

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Petition of the City of
Brooklyn Center to the Commissioner of
Education for Amendment of Minn. R. 3535

**AMENDED
THIRD PREHEARING ORDER**

This matter was commenced on April 10, 2015 upon the city of Brooklyn Center's filing of a Petition to the Commissioner of Education for Amendment of a Rule Under Minn. Stat. § 14.091 with the Office of Administrative Hearings. The matter was assigned to Chief Administrative Law Judge Tammy L. Pust.

Myron Orfield, Attorney at Law, and George Beck, Attorney at Law, appear on behalf of the city of Brooklyn Center (City). Kathryn Woodruff, Assistant Attorney General, appears on behalf of the Minnesota Department of Education (Department).

On May 19, 2015, the parties, by counsel, appeared for a Prehearing Conference pursuant to the First Prehearing Order issued in this matter on May 14, 2015. At the Prehearing Conference, the Chief Administrative Law Judge ordered that all submissions related to the legal sufficiency determinations required by Minn. Stat. § 14.091, subd. (c) (2014) should be submitted by May 29, 2015. This oral order was memorialized in the Second Prehearing Order issued on May 21, 2015.

On May 29, 2015, the Department submitted its response as required by the Second Prehearing Order. The City submitted a Memorandum on Satisfaction of Requirements of Minn. Stat. § 14.091(a) (2014) on the same date, supplementing the information it had submitted in the Petition and at the hearing on May 19, 2015. The record closed with respect to the defined legal sufficiency determinations as of May 29, 2015.

Based upon the submissions and arguments of counsel, and a review of the files and proceedings herein, the Chief Administrative Law Judge issues the following:

ORDER

Legal Determinations

1. The Petitioner has sufficiently established the availability of "significant new evidence relating to the need for or reasonableness of" Minn. R. 3535 (2013), and has thereby complied with the requirements of Minn. Stat. § 14.091(a).
2. The record contains no evidence to support a determination that Minn. R. 3535 is required to comply with a court order or to maintain authority to administer a federal program.

3. Based upon the analysis set forth in the Memorandum served herewith, the Petitioner is entitled to a hearing pursuant to Minn. Stat. § 14.091 (2014), which hearing will take place on **July 8-10, 2015** at the Office of Administrative Hearings.

4. In the interests of judicial economy and as an exercise of the Chief Administrative Law Judge's inherent authority to manage the docket of the Office of Administrative Hearings, consistent with the authority of Minn. R. 1400.6350 (2013), this matter is hereby consolidated with the rulemaking proceeding currently pending as OAH Docket No. 65-1300-32227.

5. By proposing substantive amendments to Minn. R. 3535, the Department has acknowledged, in legal effect, that: (1) the need for and reasonableness of the specified portions of the rule have changed since the rule's adoption; and (2) the agency's proposed amendments represent what is currently necessary and reasonable for adoption as a statement of general applicability and future effect, defined in Minn. Stat. § 14.02, subd. 4 (2014). In light of the pendency of the Department's rulemaking proceeding currently pending as OAH Docket No. 65-1300-32227 and in the interests of judicial economy, the Chief Administrative Law Judge determines that it would be a waste of public resources to require the Department to defend as necessary and reasonable those portions of Minn. R. 3535 which it currently and publicly seeks to amend. Therefore, the Chief Administrative Law Judge directs that this consolidated proceeding will proceed in the following fashion:

a. In this consolidated matter, the proposed amended rule language which was the subject of the Department's Request for Comments published in the State Register on February 9, 2015, a copy of which is attached as Exhibit A to this Third Prehearing Order, is deemed "the rule or portion of the rule in question" for which the Department has the burden of making an affirmative presentation of facts in support of a finding of need and reasonableness pursuant to Minn. Stat. § 14.091(c).

b. At the July 8-10, 2015 hearing in this consolidated matter, the City and the Department, through counsel, will be allowed to present fact and/or expert testimony and evidence related to the criteria set forth in Minn. Stat. § 14.091.

c. Following the July 8-10, 2015 hearing, the Chief Administrative Law Judge will issue a report directing the Department to repeal or make specific amendment of Rule 3535 "in the manner requested by the petitioner, or in another manner that the administrative law judge has determined is needed and reasonable."

d. Following the issuance of the Chief Administrative Law Judge's report, the Department will continue with the process and procedures required for

rule adoption under the Minnesota Administrative Procedure Act,¹ including the convening of a public hearing if required under that Act.²

e. If the Department fails to take action in conformity with the Chief Administrative Law Judge's Minn. Stat. § 14.091 report within the timeframe(s) specified in that statutory provision, the proposed amended rule language which was the subject of the Department's Request for Comments published in the State Register on February 9, 2015, hereby deemed "the rule or portion of the rule in question" for purposes of Minn. Stat. § 14.091, will be rendered null and void pursuant to the terms of the statute and Minn. R. 3535, in its currently adopted form, will remain in force and effect.

f. If any party objects to this directive it shall file a written motion specifying the factual and legal grounds therefor pursuant to Minn. R. 1400.6600. Initiating motion submissions shall be filed with the Chief Administrative Law Judge no later than 4:30 p.m. on **June 5, 2015**. Responsive motion submissions, if any, shall be filed with the Chief Administrative Law Judge no later than 4:30 p.m. on **June 10, 2015**.

Prehearing Process

Expert Witnesses

6. The date to identify expert witnesses and serve expert witness statements for experts that a party intends to call in its case-in-chief, or for matters for which a party has the burden of proof, shall be **June 8, 2015**. The date to identify rebuttal expert witnesses and serve rebuttal expert witness statements shall be **June 22, 2015**. The disclosure of expert witnesses shall include a report, prepared and signed by the witness, as set forth in Minn. R. Civ. P. 26.01(b)(2), which contains the following information:

- a. The name, business address, and telephone number of the expert witness;
- b. A complete statement of all opinions the witness will express and the basis and reasons for them;
- c. The facts or data considered by the witness in forming them;
- d. Any exhibits that will be used to summarize or support them;
- e. The witness's qualifications, including a list of all publications authored in the previous 10 years;
- f. A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
- g. A statement of the compensation to be paid for the study and testimony in the case.

¹ See Minn. Stat. §§ 14.05-.28 (2014).

² Minn. Stat. §§ 14.14, .25.

Witness Lists

7. By 4:30 p.m. on **July 1, 2015**, each party shall file at the Office of Administrative Hearings and serve upon the opposing party a Witness List identifying the following information regarding all witnesses that it expects to call to testify at the evidentiary hearing: (1) name; (2) address; (3) occupation; (4) specific subject matter(s) on which witness is expected to testify; and (5) a good faith estimate of length of testimony, including foreseeable cross examination. All witnesses shall be available to testify at all times during the hearing of this matter.

Joint Exhibit List

8. By 4:30 p.m. on **July 1, 2015**, each party shall serve upon the opposing party a full and complete copy of all exhibits intended to be introduced at the hearing.

9. By 4:30 p.m. on **July 1, 2015**, the parties shall jointly file with the Office of Administrative Hearings **two copies** of a Joint Exhibit List with all exhibits attached, in a tabbed binder. The Joint Exhibit List shall contain **no duplicates** and shall include the following information for every proposed exhibit:

- a. Title/name of the exhibit;
- b. Date of exhibit (if known);
- c. Author(s) of exhibit (if known); and
- d. Name of witness(es) who will be questioned about the exhibit.

All exhibits shall be pre-numbered and presented sequentially. The Department's exhibits shall start with Exhibit No. 1; the City's exhibits shall start with Exhibit No. 100. Any exhibits not included on the filed Joint Exhibit List shall not be admissible at the hearing of this matter.

10. To the extent possible, the parties shall enter into prehearing stipulations regarding the facts involved in the hearing and the foundation for anticipated exhibits. Any party objecting to the foundation for any written exhibit shall notify the offering party and the Chief Administrative Law Judge in writing no later than 4:30 p.m. on **July 1, 2015**. Responses to foundation objections, if any, shall be filed and served no later than 4:30 p.m. on **July 6, 2015**. If foundation objections are not raised as herein directed, the foundation objection is considered waived.

Subpoenas

11. All subpoena requests in this matter shall be **received** by the Chief Administrative Law Judge by **June 29, 2015**. Subpoena requests shall be directed to the Chief Administrative Law Judge, with a copy sent to the opposing party. The subpoena request shall include the full name and home or business address of all persons to be subpoenaed, a brief statement demonstrating the potential relevance of the testimony or evidence sought and, if known, the date, time, and place for responding to the subpoena. A copy of the subpoena request shall be served on the other parties. A subpoena request form is available at <http://mn.gov/oah/>.

Hearing Process

12. A hearing in this matter will commence at 9:30 a.m. on **July 8, 2015** at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota, 55101, and continue, as necessary, on **July 9, 2015 and July 10, 2015**. The parties shall organize the presentation of their cases to ensure completion during that timeframe. The parties also shall exhaust their settlement discussions prior to the commencement of the hearing.

13. The Department of Education bears the burden of proof at the hearing, as set forth in Minn. Stat. § 14.091, subd. (d): “At the public hearing, the agency shall make an affirmative presentation of facts establishing the need for and reasonableness of the rule or portion of the rule in question.”

14. Hearings are digitally recorded. A digital recording of the hearing can be obtained for a nominal fee by a party who makes a written request. However, transcripts of the hearing are not provided unless the cost for such transcription is paid in advance by the party making the request.

15. Pursuant to Minn. R. 1400.7400, subp. 2 (2013), the Chief Administrative Law Judge hereby orders that a court reporter will be present at the hearing, and that the costs of such will be split equally by the Department and the City.

16. The parties have not requested accommodation for a disability nor the appointment of an interpreter. The Office of Administrative Hearings shall be notified promptly if either an accommodation or an interpreter is needed.

17. Pursuant to Minn. R. 1400.7500 (2013), requests for continuances of a hearing shall be granted only upon a showing of good cause. A request for a continuance filed within five (5) business days of the hearing shall be denied unless the reason for the request could not have been earlier ascertained or unless good cause is shown. The Chief Administrative Law Judge will not grant a continuance to produce witnesses or evidence except in the most extraordinary circumstances.

18. Under Minn. R. 1400.6000 (2013), the failure of a party to appear at a prehearing conference or hearing without the prior consent of the Administrative Law Judge shall be considered a default by that party.

19. If the matter is resolved prior to hearing, the parties shall provide written notice to the Office of Administrative Hearings immediately, and provide notice to the Administrative Law Judge by telephone and/or email to Kendra McCausland, 651-361-7870 or at kendra.mccausland@state.mn.us.

Alternative Dispute Resolution

20. The parties are encouraged to consider settlement and/or mediation. The deadline to request mediation or a settlement conference from the Office of Administrative Hearings is **June 5, 2015**. Both parties must join in a request for mediation. Requests for

a settlement conference or mediation shall be made to the Chief Administrative Law Judge. A different Judge will be assigned to conduct the mediation or settlement conference, and will share no information with the assigned and presiding judge. See Minn. R. 1400.5950, .6550 (2013).

Communications

21. Courtesy copies of documents and correspondence should be served on the Chief Administrative Law Judge by electronic mail addressed to tammy.pust@state.mn.us. To become a part of the official hearing record, hard copies of all materials, correspondence, motions, briefs, and other documents **must be filed** with the Office of Administrative Hearings **by mail, fax, or personal delivery**, pursuant to Minn. R. 1400.5550 (2013).

Dated: June 8, 2015



TAMMY L. PUST
Chief Administrative Law Judge

MEMORANDUM

The Department argues that Petitioner's request for a hearing under Minn. Stat. § 14.091 should be denied on the grounds that the Petition is: (1) premature; (2) not legislatively intended; and (3) unnecessary given the pendency of the Department's general and nonexpedited rulemaking proceeding. None of these arguments are persuasive, and each is addressed below.

Prematurity of Petition

The Department asserts that the City's Petition is premature at this time. Noting that the agency does not have general rulemaking authority, the Department raises concerns that its adoption of rule language proposed by the City or otherwise recommended by the Chief Administrative Law Judge could put the agency outside its specific authority to adopt rules and therefore in violation of its legislated authority. 2014 Minn. Laws, Ch. 272, Art. 3, Sec. 48, directs the Department to amend the rule so as to be consistent with Minn. Stat. §§ 124D.861 and .862 (2014). This legislative rulemaking authority does not go so far as to include the scope of issues addressed in the City's Petition.

The Department is correct that it can only act to adopt rules within the statutory authority the legislature has provided it, but is incorrect in identifying the 2014 Legislature's directive as its only provided authority. Minn. Stat § 14.091 exists as a separate grant of statutory authority. In enacting this section, the legislature provided the agency with an ongoing authorization to initiate rulemaking as directed by an Administrative Law Judge acting in response to a filed petition. Should these proceedings result in an order directing the Department to amend the rule in a manner not specified in 2014 Minn. Laws, Ch. 272, Art. 3, Sec. 48, Minn. Stat. § 14.091 itself will stand as a sufficient statutory basis for the agency's eventual rulemaking action.

The agency further asserts that Minn. Stat. § 14.091 only envisions a challenge to an existing rule, and so suggests that the Petition would be a more practical effort if it were submitted after the agency's proposed amendments to Rule 3535 are adopted through the normal course of the pending rulemaking process. The Department may be correct that this proposed process would be more orderly. However, nothing in the statutory scheme under review allows the agency to dictate the timing of a challenge by petition. The Chief Administrative Law Judge cannot engraft a timing requirement into the statute where no such limiting language is found in Minn. Stat. § 14.091.³

³ *City of Brainerd v. Brainerd Investments Partnership*, 827 N.W.2d 752, 757 (Minn. 2013) (noting court "cannot add words of qualification to the statute that the Legislature has omitted."). See also, *State v. Carufel*, 783 N.W.2d 539, 545 (Minn. 2010) ("[T]he court cannot add words to a statute not supplied by the [L]egislature.").

Lack of Legislative Intent

The Department next argues that the City should be foreclosed from proceeding under Minn. Stat. § 14.091 because it is not within the community of interests the legislature intended to benefit in enacting the statute. Citing various publications related to the purpose of the statute and the circumstances of its enactment, the Department asserts that the petition process should only be allowed for rule challenges by specified governmental agencies directly affected by a rule or otherwise regulated by the rule-adopting agency. Since the City is neither in this case, the agency requests an order determining that no hearing is required under Minn. Stat. § 14.091.

The Department completely skips a critical inquiry in presenting this analysis. Before a court is allowed to examine legislative history or other extrinsic sources as a tool for construing statutory language, the language itself must be found to be ambiguous.⁴

The first step in interpreting a statute is to examine the language to determine whether it is clear and unambiguous. A statute is ambiguous if, as applied to the facts of the case, it is susceptible to more than one reasonable interpretation. If the statute is clear and not ambiguous, then we apply its plain and ordinary meaning.⁵

When a statute's words are not ambiguous, "the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16.

Although not explicitly stated, the Department implies that the statute is ambiguous on the facts presented in this case in that section 14.091 does not address how its terms should be interpreted when amendatory rulemaking is already ongoing with respect to a rule subject to a petition challenge. At best, the agency suggests that the statute is ambiguous because it does not explicitly address the facts of the instant case in light of Chapter 14's directives regarding general rulemaking. The Minnesota Supreme Court has already rejected a similar "ambiguity-created-by-silence" argument made in the face of a clear statutory directive.⁶ In the present case, section 14.091 specifically directs that a hearing be provided upon the satisfaction, by a specified petitioner, of a limited list of criteria. That showing having been made in the present case pursuant to a statute that is not ambiguous in its directive, the Chief Administrative Law Judge declines the Department's invitation to rely on extrinsic sources as a basis to deny the City its requested hearing under Minn. Stat. § 14.091.

⁴ *Id.*, citing Minn. Stat. § 645.16 (2014) (listing sources from which courts may ascertain legislative intent "[w]hen the words of a law are not explicit"); *Weber v. Hvass*, 626 N.W.2d 426 (Minn. Ct. App. 2001) ("court will examine legislative history as a tool for construing statutory language only when the language is ambiguous.").

⁵ *A.A.A. v. Minnesota Department of Human Services*, 832 N.W.2d 816, 819 (Minn. 2013) citing *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 72–73 (Minn. 2012); *Emerson v. Sch. Bd. of Indep. Sch. Dist. 199*, 809 N.W.2d 679, 682 (Minn. 2012).

⁶ *Beardsley v. Garcia*, 753 N.W.2d 735, 739 (Minn. 2008).

Duplicative Hearings

Last, the Department argues that a section 14.091 hearing would be duplicative of the general rulemaking hearing it will provide to all interested members of the public under the general rulemaking proceeding, OAH Docket No. 65-1300-32227. For the reasons set forth in the Second Prehearing Order which are incorporated by reference herein, the Chief Administrative Law Judge finds this argument to be unpersuasive as well.

T. L. P.

Minnesota Department of Education

REQUEST FOR COMMENTS

Possible Amendment to Rules Governing School Desegregation/Integration, Minnesota Rules, Chapter 3535; Revisor's ID Number RD4309

Subject of Rules. The Minnesota Department of Education requests comments on its possible amendment to rules governing school desegregation/integration. The Department is considering rules that govern desegregation and integration in Minnesota public schools. The proposed rules are needed because of inconsistencies, omissions, and outdated language in the existing rules when compared to the new achievement and integration statute passed by the 2013 Minnesota legislature. The proposed rules will address these issues and will result in better alignment between relevant Minnesota statutes and rules and better implementation of achievement and integration programs in participating districts.

Persons Affected. The amendment to and repeal of the rules will likely affect educators, school and district staff and leadership and parents and students and relevant interest, advocacy and professional groups.

Statutory Authority. 2014 Minn. Laws, Chapter 272, Art. 3, Sec. 48, requires the Department to adopt rules relating to desegregation and integration and inclusive education, consistent with sections 124D.861 and 124D.862.

Public Comment. Interested persons or groups may submit comments or information on these possible rules in writing until 4:30 p.m. on April, 17 2015. The Department has formed a legislative task force, the Integration Rule and Statute Alignment Work Group, which met between November 2013 and November 2014. Work Group members proposed changed and shared feedback about the proposed rule during the initial drafting process. The Department will continue to work with members of this group throughout the rulemaking process.

Rules Drafts. The Department has drafted the possible rules amendments. The draft rule will be available on the Department rulemaking webpage:
<http://education.state.mn.us/MDE/Welcome/Rule/ActiveRule/index.html>.

Agency Contact Person. Written comments, questions and requests for more information on these possible rules should be directed to: Kerstin Forsythe Hahn at the Minnesota Department of Education, 1500 Hwy 36 West, Roseville, MN 55113, Phone: 651-582-8583, FAX: 651- and email: Kerstin.forsythe@state.mn.us.

Alternative Format. Upon request, this information can be made available in an alternative format, such as large print, braille, or audio. To make such a request, please contact the agency contact person at the address or telephone number listed above.

NOTE: Comments received in response to this notice will not necessarily be included in the formal rulemaking record submitted to the administrative law judge if and when a proceeding to adopt rules is started. The agency is required to submit to the judge only those written comments received in response to the rules after they are proposed. If you submitted comments

EXHIBIT A

during the development of the rules and you want to ensure that the Administrative Law Judge reviews the comments, you should resubmit the comments after the rules are formally proposed.

Dated: January 30, 2015

A handwritten signature in cursive script that reads "Brenda Cassellius".

Brenda Cassellius, Commissioner
Department of Education