially different from the language as published in the *State Register*.

44. More time is allowed in subpart 3 when an undue hardship exists. The Judge suggests amending the language of the subpart because the current wording indicates that the Commissioner may extend the time for response if *extending* the time would impose an undue hardship. That is not what the Department intended by providing for an extension when an undue hardship exists. Replacing the word "it" with the phrase "compliance with the deadline for response" will cure this grammatical problem. The potential for confusion is not so great as to constitute a defect in the proposed rule.

45. When the district fails to submit required data necessary to develop a plan for remedying segregation, or to implement the plan, subpart 4 authorizes the Commissioner to take enforcement actions. The enforcement actions are the reduction of school aid under Minn. Stat. § 124.15, the referral to the Department of Human Rights for investigation, and the reporting of the district's action to the education committees of the Legislature, with recommendations for sanctions. This rule part received no comment. The rule is found to be needed and reasonable, as proposed.

Proposed Rule 3535.0160 - Integration of Racially Identifiable Schools not the Result of Segregation.

46. Proposed rule 3535.0160 sets out the requirement that a district must establish a plan to address racially identifiable schools, when the school's composition is not the result of segregation. The plan must provide options for students that can result in the integration of any racially identifiable school. The rule excludes schools that are racially identifiable due to efforts to meet the academic and cultural needs of American Indian students or voluntary choices made by those students.

47. Subpart 2 requires the district to establish a community collaboration council, reasonably representative of the diversity of the district, to participate in developing the plan to enhance student options. The council must develop an integration plan and submit that plan to the district. MSBA objected to the requirement to establish councils because the councils are not "voluntary."⁵⁴ MSBA also complained that the requirement for diversity on the council is "devoid of meaning."⁵⁵ The Department has adequately supported the need to include representatives of the various communities on councils to resolve issues of segregation. While the Department cannot require movement of students based on race in any situation other than to alleviate *de jure* segregation, the Department can require districts to engage in planning to address demonstrated racial isolation of schools within a district. Subpart 2 is needed and reasonable.

48. Subpart 3 sets a deadline for a district to submit its own plan to the Commissioner and sets standards for what must be included in that plan. The

⁵⁴ Exhibit 113, at 6.

⁵⁵ *Id.*

Commissioner is obligated under subpart 4 to report to the Legislature the ongoing status of the district's efforts to reduce racial isolation. These subparts are needed and reasonable.

49. Dr. Orfield, Heidi Vlasik, and other commentators recommended that the Department establish specific goals for the maximum percentages of protected students within schools, which would trigger the identification of a school as racially isolated. The Department responded that such an approach is indistinguishable from establishing racial quotas for schools and that such an approach is likely to be struck down by the courts as unconstitutional.⁵⁶ In addition, the Department expressed policy preferences for allowing choice for students in educational settings and local control regarding how to address integration issues.⁵⁷ Garnet Franklin, Instructional Specialist for Education Minnesota⁵⁸, who indicated that current court decisions prohibit the use of racial quotas, supported the Department's approach. Education Minnesota supports the use of voluntary options to encourage student movement to reduce racial imbalance.⁵⁹

50. The Department did modify the proposed rule to incorporate the suggestions as follows:

(3535.0160 subp. 2, replace the last two sentences): The community collaboration council shall identify ways of creating increased opportunities for interracial contact, and establish goals for meeting this objective. After identifying these opportunities and goals, the council shall develop a plan for integration at each school that may include, for example, options under subpart 3.

(3535.0160 subp. 3): After receiving the plan required under subpart 2 from its community collaboration council, the district shall provide a plan to the commissioner that describes how the goal of increased opportunities for interracial contact between students will be met. (*Continue hereafter with same language*).

(3535.0170 subp. 5): The multidistrict collaboration council shall identify ways of creating increased opportunities for interracial contact and establish goals for meeting this objective. After identifying these opportunities and goals, the council shall develop a joint collaboration plan for cross-district integration that may include the incentives contained in subpart 6, item D.

(3535.0170 subp. 6): After receiving the plan required in subpart 5 from its council each district shall review, modify if necessary, and ratify the integration plan. Each district shall provide a plan to the commissioner

⁵⁶ Department Comment, at 8.

⁵⁷ *Id.*

⁵⁸ The collective bargaining representative for 65,000 teachers and other employees in Minnesota.

⁵⁹ Franklin Testimony, Transcript, at 81.

that describes how the goal of greater opportunities for interracial contact between students will be met. (Continue hereafter with same language.)

51. The new language requires collaboration councils and districts to set goals for meeting their objectives. The new language requires the introduction of benchmarks for measuring the success of integration programs. The new language does not require the use of racial quotas. The rule, as modified, is needed and reasonable. The new language is not substantially different from the rule as published in the *State Register*.

52. The Department also added language to the list of responsibilities of the Commissioner in subpart 4 that reads as follows:

(1) evaluate any plans developed under this part at the end of each academic year after which a plan is implemented to determine whether the collaboration plan was implemented and whether the goals have been substantially met;....

53. The new language expressly states the obligation of the commissioner to assess the collaboration plan. The rule, as modified, is needed and reasonable. The new language is not substantially different from the rule as published in the *State Register*.

54. Michael L. Kremer, Ph.D., Superintendent of the Hopkins School District, objected to the rule which allows the Department to consider a school district to be intentionally segregated, if any school within that district is still racially identifiable after a period of three years following initial identification. Superintendent Kremer suggested that a new subpart be added to account for this situation by developing a new plan and analyzing why the previous plan did not succeed.⁶⁰ The Department responded by proposing a new subpart 6 which states:

Subp. 6. **Schools that did not meet earlier goals.** Schools that were included in a plan under this part but remain racially identifiable after three years from the date of review by the commissioner shall work in consultation with the commissioner to develop a new plan that shall include an analysis of why the previous plan did not achieve its goals, a list and explanation of new or continuing barriers to achieving the plan's goals, and a new plan and rationale for achieving the goals of the plan.

55. The new rule largely reflects the suggested language. Since the Department is relying on voluntary choices to reduce racial imbalance and districts cannot control those choices; the rule must reflect failure to achieve goals as something other than proof of intentional segregation. Any other result would be unreasonable. Subpart 6 is needed and reasonable. The new subpart is not substantially different from the rule as published in the *State Register*.

Proposed Rule 3535.0170 - Integration of Racially Isolated School Districts.

⁶⁰ Exhibit 114, at 2.

56. Based on 1997 data, seven school districts meet the definition of racially isolated school district.⁶¹ When a school district is identified as racially isolated, proposed rule 3535.0170 requires the district and adjoining districts to participate in a multidistrict council to develop an integration plan for the isolated district. As of 1997, twenty-six districts come within the rule definition of adjoining districts.⁶² The Department supports the rule as consistent with its limited statutory authority, which does not allow the Department to require cross-district school attendance to achieve integration.⁶³

57. MSBA objected to the description of integration efforts in the rule as "voluntary" when the efforts listed are required.⁶⁴ By contrast, Dr. Orfield, the St. Paul School Board, the Minneapolis School Board objected to the lack of required desegregation across district lines to accomplish effective integration of schools and equitable educational opportunities. As the St. Paul Board and the Minneapolis Board stated:

Although the proposed new Rule calls for some level of collaboration on desegregation planning among city and first-ring suburban districts, it stops far short of providing the kind of clear direction and support for metropolitan desegregation recommended by the State's own advisory groups. The proposed Rule merely provides that certain neighboring school districts meet and confer with us regarding possible interdistrict desegregation efforts. It allows each district to modify any plan proposed by a multidistrict collaboration council, thus ensuring that no district will ever be required to take any action that is not of its own choosing.⁶⁵

58. As support for the cross-district collaboration requirement, the Department cites its experience with the West Metro Education Program (WMEP). WMEP is collaboration between the Minneapolis School District and eight adjoining districts.⁶⁶ The Tri-District magnet school serves the same function for the St. Paul School District and two adjoining districts in the east metropolitan area.⁶⁷

59. There is a strong connection between segregation in housing and segregation in schools.⁶⁸ The decision as to which students attend which schools is determined, in the first instance, by where the school district boundaries are situated.⁶⁹ Further complicating the relationship between residents of school districts and racial

⁶¹ Exhibit 36.

⁶² Exhibit 36.

⁶³ SONAR, at 76-77.

⁶⁴ Exhibit 113, at 8.

⁶⁵ Exhibit 95, Joint Statement at 7.

⁶⁶ Exhibit 103.

⁶⁷ SONAR, at 79.

⁶⁸ SONAR, *bibliography*, Hawley, p. 61.

⁶⁹ Minn. Stat. § 123.35, subd. 2 ("It shall be the duty and function of the district to furnish school facilities to every child of school age **residing in any part of the district.**")(emphasis added).

composition of schools is the right of parents to send their children to private schools.⁷⁰ There is no mechanism available, consistent with state law, which allows the Department to require students residing in one school district to attend school in another school district. Operating within the boundaries of existing state law, the Department has required districts to participate in collaboration councils that have the ability to voluntarily agree on interdistrict transfers. That requirement is the most the Department can do with respect to interdistrict school attendance to achieve racial balance, absent a change in state law.

60. Even under federal law, there are significant limits to the power of a court to order interdistrict transfers of students. In the Detroit area, the argument was explicitly made that the lack of *de jure* segregation was not a barrier to requiring student transfers throughout the metropolitan area to accomplish integration, regardless of school district boundaries. The U.S. Supreme Court rejected this approach in **Millikin v. Bradley (Milliken I)**, stating:

Here the District Court's approach to what constituted "actual desegregation" raises the fundamental question, not presented in Swann, as to the circumstances in which a federal court may order desegregation relief that embraces more than a single school district. The court's analytical starting point was its conclusion that school district lines are no more than arbitrary lines on a map drawn "for political convenience." Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [418 U.S. 717, 742] quality of the educational process. See *Wright v. Council of the City of Emporia* 407 U.S., at 469. Thus, in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."⁷¹

61. Under **Milliken I**, the school district boundary is a barrier to federally required transfers that only *de jure* segregation can breach.⁷² Even federally ordered

⁷⁰ Minn. Stat. § 120.101, subd. 4, defining school as including "nonpublic school, church or religious organization, or home-school" ; see also SONAR, *bibliography*, Heise, p. 59.

⁷¹ **Milliken v. Bradley**, 418 U.S. 717, 741-42 (1974) (**Milliken I**).

⁷² See also **Washington v. Seattle School District No. 1**, 458 U.S. 457, 475 (1982), in which the Supreme Court stated:

interdistrict transfers based on state authority must give way, if the state withdraws that authority.⁷³ The Department was given no such authority after it was explicitly sought to allow for interdistrict transfers.⁷⁴ The Department cannot accomplish by rule an outcome contrary to state law.

62. The Department relies upon the experience of existing collaborative efforts to support the reasonableness of collaborative councils.⁷⁵ Commentators who criticize the collaboration council approach suggest that the Department offer financial incentives to encourage appropriate participation.⁷⁶ That issue is more fully discussed below. The proposed rule is needed and reasonable to accomplish the most beneficial outcomes available consistent with state and federal law.

Proposed Rule 3535.0180 - Evaluation of Collaborative Efforts.

63. Proposed rule 3535.0180 provides for the Commissioner's review of the collaborative plans of school districts and the reporting of findings to the Legislature. The proposed rule is consistent with the voluntary nature of any interdistrict effort to reduce the racial isolation of an identified school district. The Department does not have the statutory authority to require a school district to reduce racial isolation unless intentional segregation is determined. If any mandatory reduction of racial isolation is to occur, the Legislature must amend current law. Proposed rule 3535.0180 is needed and reasonable.

Resources.

64. The Minneapolis Board, the Saint Paul Board, and a number of other commentators suggested that no progress would be made on actual desegregation of racially isolated districts without significant resources from the State. The Department identified magnet school and program grants funded at \$7.5 million for the 1998-99 biennium as money designated for desegregation.⁷⁷ Of that money, \$4 million is being spent on cross-district magnet school facilities in Edina, Robbinsdale, and Minneapolis.⁷⁸ Bonding done by the State provides an additional 22.2 million for those facilities and the east metro magnet (Tri-District).⁷⁹ Statutory grants are available to pay for the entire cost of transporting children for the purposes of desegregation.⁸⁰ A variety

Those favoring the elimination of de facto school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.

This principle was reaffirmed in *Missouri v. Jenkins*, 515 U.S. 70 (1995).

⁷³ *Crawford v. Los Angeles Board of Education*, 458 U.S. 527 (1982).

⁷⁴ Testimony of Rep. Seagren, Transcript, 45.

⁷⁵ SONAR, at 80.

⁷⁶ Exhibit 95, Joint Statement, at 7.

⁷⁷ Department Comment, at 3.

⁷⁸ *Id.*

⁷⁹ *Id.* at 4.

⁸⁰ *Id.*, at 3.

of grants and programs are in place to increase the number of minority teachers.⁸¹ Per pupil funding for desegregation is set by statute⁸² and the proposed rules do nothing to change the statutory formulas. Resources are available to accomplish the goals of these rules.

The Challenge of Desegregation

65. During the course of the hearing, the challenges of dealing with desegregation issues were graphically explained by commentators who related their own personal experiences with two schools. Jane Keyes, Curriculum Coordinator of Jackson Preparatory Magnet Elementary School in St. Paul, related the difficulties faced by a school with excellent programs, serving an economically disadvantaged student population. In candid testimony, Ms. Keyes stated that when parents consider whether to send their children to Jackson Elementary School, they should be aware that people will ask, "why are you sending your children to that part of town?"⁸³

66. Gary Kwong testified to the experiences of students at Capitol Hill Magnet School. Capitol Hill is geographically separated from Jackson Elementary School by only seven city blocks. Capitol Hill requires student applicants to pass an entrance examination. Capitol Hill has so many applicants that there is a waiting list every year. Capitol Hill Magnet is in the same neighborhood as Jackson, but the school has a population of students that are, on average, more economically advantaged than any other group of students in the St. Paul School District.⁸⁴ Capitol Hill attracts students from outside the district, and could be a model for other school districts that want to create desirable schools within their districts to encourage the voluntary movement of students to reduce racial isolation. But no school district can control the economic factors and unconscious biases held by some students and parents who are reluctant to attend or send their children to schools located in racially isolated areas.

Summary

67. The Department is modifying a rule that is obsolete due to changes in demographics and federal law. In adopting new language, the Department has shown great sensitivity to the needs of students, parents, and educators. When intentional segregation is found within a school district, the Department has the authority, by rule, to compel the district to desegregate its schools. When a school is shown to be racially isolated, but no intentional segregation is found, that district is required to identify and create options that will reduce the isolation. When a school district is racially isolated, the Department has the authority to compel interdistrict collaboration, which is the limit of its statutory authority. Any attempt by the Department to do more would exceed its statutory authority and the Department would not be allowed to adopt such a rule.

⁸¹ *Id.* at 4.

⁸² Minn. Stat. § 124D.86 (\$523 per pupil for Minneapolis, \$427 per pupil unit for St. Paul, and \$93 per pupil unit for Duluth). Department Comment at 4.

⁸³ Keyes Testimony, Transcript, 166.

⁸⁴ Kwong Testimony, Transcript, 176-177.

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

CONCLUSIONS

1. The Minnesota Department of Children Families and Learning (the Department) gave proper notice of this rulemaking hearing.
2. The Department 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 Department 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 Department 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 suggested 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 Department 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 19 th day of March, 1999.

PHYLLIS A. REHA
Administrative Law Judge

Reported: Transcript, One Volume
James R. Filibeck, RMR
Kirby A. Kennedy & Associates
Minneapolis, Minnesota