

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Possible Amendment  
to Rules Governing K-12 Academic  
Standards in Social Studies, Part 3501

**ORDER OF THE CHIEF  
ADMINISTRATIVE LAW JUDGE**

This matter is pending before Chief Administrative Law Judge Jenny Starr upon a review of the Report of Administrative Law Judge Eric Lipman dated January 5, 2024, pursuant to Minn. Stat. § 14.15, subds. 3, 4 (2022), and Minn. R. 1400.2240, subp. 4 (2023).

**SUMMARY**

Judge Lipman recommended that the Department may adopt all portions of the proposed rule, except subpart 6(c). Based on a review of the record, the Chief Judge concurs with Judge Lipman's recommendation. If the Department chooses to make a change to subpart 6(c), it may re-submit the rule for further review.

**ORDER**

The Chief Judge **CONCURS** with the findings that recommend approval of proposed rule, subparts 1, 2, 3, 4, 5, 6(a), and 6(b).<sup>1</sup> The Chief Judge also **CONCURS** with Findings 99 and 102, and the recommendation that subpart 6(c) not be adopted as currently drafted.<sup>2</sup>

If either of the two potential remedies suggested in Finding 111 are adopted by the Department, the Chief Judge further **CONCURS** that neither would be substantially different from the proposed subpart as published in the *State Register*, as those words are used in Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

If the Department chooses to make a change to subpart 6(c), it may submit the change to the Chief Judge for further review.<sup>3</sup>

If the Department chooses not to make a change to subpart 6(c), it may submit the rule to the Legislative Coordinating Commission and the House of Representatives

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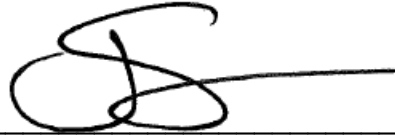
<sup>1</sup> Report of Administrative Law Judge Eric Lipman, January 5, 2024.

<sup>2</sup> *Id.*

<sup>3</sup> Minn. R. 1400.2240, subp. 4.

and Senate policy committees with primary jurisdiction over state governmental operations for their review.<sup>4</sup>

Dated: January 16, 2024

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JENNY STARR  
Chief Administrative Law Judge

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<sup>4</sup> Minn. Stat. § 14.15, subd. 4.

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Possible Amendment  
to Rules Governing K-12 Academic  
Standards in Social Studies, Part 3501

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Eric L. Lipman for rulemaking hearings on November 8 and 9, 2023. The public hearings were held by way of an interactive video conference on the WebEx platform.

The Minnesota Department of Education (MDE or the Agency) proposes to amend the current K-12 academic standards in Social Studies. The academic standards (and supporting benchmarks) identify the knowledge and skills that Minnesota students must have at the end of particular grade levels and for graduation.

The proposed amendments represent a significant revision of the 2011 standards. Among the key changes in the proposed standards are: (1) creation of “anchor standards” that define career and college readiness; (2) increasing opportunities for students to learn Dakota and Anishinaabe history; and (3) adding an ethnic studies “strand” to the standards.<sup>1</sup>

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.<sup>2</sup> The Minnesota Legislature has designed this process to ensure that state agencies have met each of the requirements that the state has specified for adopting rules.

The hearing was conducted to permit the Agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the public an opportunity to review, discuss and critique the proposed rules.

The Agency must establish that the proposed rules are within the Agency's statutory authority; necessary and reasonable; follow from compliance with the required procedures; and that any modifications that the agency made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.<sup>3</sup>

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<sup>1</sup> Exhibit (Ex.) A at 2; Ex. F at 107; Ex. K1 at 123. For clarity of the record, citations to page numbers in the agency's exhibits are made to the Bates number placed on the top, left-hand margin of each page.

<sup>2</sup> See Minn. Stat. §§ 14.131–14.20 (2022).

<sup>3</sup> Minn. Stat. §§ 14.05, 14.23, 14.25 and 14.50 (2022).

The Agency panel at the public hearing included Jennifer Dugan, the Director of MDE’s Division of Academic Standards, Instruction and Assessment; Leigh Nida, the Supervisor of Academic Standards; and Eric Taubel, the agency’s General Counsel.<sup>4</sup>

Approximately 264 people attended the rulemaking hearings.<sup>5</sup> The proceedings continued until all the time set aside for the hearing expired. 50 members of the public made statements or asked questions of the Agency panelists during the hearings.<sup>6</sup>

After the close of the second and final hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until November 29, 2023 – to permit interested persons and the agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days to permit interested parties and the agency an opportunity to reply to earlier-submitted comments.<sup>7</sup> The hearing record closed on December 6, 2023.

## **SUMMARY OF CONCLUSIONS**

Except as noted in Findings 99 and 102 below, MDE has established that it has the statutory authority to adopt the proposed rules, it fulfilled all relevant procedural requirements of law or rule, and the proposed rules are needed and reasonable.

With respect to proposed rule 3501.1350, subp. 6(c) (Ways of Knowing and Methodologies), however, the proposed rule is impermissibly vague and not supported by an affirmative presentation of facts.

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

## **FINDINGS OF FACT**

### **I. Regulatory Background to the Proposed Rules**

1. For “statewide accountability” the Minnesota Legislature requires local schools to teach “social studies, including history, geography, economics, and government and citizenship that includes civics.”<sup>8</sup>

2. The standards for Social Studies describe the expectations of coursework from Kindergarten through 12<sup>th</sup> Grade. As MDE explains, academic standards “help identify the student learning requirements for graduation [and] the knowledge and skills that all students must achieve by the end of a grade level....”<sup>9</sup>

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<sup>4</sup> Transcript of Public Hearings, OAH 8-9005-37919, at 9 (Nov. 8, 2023) (Tr.).

<sup>5</sup> Hearing Rosters, at 1-2.

<sup>6</sup> Tr., at 3, 106.

<sup>7</sup> See Minn. Stat. § 14.15, subd. 1.

<sup>8</sup> See Minn. Stat. § 120B.021, subd. 1(a)(4) (2022).

<sup>9</sup> Ex. F at 107; 48 *State Register* 314 (Sept. 25, 2023).

3. These standards “provide baseline expectations that focus on outcomes and student learning.”<sup>10</sup>

4. The standards also guide “local curriculum adoption, development, and improvement.”<sup>11</sup>

5. MDE maintains that the proposed standards will improve the ability of Minnesota students to “locate, explore, and organize information to be interpreted, analyzed, synthesized, and evaluated.”<sup>12</sup>

6. A key regulatory purpose of the revised standards is to prepare students for democratic decision-making, problem-solving and participation in civic life. Thus, the standards seek to develop “capable students and citizens.”<sup>13</sup>

7. Among the key regulatory strategies toward this goal is to broaden the sources, perspectives and viewpoints and disciplines that are presented during social studies class.<sup>14</sup>

## **II. Rulemaking Authority**

8. The Agency cites Minn. Stat. § 120B.021, subd. 3 (2022), as its source of statutory authority for these proposed rules. This statute directs MDE to “adopt statewide rules ... implementing statewide rigorous core academic standards in ... social studies ....”<sup>15</sup>

9. The Administrative Law Judge concludes that MDE has the statutory authority to adopt amendments to academic standards in social studies.<sup>16</sup>

## **III. Procedural Requirements of Chapter 14**

### **A. Publications**

10. On November 9, 2021, MDE filed documents with the Office of Administrative Hearings seeking review and approval of its additional notice plan and requests for comments.<sup>17</sup>

11. By way of an Order dated November 10, 2021, the undersigned Administrative Law Judge approved Additional Notice Plan and Requests for Comments.<sup>18</sup>

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<sup>10</sup> Ex. K-1 at 127.

<sup>11</sup> Ex. F at 107; 48 *State Register* 314.

<sup>12</sup> Ex. F at 107; 48 *State Register* 314.

<sup>13</sup> Ex. F at 108; 48 *State Register* 315; MDE’s Initial Comments at 15 (“These standards are necessary to ensure that Minnesota students are able to ‘make informed and reasoned decisions for the public good as citizens of a culturally diverse, democratic society in an interdependent world’”).

<sup>14</sup> Ex. F at 108; 48 *State Register* 315.

<sup>15</sup> Ex. F at 107; 48 *State Register* 314.

<sup>16</sup> Minn. Stat. § 120B.021, subd. 3.

<sup>17</sup> Order on Review of Additional Notice Plan and Requests for Comments, OAH 8-9005-37919 (Nov. 10, 2021).

12. On September 6, 2023, the Department filed documents with the Office of Administrative Hearings, and supplemented those filings on September 11, 2023, seeking review and approval of its Additional Notice Plan and Notice of Intent to Adopt Rules With or Without a Hearing (Dual Notice).<sup>19</sup>

13. By way of an Order dated September 13, 2023, the undersigned Administrative Law Judge approved the Additional Notice Plan and Dual Notice.<sup>20</sup>

14. On September 22, 2023, the Agency mailed a copy of the Dual Notice to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.<sup>21</sup>

15. The Dual Notice, published in the September 25, 2023 issue of the *State Register*, set 4:30 p.m. on Wednesday, October 25, 2023 as the deadline for comments or to request a hearing.<sup>22</sup>

16. On September 25, 2023, the Agency sent electronic copies of the Dual Notice and the statement of need and reasonableness (SONAR) to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over primary and secondary schools.<sup>23</sup>

17. On September 25, 2023, the Agency mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.116(b) and 14.131 (2022).<sup>24</sup>

18. The Dual Notice identified the date and location of the hearing in this matter.<sup>25</sup>

19. At the hearing on November 8, 2023, the Agency filed copies of the following documents as required by Minn. R. 1400.2220:

- (a) the Agency's Request for Comments as published in the *State Register* on November 15, 2023;<sup>26</sup>
- (b) the proposed rules dated September 7, 2023, including the Revisor's approval;<sup>27</sup>
- (c) the Agency's SONAR;<sup>28</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> Order on Review of Additional Notice Plan and Dual Notice, OAH 8-9005-37919 (September 13, 2023).

<sup>20</sup> *Id.*

<sup>21</sup> Exs. G-1, G-2, H.

<sup>22</sup> Ex. F at 108; 48 *State Register* 315.

<sup>23</sup> Exs. K-1, K-2.

<sup>24</sup> Ex. K-1.

<sup>25</sup> Ex. F at 106-07.

<sup>26</sup> Ex. A.

<sup>27</sup> Ex. C.

- (d) the Certificate of Mailing the SONAR to the Legislative Reference Library on September 15, 2023.<sup>29</sup>
- (e) the Dual Notice as mailed and as published in the *State Register* on September 25, 2023;<sup>30</sup>
- (f) the Certificate of Mailing the Dual Notice to the rulemaking mailing list on September 22, 2023, and the Certificate of Accuracy of the Mailing List;<sup>31</sup>
- (g) the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on September 22, 2023;<sup>32</sup>
- (h) the written comments on the proposed rules that the Agency received during the comment period that followed the Dual Notice;<sup>33</sup>
- (i) the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on September 25, 2023;<sup>34</sup> and,
- (j) an August 16, 2023 memorandum from Minnesota Management and Budget.<sup>35</sup>

## **B. Additional Notice Requirements**

20. Minn. Stat. §§ 14.131 and 14.23 (2022) require that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

21. On September 22, 2023, the Agency provided the Dual Notice in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

- (a) The Dual Notice was posted to its Social Studies rulemaking web page and the Agency has maintained these materials continuously since they were posted.<sup>36</sup>
- (b) The Dual Notice was sent by first-class mail to the organizations listed in its Additional Notice Plan.<sup>37</sup>

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<sup>28</sup> Ex. D.

<sup>29</sup> Ex. E.

<sup>30</sup> Ex. F.

<sup>31</sup> Exs. G-1, G-2.

<sup>32</sup> Ex. H.

<sup>33</sup> See <https://minnesotaoah.granicusideas.com/discussions> (Discussion 37919).

<sup>34</sup> Exs. K-1, K-2.

<sup>35</sup> Ex. K-3.

<sup>36</sup> See <https://education.mn.gov/MDE/about/rule/rule/k12social/>.

- (c) A copy of the Dual Notice was sent by electronic mail to those for whom the Agency had valid electronic mail addresses and were listed in its Additional Notice Plan.<sup>38</sup>

## **C. Notice Practice**

### **1. Notice to Stakeholders**

22. On September 22, 2023, the Agency provided a copy of the Dual Notice to its official rulemaking list (maintained under Minn. Stat. § 14.14.<sup>39</sup>

23. The comment period on the proposed rules expired at 4:30 p.m. on Wednesday, October 25, 2023.<sup>40</sup>

24. There are 33 days between September 22, 2023, and October 25, 2023.

25. The Administrative Law Judge concludes that the Agency fulfilled its responsibilities, under Minn. R. 1400.2080, subp. 6 (2023), to mail the Dual Notice “at least 33 days before the end of the comment period ....”<sup>41</sup>

### **2. Notice to Legislators**

26. Minn. Stat. § 14.116 requires the Agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.<sup>42</sup>

27. On September 25, 2023, the Agency sent a copy of the Dual Notice and the SONAR to the required legislators.<sup>43</sup>

28. The Administrative Law Judge concludes that the Agency fulfilled its responsibilities to remit these materials when “an agency mails notice of intent to adopt rules ....”<sup>44</sup>

### **3. Notice to the Legislative Reference Library**

29. On September 25, 2023, the Agency mailed a copy of the SONAR to the Legislative Reference Library.<sup>45</sup>

30. Minn. Stat. § 14.23 requires the Agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

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<sup>37</sup> Ex. H.

<sup>38</sup> *Id.*

<sup>39</sup> Ex. H.

<sup>40</sup> Ex. F at 108; 48 *State Register* 315.

<sup>41</sup> Minn. R. 1400.2080, subp. 6.

<sup>42</sup> Minn. Stat. § 14.116.

<sup>43</sup> Exs. H, K-1.

<sup>44</sup> Minn. Stat. § 14.116(b).

<sup>45</sup> Ex. E.



31. The Administrative Law Judge concludes that the Agency fulfilled its duty to remit the SONAR to the Legislative Reference Library in a timely fashion.<sup>46</sup>

#### **D. Impact on Farming Operations**

32. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

33. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Agency was not required to notify the Commissioner of Agriculture.<sup>47</sup>

#### **E. Statutory Requirements for the SONAR**

34. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR.<sup>48</sup> Those factors are:

- (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, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

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<sup>46</sup> Minn. Stat. § 14.23; Minn. R. 1400.2070, subp. 3 (2023).

<sup>47</sup> Minn. Stat. § 14.111.

<sup>48</sup> Minn. Stat. § 14.23.

- (7) 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; and,
- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.

#### **1. The Agency's Regulatory Analysis**

- (a) **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.**

35. The Agency asserts that a wide range of stakeholders are likely to be affected by the proposed rules, including: "Minnesota parents and students; Minnesota school districts, including charter schools; social studies educators and teachers implementing the social studies academic standards in their respective disciplines; and social studies curriculum specialists and directors."<sup>49</sup>

36. MDE further maintains that local education agencies (LEAs) will bear modest costs because of the proposed changes, but forecasts that "Minnesota students ... will achieve greater levels of social studies literacy and competency" if the proposed rules were adopted.<sup>50</sup>

- (b) **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.**

37. While MDE does not project that implementation of the proposed rules will result in additional, non-budgeted costs to it,<sup>51</sup> it concedes that there could be modest fiscal impacts to the Professional Educators Licensing State Board (PELSB). PELSB will need to "realign their social studies licensure rules" to reflect any changes to the underlying academic standards.<sup>52</sup> MDE projects that the fiscal impact to PELSB "will not be more than what is typically anticipated in the normal process of updating and revising educational policies and resources."<sup>53</sup>

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<sup>49</sup> Ex. D at 95.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

- (c) **The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

38. MDE maintains that because updating “state academic standards for social studies is a legislative requirement, there is no less costly or less intrusive method to achieve the purpose of the proposed rules.”<sup>54</sup>

39. The Agency further argues that because the proposed rules are based upon the College, Career, and Civic Life framework, its approaches represent the least costly and least intrusive methods of achieving the purpose of the proposed rule.<sup>55</sup>

- (d) **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.**

40. Because updating state academic standards for social studies through rulemaking is a statutory requirement, the Agency could not identify methods other than rulemaking to carry out the statutory directive.<sup>56</sup>

- (e) **The probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

41. MDE forecasts that LEAs may face initial increased costs to implement the new rules.<sup>57</sup>

42. The Agency adds that “LEAs typically undertake a regular curriculum adoption cycle” such that “many of these costs would be borne regardless of the adoption of the proposed 2021 K–12 Academic Standards in Social Studies.”<sup>58</sup>

43. MDE further asserts that it has allowed a five-year implementation timeline; permitting LEAs an opportunity to spread any costs of curriculum adjustments over a five-year period.<sup>59</sup>

- (f) **The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 96; see also Minn. Stat. §§ 120B.02, subd. 1(a), 120B.021, subds. 1(a)(4), 3 (2022).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

44. MDE asserts that the probable cost and consequence of not adopting the proposed rules is that students will be given “a less rigorous, complete, and competitive social studies education” than is otherwise possible.<sup>60</sup> The Agency maintains that the proposed rules are based upon “current cognitive and content research, particularly with regard to ethnic and cultural studies.”<sup>61</sup>

45. MDE argues that the proposed rules improve the prospects of “having citizens who are capable of reasoned decisions, using credible data,” thus benefitting “society as a whole.”<sup>62</sup>

**(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.**

46. MDE declares that the proposed standards align with, and carry out, federal education laws; specifically, the Every Student Succeeds Act (ESSA) and the No Child Left Behind Act.<sup>63</sup>

47. The Agency notes that Minnesota’s state plan under the ESSA references this rulemaking as producing the required academic standards in social studies.<sup>64</sup>

48. MDE maintains that the proposed standards carry out the federal directive to provide “all students access to an enriched curriculum and educational experience.”<sup>65</sup>

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

49. MDE argues that the proposed regulations do not increase regulatory burdens to Minnesotans but instead are the mechanism by which we demonstrate compliance with federal law; specifically, the ESSA.<sup>66</sup>

50. The ESSA requires each state to submit a state plan that includes assurances that it has adopted challenging academic standards aligned with academic achievement. The proposed standards and this rulemaking, continues the Agency, are how Minnesota meets the federal requirements.<sup>67</sup>

51. The Administrative Law Judge finds that the Agency has met its obligation to complete the eight assessments required by Minn. Stat. § 14.131, in its SONAR.

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 96-97.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 97.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

## **2. Consultation with the Commissioner of Minnesota Management and Budget (MMB)**

52. As required by Minn. Stat. § 14.131, by letter dated August 16, 2023, the Commissioner of Minnesota Management and Budget (MMB) responded to a request by the Agency to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Agency’s proposed rules and concluded that there were no fiscal impacts or benefits of the proposed rule on units of local government.<sup>68</sup>

53. It noted that the described impacts do not include potential impacts to local school districts. As MMB explained, as it reads Minn. Stat. § 14.131, school districts are not “local units of government” as those words are used in the statute. It does suggest, and MDE agrees, that school districts may experience increased costs when developing new curriculum to comply with the revised standards.<sup>69</sup>

## **3. Performance-Based Regulation**

54. The Administrative Procedure Act also requires an Agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the Agency’s regulatory objectives and maximum flexibility for the regulated party and MDE in meeting those goals.<sup>70</sup>

55. The proposed rules meet this requirement. Notwithstanding the description of the required knowledge and skills included in the proposed standards, local school districts have wide discretion to select teaching methodologies, curricula, classroom assessments and form of instructions.<sup>71</sup> The proposed rules “emphasize[] superior achievement in meeting the Agency’s regulatory objectives” while permitting very wide flexibility for local schools and school districts when meeting those goals.<sup>72</sup>

## **4. Summary**

56. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including implementation of the legislative policy supporting performance-based regulatory systems, and consideration of the fiscal impact on units of local government.

### **F. Cost to Small Businesses and Cities under Minn. Stat. § 14.127**

57. Minn. Stat. § 14.127 requires the Agency to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed

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<sup>68</sup> Ex. K-3.

<sup>69</sup> *Id.*

<sup>70</sup> Minn. Stat. §§ 14.002 and 14.131.

<sup>71</sup> *Compare* Ex. C with Minn. Stat. § 120B.02, subd. 1(a); Minn. Stat. § 120B.021, subd. 2(b)(2) (2022).

<sup>72</sup> Minn. Stat. § 14.002.

\$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.”<sup>73</sup>

58. The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>74</sup>

59. The Agency determined that the cost of complying with the proposed rule changes will not exceed \$25,000 for any business or any statutory or home rule charter city.<sup>75</sup>

60. The Administrative Law Judge finds that the Agency has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

### **G. Adoption or Amendment of Local Ordinances**

61. Under Minn. Stat. § 14.128, the Agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed Agency rule. The statute defines a “local government” in this context as a “town, county, or home rule charter or statutory city.”<sup>76</sup>

62. The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>77</sup>

63. MDE concluded that no town, county, or home rule charter or statutory city will need to adopt or amend an ordinance or other regulation to comply with the proposed rules.<sup>78</sup>

64. The Administrative Law Judge finds that MDE has made the determination required by Minn. Stat. § 14.128 and approves that determination.

## **IV. Regulatory Backdrop for Developing State Social Studies Standards**

65. In nearly every regular session, the Minnesota Legislature considers educational reform with an eye towards improving the performance of primary and secondary schools in our state. The impulse is understandable. Strong performances by our schools are closely related to the very purposes for which our state government was founded. As described in the first few words of the Minnesota Constitution, our state’s

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<sup>73</sup> Minn. Stat. § 14.127, subd. 1 (2022).

<sup>74</sup> Minn. Stat. § 14.127, subd. 2.

<sup>75</sup> Ex. D at 99.

<sup>76</sup> Minn. Stat. § 14.128, subd. 1.

<sup>77</sup> *Id.*

<sup>78</sup> Ex. D at 99.

government was “instituted for the security, benefit and protection of the people”<sup>79</sup> and to “perpetuate its blessings and secure the same *to ourselves and our posterity* ....”<sup>80</sup>

66. To that end, the Minnesota Constitution includes a further, more explicit directive to the legislature; specifically, legislators are directed to “secure a thorough and efficient system of public schools throughout the state.”<sup>81</sup> As Article XIII of the state constitution explains, a general, uniform, thorough, and efficient system of public schools is needed for our decentralized institutions of government to function in the future:

The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.<sup>82</sup>

67. A key object of that constitutional charge is for schools to develop a shared ethos amongst children from different backgrounds “both behavioral and abstract, to facilitate compatibility with others in this society.”<sup>83</sup> As Chief Justice Hudson has observed: “the animating purpose of the Education Clause [of the Minnesota Constitution] is to provide all students in Minnesota with ‘an education which will fit them to discharge intelligently their duties as citizens of the republic.’”<sup>84</sup>

68. When carrying out that duty, the legislature has created a complex and pyramiding set of statutory requirements. Through these statutes, the legislature has sought to “secure a thorough and efficient system of public schools,”<sup>85</sup> comply with the requirements of federal law,<sup>86</sup> and create a system that enjoys broad public confidence.<sup>87</sup>

69. State law requires that MDE create social studies standards that meet certain performance criteria. Specifically, the standards must:

- (a) be consistent with the Constitutions of the United States and the state of Minnesota;<sup>88</sup>
- (b) be promulgated by rulemaking;<sup>89</sup>

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<sup>79</sup> Minn. Const. Preamble.

<sup>80</sup> *Id.*, Art. 1, § 1 (emphasis added).

<sup>81</sup> Minn. Const. Art. 8, § 1.

<sup>82</sup> *Id.*

<sup>83</sup> *Cruz-Guzman v. State*, A22-0118, 2023 WL 8613511, at \*15 (Minn. Dec. 13, 2023) (Hudson, C. J., dissenting).

<sup>84</sup> *Id.* (citing cases).

<sup>85</sup> Minn. Const. Art. 8, § 1.

<sup>86</sup> See Ex. D at 17; No Child Left Behind Act, Pub. L. 107–110 (2002).

<sup>87</sup> See Minn. Stat. § 120B.02, subd. 1(b)(1) (2022).

<sup>88</sup> Minn. Stat. § 120B.021, subd. 2(b)(3) (2022).

<sup>89</sup> Minn. Stat. §§ 120B.021, subds. 1(a)(4), 3; see also Minn. Stat. § 120B.02, subd. 1(a).

- (c) be “clear, concise, objective, measurable, and grade-level appropriate;”<sup>90</sup>
- (d) “embed Indigenous education for all students consistent with recommendations from Tribal Nations and urban Indigenous communities in Minnesota regarding the contributions of American Indian Tribes and communities in Minnesota;”<sup>91</sup>
- (e) embed ethnic studies;<sup>92</sup>
- (f) permit linkage to ethnic studies instruction;<sup>93</sup> and
- (g) align with “the knowledge and skills students need for career and college readiness and advanced work in the particular subject area.”<sup>94</sup>

70. State law also includes restrictions that limit the breadth of any academic standard. The state academic standards cannot:

- (a) “require a specific teaching methodology or curriculum;”<sup>95</sup> or
- (b) “prescribe ... the delivery system, classroom assessments, or form of instruction that school sites must use.”<sup>96</sup>

71. In this way, state law creates a framework that includes both a regulatory “floor” and a regulatory “ceiling.” There are minimums that are required before MDE can promulgate social studies standards, as well as enforceable limits on the Agency’s use of rulemaking powers to establish new standards.

## V. State Rulemaking Standards

72. The solicitation of public comments, the rulemaking hearing, and a legal review by an administrative law judge are all “intended to insure that the rule, and the policy expressed, is within the scope of the enabling statute and is otherwise reasonable and constitutional *before it is implemented.*”<sup>97</sup>

73. Accordingly, in every rulemaking proceeding, the Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue

<sup>90</sup> Minn. Stat. § 120B.021, subd. 2(b)(1) (2022).

<sup>91</sup> Minn. Stat. § 120B.021, subd. 4(a) (2022).

<sup>92</sup> Minn. Stat. § 120B.021, subd. 4(j) (2022).

<sup>93</sup> Minn. Stat. §§ 120B.024, subd. 2 (g), 120.251, subd. 2(c) (2022).

<sup>94</sup> Minn. Stat. § 120B.021, subd. 4(a).

<sup>95</sup> Minn. Stat. § 120B.021, subd. 2(b)(2).

<sup>96</sup> Minn. Stat. § 120B.02, subd. 1(a).

<sup>97</sup> See *In the Matter of Hibbing Taconite Co.*, 431 N.W.2d 885, 894–95 (Minn. Ct. App. 1988).



delegation of authority to another entity; and whether the proposed language meets the definition of a rule.<sup>98</sup>

74. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,<sup>99</sup> “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),<sup>100</sup> and the agency’s interpretation of related statutes.<sup>101</sup>

75. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”<sup>102</sup> By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”<sup>103</sup>

76. An important corollary to these standards is that when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches so long as the alternative that is selected by the agency is a rational one.<sup>104</sup> Thus, while reasonable minds might differ as to whether one or another approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.<sup>105</sup>

77. Because the Administrative Law Judge suggests a change to the proposed rule language after the date it was originally published in the *State Register* (see Finding 111 below), it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.

78. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

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

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<sup>98</sup> See Minn. R. 1400.2100 (2023).

<sup>99</sup> See *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

<sup>100</sup> Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

<sup>101</sup> See *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>102</sup> *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>103</sup> See *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

<sup>104</sup> *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

<sup>105</sup> *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

- (2) the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice;” and
- (3) the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

79. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether:

- (1) “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;”
- (2) the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing;” and
- (3) “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”<sup>106</sup>

## **VI. Rule by Rule Analysis**

80. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency’s regulatory choice or otherwise requires closer examination.

81. The Administrative Law Judge finds that the Agency has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

82. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

83. During the rulemaking hearings, and thereafter during the public comment periods, there were four principal critiques of the proposed rules: (1) the Agency’s rulemaking advisory groups did not include designated representatives of Minnesota businesses or parents; (2) Ethnic Studies are not “embedded” into the proposed standards; (3) the phrasing of the Ethnic Studies rule is inappropriate; and (4) the proposed standards are not objective or measurable. Each critique is addressed below.

84. When assessing the claimed defects, the role of the Administrative Law Judge is not to fashion requirements that the judge regards as best suited for the

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<sup>106</sup> See Minn. Stat. § 14.05, subd. 2 (2022).

regulatory purpose; but rather, to determine whether the agency made a reasonable selection among the regulatory options it had.

85. The judge's role is limited because the delegation of rulemaking authority runs from the Minnesota Legislature to MDE and *not* to the Administrative Law Judge.<sup>107</sup>

**A. Critique 1: The Rules are Defective Because the Agency's Rulemaking Advisory Groups Did Not Include Designated Representatives of Business or Parents**

86. State Representatives Bennett, DeMuth and Kresha commented that Minn. Stat. § 120B.021, subd. 2 (a), requires the Commissioner of Education to consider advice from "parents of school-age children" and "representatives of the Minnesota business community."<sup>108</sup> The legislators argue that, notwithstanding this statutory requirement, the Social Studies Standards Review Committee empaneled by MDE did not separately designate members as representing either parents or the business community.<sup>109</sup> The legislators maintain that without these designations, compliance with the statute is uncertain and the resulting rule proposals are unlawful.<sup>110</sup>

87. The Administrative Law Judge disagrees. First, the consultation requirement of Minn. Stat. § 120B.021, subd. 2, obliges the open-minded receipt of advice, not the placement of particular designees on to the Social Studies Standards Review Committee. The statute reads in part:

- (a) The commissioner must ***consider advice*** from at least the following stakeholders in developing statewide rigorous core academic standards in language arts, mathematics, science, social studies, including history, geography, economics, government and citizenship, and the arts:
  - (1) parents of school-age children and members of the public throughout the state ....

... [and]

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<sup>107</sup> See generally, *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) ("Our role when reviewing agency action is to determine whether the agency has taken a 'hard look' at the problems involved, and whether it has 'genuinely engaged in reasoned decision-making'" (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)); *Manufactured Hous. Inst.*, 347 N.W.2d at 244 ("Agencies must at times make judgments and draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as fact, and the like") (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976)).

<sup>108</sup> Comments of State Representatives Bennett, Demuth and Kresha, at 2-3 (Nov. 29, 2023).

<sup>109</sup> *Id.* at 1-2.

<sup>110</sup> *Id.*

- (5) representatives of the Minnesota business community  
....<sup>111</sup>

There is no mention of advisory committee membership in Minn. Stat. § 120B.021.

88. Moreover, in Minn. Stat. ch. 120B (2022), and other parts of our statutes, whenever the legislature intends for particular stakeholders to be represented on an advisory committee, it knows how to place these provisions into the law.<sup>112</sup> It did not do so here.<sup>113</sup>

89. Further, the record makes clear that the Commissioner of Education leveraged the public engagement processes of the Administrative Procedure Act to reach a wide range of interested persons, receive advice, and meet the requirements of Minn. Stat. § 120B.021, subd. 2.<sup>114</sup> To those ends, the Request for Comments and the Dual Notice were each sent to the Minnesota Business Partnership and the Minnesota Chamber of Commerce, as well as a series of parent and student advocacy groups.<sup>115</sup>

90. Those outreach efforts were, by any measure, quite successful. 587 comments were received in response to the Agency’s Request for Comments.<sup>116</sup> In response to serial requests for feedback from the Advisory Committee itself, more than 30,000 comments were obtained.<sup>117</sup> Following the Dual Notice, issued earlier this year, 248 comments were received.<sup>118</sup> MDE estimates that through these various public processes, it has obtained advice and feedback from more than 3,200 individuals.<sup>119</sup> For these reasons, the Commissioner met the obligations of Minn. Stat. § 120B.021, subd. 2.

## **B. Critique 2: The Standards Do Not Embed Ethnic Studies**

91. Representatives Bennett, DeMuth and Kresha go on to argue that the proposed ethnic studies standard exceeds MDE’s authority to promulgate rules because

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<sup>111</sup> Minn. Stat. § 120B.021, subd. 2 (emphasis added).

<sup>112</sup> See Minn. Stat. §§ 120B.11, subd. 3 (“Whenever possible, parents and other community residents must comprise at least two-thirds of advisory committee members”); 120B.241, subd. 3(d) (“The computer science education advisory committee shall consist of the following members ... one representative from the business community employing computer scientists or technologists”); see also Minn. Stat. §§ 15B.11, subd. 2; 15B.36, subd. 3; 17.1018, subd. 2; 18.91, subd. 2; 21.851, subd. 2; 79A.02, subd. 1 (2022).

<sup>113</sup> See Minn. Stat. § 645.16 (2022) (“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit”).

<sup>114</sup> Tr. at 21-22 (Dugan) (“As required by Minnesota statute 120B.021, subdivision 2, during the standards development process, advice from parents, teachers, members of school boards, and charter schools, faculty from post-secondary institutions, and representatives of Minnesota’s business community is critical in developing statewide rigorous academic standards.”).

<sup>115</sup> Request for Review and Approval of Additional Notice Plan, at 1-3 (Nov. 9, 2021).

<sup>116</sup> MDE’s Initial Comments, at 2.

<sup>117</sup> Ex. K-1 at 3; see also Ex. D at 54-55 (attendants at the Advisory Committee’s “Town Halls” self-identified as “community members, parents and guardians, students, and representatives of higher education”).

<sup>118</sup> MDE’s Initial Comments, at 2.

<sup>119</sup> *Id.*

the Agency has proposed a stand-alone ethnic studies regulation instead of “embedding” ethnic study requirements into each academic standard.<sup>120</sup>

92. During the 2023 regular session, the legislature amended Minn. Stat. § 120B.021, subd. 4, as follows:

The commissioner ***must embed Indigenous education*** for all students consistent with recommendations from Tribal Nations and urban Indigenous communities in Minnesota regarding the contributions of American Indian Tribes and communities in Minnesota ***into the state's academic standards during the review and revision of the required academic standards***. The recommendations to embed Indigenous education for all students includes but is not limited to American Indian experiences in Minnesota, including Tribal histories, Indigenous languages, sovereignty issues, cultures, treaty rights, governments, socioeconomic experiences, contemporary issues, and current events.<sup>121</sup>

93. The common understanding of the term “embed” is to “fix firmly in a surrounding mass,” or “cause to be an integral part of a surrounding whole.”<sup>122</sup>

94. To the extent that proposed rule Minn. R. 3501.1350, subp. 6 (2023), obliges students to “use ethnic and Indigenous studies methods and sources” and apply lessons from “stories and histories [that] have been marginalized, erased, or ignored,”<sup>123</sup> it “fixes firmly” features of indigenous education in the social studies standard.

95. Further, MDE maintains that:

The contributions of Minnesota’s American Indian tribes and communities were integrated into each strand and all standards.... This includes the interdisciplinary study of the social, political, economic, and historical perspectives of the diverse racial and ethnic groups in America.<sup>124</sup>

96. For these reasons, the proposed rules meet the requirements of Minn. Stat. § 120B.021, subd. 4.

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<sup>120</sup> Comments of State Representatives Bennett, Demuth and Kresha, at 8-9 (“The Commissioner is establishing a curious precedent that ethnic studies will be embedded with a fully separate subpart in rule, while other embedded requirements will simply be buried within the rules .... Therefore, the Commissioner is exceeding the agency’s rulemaking authority and disregarding other equally weighted statutory directives regarding what must be embedded within the standards.”).

<sup>121</sup> Minn. Stat. § 120B.021, subd. 4 (emphasis added); 2023 Minn. Laws ch. 55, art 2 § 4.

<sup>122</sup> See *The American Heritage Dictionary Online* (last accessed December 31, 2023); see also *Exhibit Supply Co. v. Ace Patents Corp.*, 315 U.S. 126, 134 (1942) (the “dictionary definition of ‘embed’ is ‘To set solidly as in a bed’ ... ‘To fix firmly in a surrounding mass of some solid material’”) (citation omitted).

<sup>123</sup> Ex. C at 4.

<sup>124</sup> Ex. D at 68.

### C. Critique 3: Ways of Knowing and Methodologies

97. A close reading of proposed rule 3501.1350, subpart 6(c), however, does reveal weaknesses in the text. The proposed rule reads:

Ways of Knowing and Methodologies: The student will use ethnic and Indigenous studies methods and sources in order to understand the roots of contemporary systems of oppression and ***apply lessons from the past in order to eliminate historical and contemporary injustices.***<sup>125</sup>

98. A plain reading of the text suggests that each student must eliminate a historical and contemporary injustice to satisfy the academic standard.

99. This expectation is unduly vague, because those who are subject to the standard cannot know what is needed to meet the requirements<sup>126</sup> and strict compliance is unreasonable and implausible.<sup>127</sup> Proposed rule 3501.1350, subpart 6(c) is defective.

#### 1. The Factual Support for Subpart 6(c)

100. Regrettably, there are very few hints in the record that lead to any other reading of the proposed regulation. MDE's discourse on the text in subpart 6(c) is a single sentence:

This standard is needed and reasonable because it supports the inclusion of ethnic studies in K–12 social studies, in line with national trends and research.<sup>128</sup>

101. The purpose of the “Rule by Rule Analysis” of the SONAR is to give the Agency an opportunity to make “an affirmative presentation of facts” in support of its regulatory choices.<sup>129</sup>

102. While obliging new students to use a wider array of sources and methods is amply supported by other parts of the rulemaking record,<sup>130</sup> there is no indication as to how students will “eliminate historical and contemporary injustices.” Proposed

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<sup>125</sup> Ex. C at 4 (emphasis added).

<sup>126</sup> See *In re Charges of Unprofessional Conduct Against N.P.*, 361 N.W.2d 386, 394 (Minn. 1985) (citations omitted); see also *State v. Kelly*, 379 N.W.2d 649, 652 (Minn. Ct. App. 1986) (the statute was not vague because a “person of ordinary intelligence would understand what conduct the statute prohibits”).

<sup>127</sup> See generally Minn. Stat. § 645.17(1) (2022) (with respect to statutes, “the legislature does not intend a result that is absurd, impossible of execution, or unreasonable”).

<sup>128</sup> Ex. D at 94; see also Ex. D at 79 (“The student will use ethnic and Indigenous studies methods and sources in order to understand the roots of contemporary systems of oppression and apply lessons from the past in order to eliminate historical and contemporary injustices.”).

<sup>129</sup> See Minn. Stat. § 14.14, subd. 2 (2022); Minn. R. 1400.2220, subp. 3 (2023); see also *Minnesota Rulemaking Manual*, Chapter 4 at 7 (Inter-Agency Rules Comm. 2023) (“Make sure to justify each requirement or change in the rules.... One common approach to writing the justification is to justify each requirement in the order that it appears in the rule.”).

<sup>130</sup> See e.g., Ex. D at 46, 49, 65, 72, 73, 79, 92.

rule 3501.1350, subpart 6(c), therefore, is not supported by an affirmative presentation of facts.

## 2. Engagement of Stakeholder Concerns on Subpart 6(c)

103. An agency is not obliged to reply to *every single comment* it receives during a rulemaking proceeding. There are finite Agency resources and strict limits on the time-periods for Agency responses to comments; realities that the Administrative Procedures Act readily acknowledges.<sup>131</sup>

104. This is particularly true today, because new technologies make it possible for state agencies to engage more citizen-stakeholders than ever before and to “increase public participation in the formulation of administrative rules.”<sup>132</sup>

105. This rulemaking is an example of the broader trend. It is now commonplace for an executive branch agency to receive tens of thousands of comments in response to a major rulemaking. While these higher levels of engagement contribute to our collective hope for better rules, the depth and breadth of such feedback was almost unheard of ten years ago.

106. With that said, the Minnesota Court of Appeals has delineated an agency’s responsibilities when responding to public comments. The court made two key holdings: (1) providing a “meaningful response” to public comments is an implicit requirement of the Administrative Procedure Act, and (2) an agency’s responses are “meaningful” if they address “specific challenges involving issues central to its decision.”<sup>133</sup>

107. As expressed by the agency, and proponents of the proposed rules, a key objective of the new standards is to prepare students for lifelong civic participation and collaboration with people from different backgrounds.<sup>134</sup>

108. Through the proposed standards, MDE has sought to convey lessons on how political institutions and shared ideals can connect diverse populations to a single

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<sup>131</sup> See Minn. Stat. § 14.001 (the intention when enacting chapter 14 was “to strike a fair balance between” increases in public accountability and public access to governmental information “and the need for efficient, economical, and effective government administration.”); Minn. R. 1400.2230 (2023).

<sup>132</sup> See Minn. Stat. § 14.001(5) (2022).

<sup>133</sup> *Minnesota Env’tl. Sci. & Econ. Review Bd. v. Minn. Pollution Control Agency*, 870 N.W.2d 97, 101–03 (Minn. Ct. App. 2015).

<sup>134</sup> Ex. C at 1 (“The student will apply civic reasoning and demonstrate civic skills for the purpose of informed and engaged lifelong civic participation”); Ex. D at 20 (Engagement in public life requires “the ability to gather and interpret information, speak and listen, engage in dialogue about differences, resolve conflicts, reach agreements, collaborate with peers, understand formal government, and advocate for change”); see also Comments of 24 Minnesota Legislators, at 1 (November 28, 2023) (a key object of the proposed standards is to “build empathic and compassionate leaders ....”); Comments of State Representative Jim Davnie (the proposed standards prepare students “to participate in democratic decision-making and full participation in civic life”); Tr. at 129 (Greene) (“a more complete and inclusive social studies curriculum will equip students with the knowledge and skills they need for success in college, their careers and civic life”).

set of communal processes for decision-making.<sup>135</sup> In this way, MDE has taken on the work that is described on our nation’s seal: *E pluribus unum*; out of many peoples, one.<sup>136</sup>

109. Accordingly, when several commentators suggested that the Agency’s word choices were unusually divisive and diminished the likelihood of collaborations between students of different backgrounds,<sup>137</sup> those critiques touched upon ideas that were central to the Agency’s regulatory purposes.

110. The critiques were also an important invitation for the Agency to reexamine the wording of its proposed rules before the close of the public comment periods.<sup>138</sup>

### 3. Potential Cures to the Drafting Defects

111. Two possible cures that the Agency could make to cure the defect in subpart 6(c), would be to revise the rule to read:

- (c) The student will use ethnic and Indigenous studies methods and sources in order to understand the roots of contemporary systems of oppression and apply lessons from the past ~~in order to~~ **that could** eliminate historical and contemporary injustices;

or alternatively,

- (c) The student will use ethnic and Indigenous studies methods and sources **to investigate how ethnic or racial groups and society address systemic oppressions through social movements, local, community, national, and global advocacy, and individual champions** ~~in order to understand the roots of contemporary systems of oppression and apply lessons from the past in order to eliminate historical and contemporary injustices.~~

112. The suggestion in Finding 111 (a), borrows the word “could” from proposed subpart 6(b), thus reprising the same approach in the Ways of Knowing and Methodologies rule that MDE used with the Resistance studies rule.<sup>139</sup>

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<sup>135</sup> See Ex. D at 83-84, 94; see also *Educating for American Democracy, Roadmap to Educating for American Democracy* at 2 (2021).

<sup>136</sup> Chap. XIV, 1 Stat. 68 (March 2, 1799).

<sup>137</sup> See e.g., Comments of Craig Frisby (“If we allow the ethnic studies standards to go forth as written, this will inevitably lead to the unleashing of a poisonous ideology that pits groups against each other, leading to untold damage to schools, children, and the integrity of education for all children”); Comments of Katherine Kersten, at 3 (November 28, 2022) (“The proposed Social Studies standards, if adopted, will ... instill a ‘resistance’ mindset in our state’s classrooms, and prep students—young, uninformed and easily manipulated—for one-sided political activism”).

<sup>138</sup> See Minn. Stat. § 14.001 (5) (2023) (among the purposes of the Administrative Procedure Act are “to increase public accountability of administrative agencies”).

<sup>139</sup> Ex. C at 4.



113. The suggestion in Finding 111 (b), borrows the phrasing used by the Indiana Academic Standards for Ethnic Studies, which MDE cites approvingly in its SONAR.<sup>140</sup>

114. These are not the only possible cures to the defect in subpart 6(c) (the Agency may have other ideas),<sup>141</sup> but the revision of the text in either of these ways is needed and reasonable and would not be a substantial change from the rule as originally proposed.

#### **D. Critique 4: The Standards are Not Objective or Measurable**

115. Several commentators argue that the proposed academic standards are too imprecise to meet the statutory requirement that all academic standards must be objective and measurable.<sup>142</sup>

116. Except for proposed subpart 6(c), discussed above, the Administrative Law Judge disagrees.

117. As the Agency explained in its initial comments: “The standards across all strands make use of ‘measurable verbs’ which districts and teachers use to create lesson plans and assessments.”<sup>143</sup>

118. This strategy is appropriate because words like “apply,” “analyze,” “explain,” “evaluate,” or “investigate,” are specific enough to be measured by local teachers and yet not so restrictive as to require a particular teaching methodology, curriculum or form of instruction.<sup>144</sup>

119. Terms such as “apply,” “analyze,” “explain,” “evaluate,” or “investigate” have independent meanings that are readily verifiable and not functions of the evaluator’s feelings, tastes, or opinions. The words are objective.

120. Except as to subpart 6(c), the Agency’s use of ‘measurable verbs’ in the proposed standards meet the requirements of Minn. Stat. § 120B.021, subd. 2(b)(1) and are needed and reasonable.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. MDE gave notice to interested persons in this matter.

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<sup>140</sup> Ex. D at 61.

<sup>141</sup> See Conclusion of Law, Number 9, *infra*.

<sup>142</sup> Compare e.g., Tr. at 32 (Swanson), 54 (Frisby), 58 (Wigfall), 79 (Montzka), 96 (Kersten) with Minn. Stat. § 120B.021, subd. 2(b)(1) (2022) (“Academic standards must ... be clear, concise, objective, measurable, and grade-level appropriate”).

<sup>143</sup> MDE’s Initial Comments, at 5.

<sup>144</sup> See Minn. Stat. §§ 120B.02, subd. 1(a), 120B.021, subd. 2(b)(2).

2. Except as noted in Findings 99 and 102, the Agency has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Administrative Law Judge concludes that the Agency has fulfilled its additional notice requirements.

4. The Agency 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).

5. The Dual Notice, the draft of the proposed rules and the SONAR complied with Minn. R. 1400.2080, subp. 5.

6. Except as to proposed rule 3501.1350, subpart 6(c), the Agency 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 and 14.50.

7. Either of the two potential remedies suggested by the Administrative Law Judge in Finding 111, would not be substantially different from the proposed rules as published in the *State Register*, as those words are used in Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

8. During the public comment process, several stakeholders urged the Agency to adopt other revisions to Part 3501. In each instance, the Agency's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

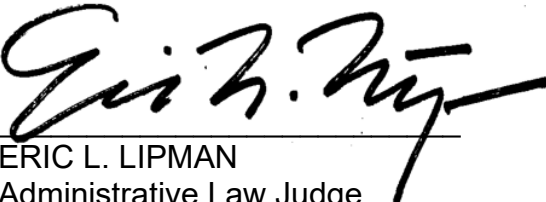
9. A Finding or Conclusion of need and reasonableness about any rule subsection does not preclude, and should not discourage, MDE from further modification of the proposed rules – provided that any rule finally adopted is based upon facts appearing in this rule hearing record.

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

### RECOMMENDATION

Except as noted in Findings 99 and 102, IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: January 5, 2024

  
ERIC L. LIPMAN  
Administrative Law Judge

## NOTICE

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

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Agency of actions that will correct the defects, and the Agency may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected.

However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Agency may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. If the Agency makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Agency is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Agency's submission.

If the Agency elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Agency makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

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