

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

In the Matter of Proposed Adoption of
the Exempt Rules of the State Board
of Education Relating to Graduation
Standards in Mathematics, Reading,
and Written Composition, Minn. Rule
Parts 3501.00330 to 3501.0260.

**ORDER ON REVIEW OF RULES
UNDER MINN. STAT. § 14.386**

The Minnesota State Board of Education (the Board) is seeking review and approval of the above-entitled rules, which were adopted by the Board pursuant to Minn. Stat. § 14.388. On May 7, 1999, the Office of Administrative Hearings received the documents from the Board required to be filed under Minn. Stat. § 14.388 and Minn. Rule 1400.2400. Based upon a review of the written submissions and filings, Minnesota Statutes, Minnesota Rules, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

1. The rules were adopted in compliance with the procedural requirements of Minn. Stat. Chap. 14 and Minn. R. Chap. 1400.
2. The proposed amendments to Minn. R. 3501.0180, subps. 2 and 3 are **DISAPPROVED** as not meeting the legal standards of Minn. Stat. 14.388 (4) and Minn. R. 1400.2100, items A and E, for the reasons set out in the accompanying Memorandum.
3. The remainder of the rules is **APPROVED**.

Dated this 13th day of May, 1999.

/s/

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

Deletion of Testing Options

The existing rule contains provisions allowing school districts to adopt their own testing options to meet the basic skills testing requirements for graduation. In 1998, the Legislature amended the basic skills testing statute to require the use of the statewide test for meeting the standards to graduate from high school.^[1] The Board has proposed that all provisions in the basic skills testing rules that relate to local options be deleted to conform the rules to the statute.

The statute referenced by the Board is Minn. Stat. § 120B.30, which states in pertinent part:

120B.30 Statewide testing and reporting system.

Subdivision 1. Statewide testing. (a) The commissioner, with advice from experts with appropriate technical qualifications and experience and stakeholders, shall include in the comprehensive assessment system, for each grade level to be tested, a single statewide norm-referenced or criterion-referenced test, or a combination of a norm-referenced and a criterion-referenced test, which shall be highly correlated with the state's graduation standards and administered annually to all students in the third, fifth, and eighth grades. The commissioner shall establish one or more months during which schools shall administer the tests to students each school year. **Only Minnesota basic skills tests in reading, mathematics, and writing shall fulfill students' testing requirements for a passing state notation.**^[2]

The Board's proposed deletion of references to local options in basic skills testing comports with Minn. Stat. § 14.388(3). The statutory change is unambiguous and no interpretation of the impact of the change on the Board's rule is required. The local options rule language is superceded by Minn. Stat. § 120B.30. The Board's proposed changes regarding that language are APPROVED.

Elimination of 80 Percent Passing Standard

The existing language of Minn. Rule 3501.0180, subparts 2 and 3, establish a progression of increasingly higher passing scores for basic skills tests, 70 percent in 1996, 75 percent in 1997, and 80 percent for "students entering grade 9 in 1998 and thereafter." In 1997, the Legislature passed Minn. Laws 1997, Sec. 2, which states:

(a) By September 1, 1997, the state board of education shall amend Minnesota Rules, part 3501.0180, subparts 2 and 3, to adjust the passing scores for the state mathematics and reading tests for students entering the ninth grade in 1998. This amendment must be done in the manner specified in Minnesota Statutes, section 14.386, paragraph (a).

(b) The state board of education may subsequently amend this rule according to the provisions of Minnesota Statutes, chapter 14.

The Board made the amendment directed by the Legislature, using the procedure in Minn. Stat. § 14.386. The Board maintains that the amendments to passing scores are eligible for permanent adoption through the good cause exemption provisions of Minn. Stat. § 14.388. Specifically, the Board cites item 4 as the basis for adopting the changes to the passing scores language. The statute reads as follows:

14.388 Good cause exemption.

If an agency for good cause finds that the rulemaking provisions of this chapter are unnecessary, impracticable, or contrary to the public interest when adopting, amending, or repealing a rule to:

- (1) address a serious and immediate threat to the public health, safety, or welfare;
- (2) comply with a court order or a requirement in federal law in a manner that does not allow for compliance with sections 14.14 to 14.28;
- (3) incorporate specific changes set forth in applicable statutes when no interpretation of law is required; or
- (4) make changes that do not alter the sense, meaning, or effect of a rule,

the agency may adopt, amend, or repeal the rule after satisfying the requirements of section 14.386, paragraph (a), clauses (1) to (3). The agency shall incorporate its findings and a brief statement of its supporting reasons in its order adopting, amending, or repealing the rule.

In review of the rule under section 14.386, the office of administrative hearings shall determine whether the agency has provided adequate justification for its use of this section.

Rules adopted, amended, or repealed under clauses (1) and (2) are effective for a period of two years from the date of publication of the rule in the State Register.

Rules adopted, amended, or repealed under clause (3) or (4) are effective upon publication in the State Register.

In order to qualify for the exemption from the rulemaking procedure under Minn. Stat. § 14.388 (4), the rule language proposed must make changes that "do not alter the sense, meaning, or effect of a rule."^[3] The rule currently in effect for students is the exempt rule. That rule expires by operation of Minn. Stat. § 14.386(b), which states:

(b) A rule adopted under this section is effective for a period of two years from the date of publication of the rule in the State Register. The authority for the rule expires at the end of this two-year period.

Minn. Stat. § 14.386(b) renders temporary any rule adopted under its provisions. In this instance, the temporary rule acts as an exemption from the permanent rule requiring an 80 percent score to pass the mathematics and reading basic skills test. The "sense, meaning, or effect" of Minn. Rule 3501.0180, subps. 2 and 3, is to require the 80 percent score as soon as the exempt rule expires. The Board acknowledges this impact in its proposed order adopting these rules.^[4]

The rule proposed by the Board has the effect of changing the passing standard from 80 percent for mathematics and reading (that will go into effect on July 14, 1999^[5]) to 75 percent. That is a significant change that alters the effect and meaning of the basic skills testing standard. The proposed rule also has the effect of avoiding the statutory limitation of exempt rules to an effective period of two years.^[6] The passing standards are not eligible for adoption under Minn. Stat. § 14.388(4). The disqualification of the basic skills testing scores from adoption under Minn. Stat. § 14.388(4) requires disapproval under Minn. R. 1400.2100(A)^[7]. The effect of the proposed adoption is to violate the exempt rule expiration requirement of Minn. Stat. § 14.386(b) and this effect requires disapproval under Minn. R. 1400.2100(E)^[8]. For these reasons, the proposed changes to Minn. Rule 3501.0180, subps. 2 and 3 are **DISAPPROVED**.

G.A.B.

^[1] Minn. Laws 1998, Art. 5, Sec. 8.

^[2] Emphasis added.

^[3] Minn. Stat. § 14.388 (4).

^[4] "The amendment ... eliminates the expiration date of the 1997 rule ... Amending Minn. Rule 3501.0180, Subps. 2 and 3, to continue the same passing score meets the provisions of Minn. Stat. § 14.388 (4) because it maintains the status quo thereby avoiding the premature increase of the passing score while schools are still implementing the graduation standards rule and are still building capacity to respond to student needs in meeting the requirements of rules relating to graduation standards, mathematics and reading." Board Order [Proposed], at 2.

^[5] Board Letter, May 7, 1999.

^[6] Following the Board's approach would allow any agency, having obtained a rule through exempt rulemaking, to permanently adopt that same rule in a subsequent exempt proceeding. This result is contrary to the legislative intent regarding exempt rules and the express authority of the Board under Minn. Laws 1997, Sec. 2(b).

^[7] "... not adopted in compliance with procedural requirements of this chapter, [or] Minnesota Statutes, chapter 14...."

^[8] "is ... illegal".