STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Possible Amendments to Rules Governing Unit and Program Approval, Minnesota Rules Chapter 8705

REPORT OF THE CHIEF ADMINISTRATIVE LAW JUDGE

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2020) and Minn. R. 1400.2240, subp. 4 (2019). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge’s findings that a proposed agency rule is defective and should not be approved.

This rulemaking concerns the proposed rules of the Professional Educator Licensing and Standards Board (Board) governing unit and program approval, Minnesota Rules Chapter 8705.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby concurs with the disapproval of proposed Rule Part 8705.1010, subparts 5(B) and 5(C), and approves in all respects the findings in the Report of the Administrative Law Judge dated October 28, 2020.

The changes or actions necessary for approval of the disapproved rules are identified in the Administrative Law Judge’s Report. If the Board elects not to correct the defects associated with the proposed rules, the Board must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2020).

If the Board chooses to make changes to correct the defects, it shall submit to the Chief Administrative Law Judge a copy of the rules as originally published in the State Register, the order adopting the rules, and the rule showing the Board’s changes. The Chief Administrative Law Judge will then make a determination as to whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: November 5, 2020

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JENNY STARR
Chief Administrative Law Judge
In the Matter of the Possible Amendments to Rules Governing Unit and Program Approval, Minnesota Rules Chapter 8705

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on September 1, 2020. Because of the Peacetime Emergency, and the need to safeguard public health against transmission of the COVID-19 virus, the public hearing was held by way of an interactive video conference on the WebEx platform.

As detailed below, the Professional Educator Licensing and Standards Board (PELSB or the Board) proposes to amend its administrative rules relating to approval of units and programs that prepare students for licensure as teachers and teacher-educators.

The public hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act. The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit 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 general public an opportunity to review, discuss and critique the proposed rules.

As described more fully below, the agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.

**SUMMARY OF CONCLUSIONS**

With the exception of Minn. R. 8705.1010, subparts 5(B) and 5(C), the Board has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are needed and reasonable.
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. During a May Special Session in 2017, the state legislature enacted a series of reforms to the process of licensing teachers in Minnesota. Among the changes, the legislature established a tiered licensure system with several different pathways by which individuals could obtain licensure.¹

2. The 2017 legislature also repealed the requirement that “alternative preparation providers” partner with an institution of higher education in order to prepare candidates for licensure. Moreover, the legislature directed PELSB to adopt rules to approve all types of teacher preparation providers and programs.²

3. In order to obtain a Tier 4 license – the highest tier of licensure – a candidate must complete an approved teacher preparation program.³

4. As of January 1, 2020, there were 35 approved teacher preparation providers in Minnesota. These providers offer over 800 programs that lead to teacher licensure and prepare thousands of candidates for later practice as teachers. Additionally, there are three approved community college providers that offer programs on a subset of licensure standards and meet the requirements of a subset of unit rules.⁴

5. A “unit” or a “teacher preparation program provider” is an entity that oversees and delivers a teacher preparation program.⁵

II. **Rulemaking Authority**

6. The Board cites two statutes as sources of its authority to adopt the proposed rules: Minn. Stat. §§ 122A.09, subd. 9; .092, subsds. 1, 4 (2020).⁶

7. Minn. Stat. § 122A.09, subd. 9, grants the Board the authority to:


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¹ See, e.g., 2017 Minn. Laws 1st Spec. Sess. ch. 5, art. 3, § 3.


³ Minn. Stat. § 122A.06, subd. 8 (2020).

⁴ Ex. D at 9.

⁵ Minn. Stat. § 122A.184, subd. 1(1) (2020).

⁷ Minn. Stat. § 122A.09, subd. 9.

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8. Minn. Stat. § 122A.092, subd. 1, provides that:

The board must adopt rules to approve teacher preparation programs, including alternative teacher preparation programs under section 122A.2451, nonconventional programs, and Montessori teacher training programs.8

9. Minn. Stat. § 122A.092, subd. 4, directs that:

The board must adopt rules requiring teacher educators to work directly with elementary or secondary school teachers in elementary or secondary schools to obtain periodic exposure to the elementary and secondary teaching environments.9

10. It is important note in this context that the legislature also enacted provisions which reiterate and re-emphasize the role it plays in setting education policy, including policy on teacher licensure. The statute included reminders that:

(a) Administrative rules that conflict with statutory provisions are void;
(b) the Board must only adopt rules when authorized to do so; and
(c) the Board should include assessments of the impact its proposals on demand and supply for teachers in its Statements of Need and Reasonableness under section 14.131.10

11. The Administrative Law Judge concludes that the Board has the statutory authority to adopt rules governing approval of units and programs preparing students for licensure as teachers.11

III. Procedural Requirements of Chapter 14

A. Applications, Meetings, Publications and Mailings

12. By way of an Order dated January 10, 2019, the undersigned Administrative Law Judge approved the Board’s Request for Comments and Additional Notice Plan.12

13. On February 11, 2019, the Board published in the State Register a Request for Comments. The Board sought comments on possible methods of streamlining the “teacher preparation provider and program requirements, such that all provider types and program types are held to the same requirements”; establishing “a

8 Minn. Stat. § 122A.092, subd. 1.
9 Minn. Stat. § 122A.092, subd. 4.
11 See Minn. Stat. §§ 122A.092, subs. 1, 9, 492, subd. 4 (2020).
12 Order on Review of Additional Notice Plan and Request for Comments, OAH 8-9021-35856 (January 10, 2019).
clear discretionary variance process”; and updating the unit and program approval processes.13

14. On May 27, 2020, the Board requested approval of its Notice of Hearing.14

15. By way of an Order dated June 1, 2020, the undersigned Administrative Law Judge approved the Board’s Notice of Hearing.15

16. The Notice of Hearing, published in the July 6, 2020 State Register, set the hearing date as September 1, 2020.16

17. On July 6, 2020, the Board mailed a copy of the Notice of Hearing to all persons and associations who had registered their names with the Board for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.17

18. On July 6, 2020, the Board mailed a copy of the Notice of Hearing and the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the licensing and accreditation of teachers.18

19. On July 6, 2020, the Board mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131, .23 (2020).19

20. The Notice of Hearing identified the date and process for the rulemaking hearing in this matter.20

21. The Notice of Hearing was posted to the Board’s website and the Board has maintained these materials continuously since they were posted.21

22. Board staff participated in approximately 28 meetings with stakeholder groups, as detailed on SONAR pages 11 through 13, regarding this rulemaking and possible reforms to the unit and program approval process.22

23. In advance of the hearing on September 1, 2020, the Board filed copies of the documents required by Minn. R. 1400.2220 (2019).23

13 43 State Register 945, 951 (February 11, 2019).
14 Order on Review of Notice of Hearing, OAH 8-9021-35856 (June 1, 2019).
15 Id.
16 45 State Register 1, 5 (July 6, 2020).
17 Exs. G-1, H.
18 Ex. K-3.
19 Ex. I.
20 Ex. E-2.
21 Ex. E-1.
B. Notice Practice

1. Notice to the Board’s Rulemaking List

24. Minn. Stat. § 14.23 and Minn. R. 1400.2080, subp. 6 (2019), require the Board to mail the Notice of Hearing “at least 33 days before … the start of the hearing” to “all persons on its [rulemaking] list ….”

25. The Administrative Law Judge concludes that the Board fulfilled its responsibilities under Minn. Stat. § 14.23 and Minn. R. 1400.2080, subp. 6.

2. Additional Notice Requirements

26. Minn. Stat. §§ 14.131, .23, requires 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.

27. The Administrative Law Judge concludes that the Board fulfilled its responsibilities to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intention to adopt rules on the unit and program approval process.

3. Notice to Legislators

28. Minn. Stat. § 14.116 (2020) requires the agency to send a copy of the Notice of Hearing 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.

29. The Administrative Law Judge concludes that the Board fulfilled its responsibilities, to notify designated legislators of the rulemaking hearing “at least 33 days before … the start of the hearing.”

4. Notice to the Legislative Reference Library

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.
31. The Administrative Law Judge concludes that the Board fulfilled its responsibilities, to mail the Dual Notice “at least 33 days before ... the start of the hearing.”

5. Notice to Commissioner of Agriculture

32. Minn. Stat. § 14.111 (2020) 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 Board was not required to notify the Commissioner of Agriculture.

C. Statutory Requirements for the SONAR

34. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR.

35. 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;

31 Ex. I.
33 Ex. D at 24.
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;

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,

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.35

Additionally, Minn. Stat. § 122A.09, subd. 9(e) requires PELSB to include in the SONAR accompanying its rulemaking, an assessment of “a proposed rule's probable effect on teacher supply and demand ....”36

1. The Board’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.

The Board asserts that teacher candidates, teacher preparation providers, school districts and Minnesota students will all be impacted by the proposed rules. The Board maintains that changes in the accreditation standards, pathways and methods of obtaining program approval, and the requirements for clinical experiences, will result in both new costs and benefits upon the impacted persons.37

(b) The probable costs to the Board and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The Board does not project that implementation and enforcement of the proposed rules will result in additional costs to its sister agencies. However, it maintains that the proposed changes in its accreditation and approval processes will have both positive and negative impacts to state revenue. The Board states that as it transitioning to a new set of methods there will be in an increase in state expenses, however, given the overall lengthening of re-accreditation cycles, and the simplification of the re-accreditation process, the Board projects that the proposed rules will reduced required expenditures in the longer term.38

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35 Id.
36 Minn. Stat. § 122A.09, subd. 9(e).
38 Id. at 16-17.
(c) The determination of whether there are less costly methods or
less intrusive methods for achieving the purpose of the proposed rule.

39. The Board maintains that while program accreditation from certain
national teacher program accreditation organizations is permitted under Minnesota law,
the costs of obtaining such accreditation is “significantly more expensive” than approval
under both the current and proposed rules. It also notes that many teacher preparation
programs in Minnesota do not have approvals from the accreditation organizations that
operate nationwide. From these facts, the Board concludes that there are not less costly
or less intrusive methods for achieving the purposes of the proposed rule.39

(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. The Board considered accepting one or more accreditations from among
the national teacher program accreditation organizations, in lieu of a set of Minnesota
standards, but rejected this approach. The Board expressed concern that such a
system would not address Minnesota-specific requirements – “such as training in
reading and the state’s student teaching requirements” – and that accreditations from
different organizations could represent very different levels of quality.40

(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. The Board maintains that the probable costs of the proposed rule, all of
which would fall upon providers of teacher preparation programs, would be lower in
some instances, when compared to the current rule, and higher in some other
instances. The Board asserts that the submission of narrative reports that are both
shorter, and filed less often than under the current rule, will result in significant cost
savings. The Board does acknowledge, however, that requiring all providers to
undertake more “triad meetings” (conferences that include the candidate for licensure,
his or her supervisor, and a cooperating teacher) than provided in the current rule, will
result in some programs incurring more costs.41

39 Id. at 17.
40 Id. at 17-18.
41 Id. at 18-19; see generally Minn. R. 8705.2100, subp. 2(D)(4)(d) (2019).
(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.

42. The Board argues that without the regulatory reforms included in the proposed rules: (a) Minnesota will have greater difficulty in retaining quality teachers in the workforce; (b) those teachers will be under-prepared to make improvements in the future; (c) alternative program providers will suffer unnecessary added costs; and (d) regulatory burdens will present unneeded barriers to first generation college students.42

(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.

43. The Board notes that while federal regulations require the collection of submission of assessment data relating to “graduates” of particular teacher preparation programs, the proposed state rule would also obtain such data on “program completers” – a term that includes both graduates and those who complete a licensure-related program that does not result in a degree.43

44. The Board asserts that the different and broader range of data collection is needed and reasonable, so as to maintain the quality of both degree-conferring and non-degree-conferring teacher preparation programs.44

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

45. The Board acknowledges the concerns that meeting assessment and accountability requirements from both state and federal agencies could be burdensome. In response, the Board notes that whenever possible, the proposed rules offer flexible methods to meet the state requirements and “to allow the provider to make their own alignment” with the standards.45

2. Assessment of the Impacts Upon Teacher Supply and Demand

46. As noted above, Minn. Stat. § 122A.09, subd. 9(e) requires the Board to include in the SONAR accompanying its rulemaking, an assessment of “a proposed rule’s probable effect on teacher supply and demand ....”46

42 Ex. D at 19-20.
43 Id. at 20-21.
44 Id.
45 Id. at 21.
46 Minn. Stat. § 122A.09, subd. 9(e).
47. In the Board’s view, the proposed rules are aimed, in part, at reducing regulatory burdens and boosting supplies of teachers from traditionally under-represented communities and those who are able to serve in areas where there are teacher shortages. Further, by eliminating restrictions on the types of bachelor’s degree a teacher candidate must have, and work rules on teachers with a Tier 2 license, PELSB hopes to reduce the strains on the state’s hardest hit teacher shortage areas.47

48. Additionally, revisions to “Standard 16” require that all providers implement methods to effectively recruit and retain teachers to serve in teacher shortage areas.48

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

49. As required by Minn. Stat. § 14.131, the Commissioner of Minnesota Management and Budget (MMB) responded to a request from the Board – dated April 20, 2020 – to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Board’s proposed rules and, in a Memorandum dated June 19, 2020, concluded that the proposed rules “are not anticipated to cause a fiscal impact on local units of government.”49

4. Performance-Based Regulation

50. 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 the Board in meeting those goals.50

51. The Board responds that it has taken seriously the legislature’s dual mandate to emphasize superior achievement and regulatory flexibility in reaching these higher performance levels. It points to various provisions within proposed rule 8705.1010 that emphasize continuing reassessment of program efficacy and the requirement that program elements are supported by data that demonstrates that the provider’s approaches are effective. Additionally, the Board asserts that granting providers the possibility to obtain accreditation either by meeting the proposed standards, or obtaining accreditation from one of several national program accreditation organizations, demonstrates its commitment to flexibility for regulated parties.51

47 Ex. D at 23.
48 Id.
51 Ex. D at 22.
5. Summary

52. The Administrative Law Judge finds that the Board has met the requirements set forth in Minn. Stat. §§ 14.131, 122A.09, subd. 9(e) for assessing the impacts of the proposed rules, including the potential regulatory impacts on regulated parties, accredited teachers, small businesses and local units of government.52

53. The Administrative Law Judge finds that the Board has met its obligation to complete the nine assessments within the SONAR.53

D. Cost to Small Businesses and Cities under Minn. Stat. § 14.127 (2020)

54. Minn. Stat. § 14.127, requires the Board to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $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.” 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.54

55. PELSB 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.55

56. The Administrative Law Judge finds that the Board has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.56

E. Adoption or Amendment of Local Ordinances

57. Under Minn. Stat. § 14.128 (2020), 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 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.57

58. The Board concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Board’s

52 Id. at 14-25.
53 Id.
54 Minn. Stat. § 14.127, subds. 1, 2.
55 Ex. D at 27.
56 Id.
57 Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subs. 2, 3.
proposed rule should not require local governments to adopt or amend those more
general ordinances and regulations.58

59. The Administrative Law Judge finds that PELSB has made the
determination required by Minn. Stat. § 14.128 and approves that determination.59

F. Public Hearing Practice

60. The agency panel at the public hearing included Alex Liuzzi (PELSB
Executive Director), Michelle H. Vaught (PELSB Rulemaking Specialist), Lucy Payne
(PELSB Board Member) and Michelle Sandler (PELSB Education Specialist).60

61. Approximately 93 people attended the hearing. The proceedings
continued until all interested persons, groups or associations had an opportunity to be
heard concerning the proposed rules. Twelve members of the public made statements
or asked questions during the hearing.61

62. After the close of the hearing, the Administrative Law Judge kept the
rulemaking record open for another 20 calendar days – until Monday, September 21,
2020 – to permit interested persons and the Board to submit written comments.
Following the initial comment period, the hearing record was open an additional five
business days so as to permit interested parties and the Board an opportunity to reply to
earlier-submitted comments.62 The hearing record closed on Monday, September 28,
2020.

IV. Rulemaking Legal Standards

63. 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 delegation of authority to another entity;
and whether the proposed language meets the definition of a rule.63

64. Under Minn. Stat. § 14.14, subd. 2 (2020) and Minn. R. 1400.2100 (2019),
the agency must establish the need for, and reasonableness of, a proposed rule by an
affirmative presentation of facts.64

65. 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.”65

58 Ex. D at 26.
59 Id.
60 Hearing Recording (September 1, 2020) (Hearing Recording).
61 WebEx Hearing Roster.
62 See Minn. Stat. § 14.15, subd. 1.
63 See Minn. R. 1400.2100.
64 Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.
66. 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.”

67. When establishing the need and reasonableness of a proposed rule, the agency may rely upon materials included the hearing record.

68. When establishing the need and reasonableness of a proposed rule, the agency may rely upon “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.

69. When establishing the need and reasonableness of a proposed rule, the agency may rely upon the agency’s interpretation of related statutes.

70. 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.

71. Accordingly, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.

72. The Board and its staff have been making a series of revisions to the proposed rules throughout the rulemaking process. The Board’s first draft of the proposed rules predated the Board’s initial Request for Comments in this matter and was made available to the public for its review. Still later, between February of 2019 and April of 2020, six other drafts followed in succession, approximately every two or three months apart.

73. On August 21, 2018, one week in advance of the rulemaking hearing, the Administrative Law Judge wrote to the Board and requested that it consider a series of revisions to then-Draft 7 of the proposed rules. The changes were suggested so as to make the Board’s intentions clear.

65 Manufactured Hous. Inst., 347 N.W.2d at 244.
66 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).
67 See Manufactured Housing Institute v. Pettersen, 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).
68 Compare generally, United States v. Gould, 536 F.2d 216, 220 (8th Cir. 1976).
69 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.
70 Peterson v. Minn. Dep’t of Labor & Indus., 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).
71 Minnesota Chamber of Commerce, 469 N.W.2d at 103.
74. On August 28, 2020, a few days before the public hearing, the Board approved a series of “page and line” revisions for inclusion in the proposed rules.74

75. At the request of the Administrative Law Judge, the Board agreed to work with the staff of the Revisor’s office to assemble this collection of revisions into a new draft. On or around September 9, 2020, while the initial comment period was underway, the Board released an “unofficial Draft 8” of the proposed rules. The unofficial draft placed the page and line amendments approved by the Board in late August, into context and as a separate, free-standing document with its proposals.75

76. Because both the Board and the Administrative Law Judge suggested changes to the proposed rules after the rule text was originally published in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed.76

77. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2 (2020). 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”;

   (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.”77

78. 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

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74 Ex. K-5.
75 Revisor R-4576A (September 9, 2020) (Revisor R-4576A or unofficial Draft 8).
76 Minn. Stat. § 14.05, subd. 2(a), (c) (2020).
77 Minn. Stat. § 14.05, subd. 2.
V. Rule by Rule Analysis

79. 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 necessarily 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 Board’s regulatory choice or otherwise requires closer examination.79

80. The Administrative Law Judge finds that the Board 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.80

81. 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.81

82. The Administrative Law Judge has closely reviewed the text and revisions that have been incorporated into the unofficial Draft 8, dated September 9, 2020.82

83. In this context it is important to emphasize that the role of the Administrative Law Judge during a legal review of rules is not to fashion requirements that the judge regards as best suited for the regulatory purpose. Instead, the judge’s role is to determine whether the Board has made a reasonable selection among the regulatory options it had. The delegation of rulemaking authority is from the Minnesota Legislature to the Board; and not to the judge.83

84. The Administrative Law Judge makes two key findings with respect to Revisor R-4576A (unofficial Draft 8):

(a) the revisions to the text in Revisor R-4576A are not substantially different (as those terms are used in Minn. Stat. § 14.05, subd. 2) from the text of the proposed rules as

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78 Id.
79 See generally id. at 2(a).
80 Ex D; PELSB’s Pre-Hearing, Initial and Rebuttal Comments.
81 See id.
82 Revisor R-4576A.
83 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)).
originally published in the July 6, 2020 issue of the *State Register*; and

(b) except as Minn. R. 8705.1010, subparts 5(B) and 5(C), each clarification and refinement to the proposed text in Revisor R-4576A is needed and reasonable.\(^84\)

85. The principal critiques from opponents of the proposed rules relate to whether the Board has exceeded its statutory authority in promulgating the proposed rules and whether PELSB permitted its stakeholders enough time before the rulemaking hearing to review its most-recent changes to the rules. Each of these questions is addressed, in turn, below.\(^85\)

A. **Part 8705.0200, subp. 4(d) – Culturally Responsive Teaching**

86. In proposed Part 8705.1010, units and their school partners have certain obligations to provide and promote “culturally responsive teaching” – a term of art that is specifically defined at Part 8705.0200, subp. 4(d). For example, units are obliged to ensure that each program is able to implement culturally responsive teaching and that they maintain processes for identifying teachers who model those practices.\(^86\)

87. Some commentators maintain that the Board’s rules which define “culturally responsive teaching,” and oblige units and school partners to implement these practices, violates Minn. Stat. § 120B.30, subd. 1(q) (2020).\(^87\)

88. As these commentators reason the Board may not build program requirements around “culturally responsive teaching” that are different from the legislature’s definition (in Minn. Stat. § 120B.30, subd. 1(q)) of “cultural competence.” To do so, the critics argue, violates state law.\(^88\)

89. The Administrative Law Judge disagrees. The only appearance of the term “cultural competence” in Minnesota Statutes is section 122A.184, subdivision 3 (2020). This provision requires a teacher who holds either a Tier 3 or Tier 4 license to demonstrate, among other items, his or her “cultural competence in accordance with section 120B.30, subdivision 1, paragraph (q)” as a “condition of license renewal ….\(^89\)

90. Minn. Stat. § 122A.184, subd. 3 does not impose any restrictions upon approval of units or programs for teacher educators. Thus, the proposed requirements in Part 8705.1010 do not reach, or conflict with, the provisions of Minn. Stat. § 122A.184, subd. 3.\(^90\)

\(^{84}\) See Revisor R-4576A.
\(^{85}\) See generally Post-hearing Comments.
\(^{86}\) See Proposed Minn. R. 8705.1010, subp. 1(B)(5), 3(A)(4)(b).
\(^{87}\) Compare e.g., Comments of Senator Eric Pratt at 2 (August 31, 2020) with Draft 8 at 2, 8.
\(^{88}\) See, e.g., Comments of State Representative Sondra Erickson, at 2 (September 17, 2020).
\(^{89}\) Minn. Stat. § 122A.184, subd. 3.
\(^{90}\) See id.
91. It is true that PELSB did not carry forward the legislature’s definition of “cultural competence” from teacher license renewals and apply it in the context of unit and program approvals; but it is not unlawful for PELSB to make this choice. The delegation of rulemaking authority to the Board under Minn. Stat. § 122A.09, subd. 9 is broad enough to authorize a separate set of requirements for unit and program approvals than the legislature set for license renewals.91

92. It may be incautious legislative relations for PELSB to take such a step, but that is a matter for the oversight committees of Minnesota House and Senate. The wisdom of having a separate set of cultural competency requirements for unit and program approvals is distinct from the Board’s authority to promulgate such a rule. The Board’s authority to make such a choice is the focus here.92

93. Further, if the legislature prefers that the definition in Minn. Stat. § 120B.30, subd. 1(q) apply to both license renewals, and unit and program approvals, its remedies are simple enough: It could either repeal or revise Part 8705.1010 to include the hoped-for definition or pass a statute designating the settings in which its definition of cultural competence must be applied.93

B. Part 8705.1010 – Requirement of a Bachelor’s Degree

94. In Part 8705.1010, the Board proposes to permit the accreditation of field-specific methods of instruction by teacher educators, when the highest degree held by those candidates is a bachelor’s degree. PELSB would permit such accreditation in three instances; when the teacher educator has: (a) at least five years of experience as a teacher of record and has completed a state-approved teacher preparation program; (b) at least five years of relevant professional work experience, and will serve as a teacher educator of career education, technical education, visual arts or performing arts; or (c) obtained a discretionary variance from the Board.94

95. Under proposed rules, the Board is authorized to grant a discretionary variance from one or more of the requirements of Chapter 8705 when the applicant demonstrates:

91 Minn. Stat. § 122A.09, subd. 9.
92 Minn. Stat. § 14.50 (2020) (“it shall also be the duty of the judge to make a report on each proposed agency action in which the administrative law judge functioned in an official capacity, stating findings of fact and conclusions and recommendations, taking notice of the degree to which the agency has (i) documented its statutory authority to take the proposed action ....
); Manufactured Hous. Inst., at 244 (each tribunal that reviews agency rulemaking must guard against substituting “its judgment for that of the agency”).
93 See Minn. Stat. § 14.05, subd. 1 (2020) (“Each agency shall adopt, amend, suspend, or repeal its rules in accordance with the procedures specified in sections 14.001 to 14.69, and only pursuant to authority delegated by law and in full compliance with its duties and obligations. If a law authorizing rules is repealed, the rules adopted pursuant to that law are automatically repealed on the effective date of the law's repeal unless there is another law authorizing the rules.”).
94 Revisor R-4576A at 16-18.
(a) why “adherence to the particular rule requirement would impose an undue burden or hardship;” and

(b) that “alternative practices or measures [are] in place to protect the rights and learning opportunities of candidates and students and the rationale for any alternative practices or measures.”

96. As the Board explains in its SONAR, with respect to the minimum requirements of Standards 23 and 24:

[It] is worth noting that all units can seek a discretionary variance if and when they identify a teacher educator that does not meet these established qualifications, but the unit believes the teacher educator meets the intent of the requirement in a manner other than as set forth by this standard....

The qualifications are more expansive than current rule and there continues to be opportunities to evidence non-traditional criteria through the discretionary variance process.

97. Senator Carla Nelson, and others, maintain that restrictions found in the proposed Part 8705.1010, Standards 23 and 24, directly conflict with the more permissive qualification requirements in Minn. Stat. § 122A.2451, subd. 6 (2020).

98. Minn. Stat. § 122A.2451, subd. 6 provides that:

(a) The board must permit alternative teacher preparation providers and teacher candidates to demonstrate pedagogy and content standard proficiency in school-based programs and through other nontraditional means. Nontraditional means may include previous work experiences, teaching experiences, educator evaluations, industry-recognized certifications, and other essentially equivalent demonstrations.

(b) The board must use nontraditional criteria to determine qualifications of program instructors, including permitting instructors to hold a baccalaureate degree only.

99. As Senator Nelson summarized in her post-hearing comments:

Standard 23 of the proposed rules conflicts with [the statute] by requiring teacher educators to have a bachelor’s degree plus at least five years of teaching experience, as well as national board certification or 125 hours of

95 Proposed Minn. R. 8705.2600, subp. 5(B), (C); Revisor R-4576A at 49.
96 Ex. D at 61; see also Ex. D at 62.
97 Comments of Senator Carla Nelson at 1 (September 16, 2020); see also Comments of Martha Moriarty (September 18, 2020); Comments of Senator Eric Pratt (August 31, 2020); Comments of State Representative Sondra Erickson (September 17, 2020).
98 Minn. Stat. § 122A.2451, subd. 6 (emphasis added).
instructional leadership. This proposed rule conflicts with law and runs counter to the goal of allowing teacher instructors to qualify based on nontraditional criteria—like being a proven, experienced, high-quality, effective teacher or having relevant career experience.\textsuperscript{99}

100. The Administrative Law Judge agrees. To the extent that proposed Part 8705.1010 requires those who hold a bachelor’s degree, but have not completed a state-approved teacher preparation program, to pursue accreditation through a variance process, the rule is defective.\textsuperscript{100}

101. The appropriate standard under Minn. Stat. § 122A.2451, subd. 6(a) is a fair opportunity for teacher candidates to demonstrate the “essential equivalence” of their background and experience on “pedagogy and content standard proficiency….”\textsuperscript{101}

102. The variance process, as now described in Part 8705.2600, subpart 5, cannot serve this role. It employs different and more restrictive requirements than those contemplated by Minn. Stat. § 122A.2451, subd. 6(a). First, it forestalls direct application to the Board by teacher candidates, by limiting access to the variance process to “providers.” Second, the proposed rules oblige those applying for a variance to demonstrate both an “undue burden or hardship” from application of the proposed rule and how “the rights and learning opportunities” of the candidate’s students will be protected if a variance is granted.\textsuperscript{102}

103. These are different, narrower and more demanding standards than those guaranteed by Minn. Stat. § 122A.2451, subd. 6(a). (They are also more demanding than variance standards in the Minnesota Administrative Procedure Act, which requires a showing of “hardship or injustice” and not an “undue hardship.”)\textsuperscript{103}

104. To the extent that the proposed rules require teacher candidates with a bachelor’s degree to choose between completing a state-approved teacher preparation program, or a rigorous variance process, the rule contravenes Minn. Stat. § 122A.2451, subd. 6(a).\textsuperscript{104}

105. Proposed rule Part 8705.1010, subparts 5(B) and 5(C) are disapproved.\textsuperscript{105}

\textsuperscript{99} Comments of Senator Carla Nelson at 1.

\textsuperscript{100} See Minn. Stat. § 122A.092, subd. 9(d) (“If a rule adopted by the board is in conflict with a session law or statute, the law or statute prevails. Terms adopted in rule must be clearly defined and must not be construed to conflict with terms adopted in statute or session law.”); Minn. R. 1400.2100 (D) (“A rule must be disapproved by the judge or chief judge if the rule … exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law.”).

\textsuperscript{101} Minn. Stat. § 122A.2451, subd. 6(a).

\textsuperscript{102} Compare Minn. Stat. § 122A.2451, subd. 6(a) with Revisor R-4576A at 48-49.

\textsuperscript{103} Id. See also Minn. Stat. § 14.055, subd 4 (2020).

\textsuperscript{104} Minn. Stat. §§ 122A.092, subd. 9(d), 122A.2451, subd. 6 see also Comments of Mikisha Nation at 2 (September 21, 2020).

\textsuperscript{105} Minn. R. 1400.2100 (D).
106. One possible cure to the defect is to permit alternative teacher preparation providers and teacher candidates an opportunity to demonstrate the “essential equivalence” of their background and experience on “pedagogy and content standard proficiency” as part of conferring approvals or licensure. A second possible cure is to broaden the variance process to permit such a showing, albeit with the assessment standards set forth in Minn. Stat. § 122A.2451, subd. 6(a).

107. Either of these revisions would be needed and reasonable and would not be a substantial change from the rule as originally proposed.

C. Part 8705.2000 – Program Review Panel Membership

108. The current version of Minn. R. 8705.2000 obliges the Board to establish a “program review panel (PRP) as a standing committee of the board” for the purpose of assisting the Board with “program review and approval processes.”

109. The current rule provides:

PRP membership shall include representation from organizations including, but not limited to, the Professional Educator Licensing and Standards Board, Minnesota Association of Colleges for Teacher Education, the Minnesota Department of Education, and Education Minnesota.

110. In this rulemaking, the Board proposes to revise Part 8705.2000 so as to strike the Minnesota Department of Education from the list of organizations that have permanent representation on the PRP and add a requirement to include “varying types of teacher preparation and teacher advocacy organizations.”

111. A number of commentators asserted that PELSB’s proposal to carry forward, without change, representation by Minnesota Association of Colleges for Teacher Education and Education Minnesota, is unreasonable.

112. These commentators maintain that because both of these groups opposed earlier proposals to establish alternative pathways to program accreditation and teacher licensure, requiring program review panels to include their members will result in “institutional bias and conflicts of interest.”

113. The Administrative Law Judge disagrees. The Board has established by an affirmative presentation of facts how service by members of the Minnesota Association of Colleges for Teacher Education and Education Minnesota could

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106 See generally Minn. Stat. § 14.05, subd. 2.
107 Id.
109 Id.
110 Revisor R-4576A at 32.
111 See, e.g., Hearing Recording (Banovetz); Hearing Recording (Leonard); Hearing Recording (Crosson).
112 See, e.g., Hearing Recording (Haugen); Hearing Recording (Nation); Hearing Recording (Crosson).
contribute to the functioning and deliberations of the PRP.\textsuperscript{113} Under such circumstances, declining the invitation to revise the existing regulation so as to excise these groups from PRP membership, is not unlawful.

\textbf{D. Issuance of a New Draft of Rule Revisions Shortly Before the Rulemaking Hearing}

114. As noted above, on August 28, 2020, a few days before the public hearing in this matter, the Board approved a series of “page and line” revisions to the proposed rules.\textsuperscript{114}

115. Some commentators objected to the approval and release of the revised text on the eve of the public hearing. The commentators maintain that the practice was unreasonable and unfair, because interested stakeholders did not have sufficient time to review the new text in advance of the rulemaking hearing.\textsuperscript{115}

116. While acknowledging the concerns of these commentators, the Administrative Law Judge disagrees that the Board’s release of the “page and line” revisions was improper or unreasonable. Minnesota’s rulemaking process involves an iterative discussion between executive branch agencies and the public at several different intervals in time: at the Request for Comments, the Notice of Hearing, the rulemaking hearing, post-Hearing comments, and thereafter.\textsuperscript{116}

117. In fact, in our system of self-government, the lines of communication between agencies and the citizens that they serve are always open to good ideas and calls for reform.\textsuperscript{117}

118. In this particular case, while it was regrettable that there was only one working day between the release of the Board’s latest round of revisions, and the public hearing, this short window was not overly prejudicial to the public. This is because after the rulemaking hearing, there was a 20 calendar-day comment period and a five working-day rebuttal period, in which interested persons could submit written comments on those revisions. Commentators could, and did, submit detailed and thoughtful comments on the Board’s latest drafting.\textsuperscript{118}

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

\textsuperscript{113} See, e.g., PELSB Pre-Hearing Comments at 29 (September 15, 2020); Hearing Recording (Bonstetter); Hearing Recording (Snyder); see also Minn. Stat. § 14.14, subd. 2.
\textsuperscript{114} Ex. K-5.
\textsuperscript{115} See, e.g., Comments of Troy Haugen (September 20, 2020); Comments of Paul Spies (September 21, 2020).
\textsuperscript{116} See Minn. Stat. §§ 14.101, subd. 1, .14, subsds. 1a, 2a, .05, subd. 6, .15, subd. 1 (2020).
\textsuperscript{117} See, e.g., Minn. Stat. §§ 14.001(5), .05, subd. 6, .09, 14.091, .14 subd. 1a (2020).
\textsuperscript{118} See Hearing Recording (September 1, 2020); Post-Hearing Comments; Post-Hearing Rebuttal.
CONCLUSIONS

1. The Board gave notice to interested persons in this matter.

2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 (2020) and all other procedural requirements of law or rule.

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

4. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; .15, subd. 3; .50 (i), (ii) (2020).

5. The Notice of Hearing, the proposed rules and SONAR complied with Minn. R. 1400.2080, subp. 5 (2019).

6. Except as to Findings 100 to 105, the Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 ,.50 (2020).

7. The modifications to the proposed rules suggested by the Board after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2; .15, subd. 3.

8. The modifications to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2; .15, subd. 3.

9. As part of the public comment process, a number of stakeholders urged the Board to adopt other revisions to Chapter 8705. In each instance, PELSB's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

10. A finding or conclusion of need and reasonableness with regard to any particular rule does not preclude, and should not discourage, the Board from further modification of the proposed rules – provided that the rule finally adopted is not “substantially different” (under Minn. Stat. § 14.05, subd. 2) and is based upon facts in the rulemaking record.

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

IT IS HEREBY RECOMMENDED that, with the exception of Part 8705.1010, subparts 5(B) and 5(C), the proposed amended rules be adopted.

Dated: October 28, 2020

ERIC L. LIPMAN
Administrative Law Judge
NOTICE

The Board 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 Board makes changes in 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 Board of actions that will correct the defects, and the Board 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 Board 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 Board 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 Board is not required to wait for the Commission’s advice for more than 60 days after the Commission has received the Board’s submission.

If the Board 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 Board 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 Board 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 the Board, and the Board will notify those persons who requested to be informed of their filing.