OAH 65-9050-36037
Revisor R-4546

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to the Rules Governing School Administrators, Minn. R. Part 3512	**ORDER OF CHIEF ADMINISTRATIVE LAW JUDGE ON REVIEW OF RULES**

The Minnesota Board of School Administrators sought review and approval of the above-entitled rules pursuant to Minn. Stat. § 14.26 (2018).

On December 12, 2019, the Board filed a request for review and approval of its proposed rules pursuant to Minn. Stat. § 14.26 and Minn. R. 1400.2310 (2019). The Board supplemented its filings on December 17 and 18, 2019.

Administrative Law Judge Ann O'Reilly issued an Order on Review of Rules Without a Hearing on January 2, 2020. Based upon a review of the Order, written submissions and filings, Minnesota Statutes and Rules, and the rulemaking record, the Chief Administrative Law Judge issues the following:

ORDER

The findings of the Administrative Law Judge in the January 2, 2020 Order on Review of Rules are affirmed. The following rule parts are **DISAPPROVED**:

Minn. R. 3512.0100, subp. 8
Minn. R. 3512.0200, subp. 3(A)
Minn. R. 3512.0505, subps. 2(B) and 5
Minn. R. 3512.0700, subp. 1
Minn. R. 3512.0800, subps. 3, 6, and 7
Minn. R. 3512.2000, subps. 1, 2, and 5
Minn. R. 3512.2050
Minn. R. 3512.2100
Minn. R. 3512.2400, subp. 2(C)
Minn. R. 3512.2500, subp. 4
Minn. R. 3512.2600
Minn. R. 3512.5300, subp. 5 (disapproval of repeal)

The reasons for the disapproval of the rules and recommended corrective changes are set forth in the January 2, 2020 Order.

Dated: January 8, 2020

JENNY STARR
Chief Administrative Law Judge

OAH 65-9050-36037
Revisor ID: R-04546

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF SCHOOL ADMINISTRATORS

In the Matter of the Proposed Amendments to the Rules Governing School Administrators, Minn. R. Part 3512

ORDER ON REVIEW OF RULES WITHOUT HEARING PURSUANT TO MINN. STAT. § 14.26 AND MINN. R. 1400.2300

This matter came before Administrative Law Judge Ann C. O'Reilly upon a request from the Minnesota Board of School Administrators (Board) for review of its proposed rules without a public hearing. The Board seeks a legal review of its materials under Minn. Stat. § 14.26 (2018) and Minn. R. 1400.2300 (2019).

On December 12, 2019, the Board filed a request for review and approval of its proposed rules. The Board supplemented its filings on December 17, 2019, by filing a Certificate of Making Revised SONAR (Statement of Need and Reasonableness) Available to Public; and on December 18, 2019, by filing the Revisor's Certificates of Approval of the proposed rules and adopted rules. The rule record, thus, closed on December 18, 2019.

Based upon a review of the Board's written submissions, and subject to the conditions detailed in the attached Memorandum incorporated herewith,

IT IS HEREBY DETERMINED THAT:

1. The Board has the statutory authority to adopt the rules.

2. The Board's failure to fully satisfy the procedural requirements of Minn. Stat. §§ 14.01-.69 (2018) and Minn. R. 1400.2000-.8612 (2019) did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. The Board has taken corrective action to cure the errors such that the errors did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.

3. The following rules are **APPROVED** but the Administrative Law Judge respectfully recommends changes or provides commentary set forth in the Memorandum below with respect to the following proposed rules:

3512.0200, subp. 1
3512.0300, subp. 1
3512.0400, subp. 1
3512.0505, subp. 2(A)

3512.0510, subps. 1(H)(7) and 1(K)(5)
3512.0700, subp. 4
3512.0800, subps. 2 and 4
3512.1200
3512.1300
3512.1600
3512.2300, subps. 3 and 4
3512.2400, subps. 7(B) and 7(C)
3512.2500, subps. 2(K) and 5
3512.2700
3512.5300, subp. 3

4. The Administrative Law Judge respectfully recommends **ADDING** a definition of "regionally accredited institution" as Rule 3512.0100, subp. 9.

5. The Administrative Law Judge **DISAPPROVES** the following rules:

3512.0100, subp. 8.
3512.0200, subp. 3(A)
3512.0505, subps. 2(B) and 5
3512.0700, subp. 1
3512.0800, subps. 3, 6, and 7
3512.2000, subps. 1, 2, and 5
3512.2050
3512.2100
3512.2400, subp. 2(C)
3512.2500, subp. 4
3512.2600
3512.5300, subp. 5 (disapproval of repeal)

6. All other rule parts are **APPROVED**.

Dated: January 2, 2020

ANN C. O'REILLY
Administrative Law Judge

MEMORANDUM

This rulemaking proceeding involves proposed amendments to Minn. R. Part 3512, related to the licensing of, the educational requirements for, and the ethical standards applied to, school administrators.[1] Under the rules, school administrators are comprised of four groups of licensed professionals: (1) school superintendents and assistant superintendents; (2) kindergarten through grade 12 principals and assistant principals; (3) directors and assistant directors of community education; and (4) directors and assistant directors of special education.[2] There are approximately 7,000 individuals currently holding licenses issued by the Board for these positions.[3]

This rulemaking proceeding was initiated by the Board without the assistance of rule-writing professionals or legal counsel. This was an improvident choice. Because rulemaking involves the exercise of law-making power, the legislature imposes a series of technical and exacting conditions on the promulgation of new rules. Fulfilling these conditions is legally required, essential to public confidence in state government, and necessary to prevent abuses of power.

This case is a cautionary tale for all agencies that, despite clear and unambiguous warnings, when an agency does not dedicate the time, care, and needed expertise to making new regulations, the result will not be a set of new rules, but rather, added costs and delays that could have been avoided.

I. Procedural Background

The procedural history of this rule proceeding evidences numerous errors and omissions, which the Board attributes to a lack of adequate resources, personnel, and legal assistance.

The Board commenced the rulemaking process approximately two years ago when it retained a consultant to organize a work group (Work Group) to develop proposed changes to Minn. R. Part 3512.[4] The Work Group was comprised of members from various educational organizations, the Public Educator Licensing and Standards Board (PELSB), and representatives from the 14 Board-approved administrator licensure programs in Minnesota.[5] The Work Group's efforts resulted in the proposed rules.[6]

The 14 Minnesota-based, Board-approved administrator licensure programs also comprise a group referred to herein as the "University Collaborative." The University Collaborative was particularly instrumental in the development of these rules.[7]

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[1] Revised Notice of Intent to Adopt Rules Without a Public Hearing.
[2] Minn. R. 3512.0100, subps. 2, 5, 6, 7 (2019).
[3] SONAR at 8.
[4] SONAR at 0-1.
[5] *Id.*
[6] *Id.*
[7] *Id*. *See also* Exhibit (Ex.) Q.

A. Request for Comments

The Board initiated this proceeding on April 5, 2019, when its Executive Director, Dr. Anthony Kinkel, submitted for administrative review a Request for Comments and an Additional Notice Plan.[8] The Request for Comments advised that the Board was seeking to amend Minn. R. Part 3512 and sought public comment on such amendments.[9]

The Additional Notice Plan for the Request for Comments was submitted for review under Minn. R. 1400.2060, subp. 2(A).[10] The Additional Notice Plan provided that the Board would publish the Request for Comments in the *State Register* and electronically provide "notice" to the following individuals and organizations:[11]

- The Board's "stakeholder email list" "containing over 200 interested individuals"
- The 14 "approved Minnesota university administrator preparatory programs, including all licensed officers"
- "School district administrators"
- The Minnesota School Board Association
- Education Minnesota
- The Minnesota Education Equity Partnership
- The Association of Metropolitan School Districts
- The Minnesota Rural Education Association
- The Minnesota Association of School Administrators
- The Minnesota Community Education Association
- The Minnesota Administrators of Special Education
- The Minnesota Association of Elementary School Principals
- The Minnesota Association of Secondary School Principals
- The Minnesota Association of Charter Schools
- The Commissioner of the Minnesota Department of Education
- The Commissioner of the Minnesota Office of Higher Education
- The Executive Director of the Professional Educator Licensing and Standards Board

The Additional Notice Plan further provided that the Board had created a link on its webpage (located at https://bosa.mn.gov/bosa/index.htm) which would "display the proposed rules" and where the Board would post its Request for Comments, once published.[12]

On April 10, 2019, the Administrative Law Judge approved, as to substance and form, the Request for Comments and the Additional Notice Plan.[13] In approving the Additional Notice Plan for the Request for Comments, the Administrative Law Judge was under the understanding that: (1) the "stakeholder list" identified by the Board in its

[8] Requests for Comments (Apr. 6. 2019).
[9] *Id.*
[10] Additional Notice Plan (Apr. 5, 2019).
[11] *Id.*
[12] *Id.*
[13] *See* Order on Review of Request for Comments and Additional Notice Plan Under Minn. Stat. § 14.101 and Minn. R. 1400.2060 (Apr. 10, 2019).

Additional Notice Plan was the Board's rulemaking list developed pursuant to Minn. Stat. § 14.14, subd. 1a; and (2) "school district administrators" meant that the Board would be serving notice on all persons licensed by the Board as school administrators (i.e., all licensed superintendents, assistant superintendents, principals, assistant principals, directors and assistant directors of community education, and directors and assistant directors of special education in Minnesota).

Minn. Stat. § 122A.14, subd. 6 (2018) requires the Executive Director of the Board to keep a register of all persons licensed by the Board under Minn. Stat. ch. 122A (2018). This register must include the name, address, license number, and renewal date of all licensees.[14] Such list must be transmitted to the Board on July 1 of each year and must be available for review by any interested persons during business hours at the Board's office.[15] Given this requirement, it was presumed that the Board had a list of all of its licensees and that the "school administrators list" that the Board referenced in its Additional Notice Plan was the list of all school administrators licensed by the Board.

Unbeknownst to the Administrative Law Judge, however, the "stakeholder list" identified in the Additional Notice Plan was merely a random list of "interested persons" compiled by the agency. It was not a rulemaking list required by Minn. Stat. § 14.14, subd. 1a. In fact, the agency had not yet developed any rulemaking list.

Moreover, the group of "school district administrators" that the Board referenced in the Additional Notice Plan, was not intended by the Board to be a full and complete list of the school district administrators licensed by the Board. Rather, the Board's Executive Director, Dr. Anthony Kinkel, only planned to give notice to the approximately 300 superintendents licensed in the state, not the entire 7,000 individuals holding a school administrator license.

On or about April 22, 2019, the Board published the Request for Comments in the *State Register*. There is no evidence in the record that the Request for Comments was ever published on the Board's website, as was stated in the Board's Additional Notice Plan.[16]

With respect to the mailing of the Request for Comments, the Board did not provide electronic notice to all "school district administrators" in the state, as indicated by the Additional Notice Plan. Instead, the Board mailed a letter to the first approximately 200 names on the list of 7,000+ school administrator license holders.[17] According to Dr. Kinkel, he enlisted an intern to mail notice to only school superintendents (a group of approximately 300 people), not the entire list of school administrator license holders. Misunderstanding Dr. Kinkel's instructions, the intern mailed notice to the first 200 or so individuals on the general list of school administrator licensees.

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[14] Minn. Stat. § 122A.14, subd. 6.

[15] *Id.*

[16] The Board's website only included a link to the proposed rules, not the Request for Comments published on April 22, 2019, nor the Notice of Intent to Adopt published on June 24, 2019. (This fact was confirmed again on December 19, 2019.)

[17] According to Dr. Kinkel, an assistant handling the mailing misunderstood his instructions. Instead of mailing notice to the approximately 300 school superintendents in the state, the intern mailed notice to the first 200 people listed on the Board's school administrator license holder list (a list containing approximately 7,000 license holders).

There is no evidence in the record that the Board complied with any of the other requirements of the Additional Notice Plan for the Request for Comments.

By Order dated September 27, 2019, the Administrative Law Judge advised the Board that:

> [a]t hearing, or at the time the rules are submitted to the Administrative Law Judge for approval, the Board will need to provide evidence of when notice of the Request for Comments was served, who was served with such notice, what the notice consisted of, and how this notice met the requirements of the Additional Notice Plan approved by the Administrative Law Judge on April 10, 2019.[18]

The Judge further advised the Board in that Order:

> The Board will need to provide an affidavit or certificate of service identifying *with particularity* the individuals and groups of individuals served. This will require the Board to identify if all school administrator license holders were served, if only 200 license holders were served, or if only individuals licensed as school superintendents were served. It is not sufficient that the Board state that a random group of 'school administrators' were served. The Board cannot pick and choose who from a group of interested parties gets served and who does not, unless there is a legitimate reason for excluding interested parties from service. Administrative burden and cost are not acceptable reasons for failing to provide notice if notice is required by an approved Additional Notice Plan.[19]

With respect to the "notice" of the Request for Comments, the Judge advised:

> If the notice is a letter (as opposed to a copy of the Request for Comments), the Board must provide a copy of the letter to ensure it provides sufficient notice. It is best practice to simply serve the Request for Comments, as that form, once approved by an Administrative Law Judge, should contain the information required by law.[20]

Despite these clear directives, the Board has not submitted any evidence that it complied with the Additional Notice Plan for the Request for Comments approved by the Administrative Law Judge on April 19, 2019. The Board has also not explained how it corrected this procedural defect or why this procedural defect would result in harmless error. Moreover, the record does not evidence that any of the affected stakeholders, including the university preparatory programs, educational associations representing licensees, or PELSB (the Board's "sister" agency), received notice of the Request for Comments, as required by the approved Additional Notice Plan.

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[18] Order on Review of Revised Notice of Intent to Adopt Rules and New Additional Notice Plan (Sept. 27, 2019) at 5.
[19] *Id.* at FN 13.
[20] *Id.* at FN 14.

B. Original Notice of Intent to Adopt

After publishing its Request for Comments, the Board prepared a Notice of Intent to Adopt Rules Without a Public Hearing. The Board did not submit such notice to the Office of Administrative Hearings (OAH) for review or approval under Minn. R. 1400.2080 prior to publication. Nor did the Board develop or submit for approval an Additional Notice Plan for the Notice of Intent to Adopt pursuant to Minn. R. 1400.2060, subp. 2(B). Instead, the Board proceeded to publication and service of its Notice without obtaining approval of its form or plan from the OAH. This decision proved both costly and time-consuming for the Board, and resulted in delay, as explained below.

On June 24, 2019, the Board published in the *State Register:* (1) the Notice of Intent to Adopt Rules Without a Public Hearing; and (2) the proposed rules. The Notice advised the public that they had until July 30, 2019, to submit comments and to request a hearing on the rules.

The Notice of Intent to Adopt incorrectly advised that the proposed rules were available for review on the OAH website and that comments on the rules could be submitted electronically through the OAH website. In reality, however, the Board had never arranged for publication of the rules on the OAH website and there was no capability for the public to submit comments on the OAH website because the Board had never requested OAH to host comments on its website.

The Board did not undertake a mailing of the Notice of Intent to Adopt until July 10, 2019, approximately 20 days prior to the end of the comment period. Minn. R. 1400.2080, subp. 6 requires that notice be mailed at least 33 days prior to the end of the notice period, which was July 30, 2019. Therefore, the Board was required to mail the notice on or before June 27, 2019 (33 days prior).

It is unclear in the record what persons or organizations, if any, were mailed a copy of the Notice of Intent to Adopt. The Additional Notice Plan approved by the OAH in April 2019 only applied to the Request for Comments, not the Notice of Intent to Adopt.

On July 12, 2019, Dr. Kinkel contacted the OAH to inquire about a remedy for the late mailing. It was at this time that the Administrative Law Judge first learned that: (1) the "stakeholder list" in the approved Additional Notice Plan was not the rulemaking list required by Minn. Stat. § 14.14; and (2) not all licensed "school district administrators" were sent notice of the Request for Comments. Indeed, only a small portion (approximately 200) of the 7,000 individuals licensed by the Board were included in the "school district administrators" group identified in the Additional Notice Plan.

The Judge also discovered that the Board's website did not actually contain a link to the proposed rules, as the Board indicated in the Request for Comments.[21] As a result, the Judge advised the Board to:

[21] When the Administrative Law Judge went to the Board's website to find the rules on or about July 12, 2019, she was unable to locate a link. According to the Board, this was a temporary technical glitch that was subsequently remedied. The Judge advised the Board that it would need to explain this further when it submits the proposed rules for approval. *See* Order on Review of Revised Notice of Intent to Adopt Rules and New Additional Notice Plan at Footnote 16 (Sept. 27, 2019).

- Strongly consider restarting the rulemaking process from the Request for Comments stage to remedy its procedural errors before embarking further in the costly rulemaking process;

- Enlist the assistance of a lawyer or experienced rule writer to assist the Board in complying with technical rulemaking requirements;

- Develop a rulemaking list as required by Minn. Stat. §§ 14.14, subd. 1a and 14.22, subd. 1(a);

- Prepare a new Additional Notice Plan for the Notice of Intent to Adopt, which unambiguously identifies the groups, organizations, and persons the Board actually intends to serve with the Notice;

- Draft a new Notice of Intent to Adopt Rules With or Without a Hearing (i.e., a "Dual Notice") that includes a new comment period deadline which is at least 33 days after the date of publication of the Notice;

- Request that the OAH review and approve the new Notice of Intent to Adopt and the new Additional Notice Plan before the Notice is published or served;

- Re-publish and re-serve the new Notice of Intent to Adopt Rules With or Without a Hearing (i.e., a Dual Notice);

- Make a written request to the Chief Administrative Law Judge to allow the Board to omit the proposed rules from the republication of the new Notice of Intent to Adopt, pursuant to Minn. Stat. § 14.22, subd. 1(b). This would allow the Board to avoid the cost of republication of both the Revised Notice and the proposed rules;[22] and,

- Fix the Board's website to include a link to the proposed rules, the Request for Comments, the Notice of Intent to Adopt, and the SONAR.

C. Request for Review of a Notice Related to "Expedited Rules"

On July 26, 2019, without seeking assistance from an experienced rule writer or legal counsel, the Board submitted to the Administrative Law Judge for review: (1) a "Notice to Extend the Intent to Adopt Expedited Rules Without a Public Hearing;" (2) the same proposed rules; and (3) a draft SONAR, which included an Additional Notice Plan that excluded "school administrators." The submissions represented that the Board had statutory authority to proceed with expedited rulemaking.

[22] Dr. Kinkel noted that the Board has already published the proposed rules in the *State Register* with the Notice of Intent to Adopt Rules Without a Hearing on June 24, 2019, and that the cost of such publication was significant (approximately $4,000). Dr. Kinkel explained that the Board will incur hardship should it have to re-publish the rules again.

The Administrative Law Judge spent a considerable amount of time reviewing the documents and the statutory citations, and determined that the Board did not, in fact, have legal authority to proceed with expedited rulemaking under Minn. Stat. § 14.389. When presented with this fact, Dr. Kinkel explained that the Board had simply utilized an expedited rule form because the Board wanted to accelerate the rule process that it had prolonged due to its earlier errors. Dr. Kinkel failed to appreciate the unique legal effect of the expedited rulemaking process.

The Judge notified the Board that she did not believe the Board had legal authority to proceed with the expedited rule process and explained that she would likely be disapproving the notice. The Judge again strongly advised Dr. Kinkel to seek legal counsel and assistance from experienced rule writers before proceeding further.

On July 29, 2019, the Board filed a request to withdraw its Notice to Extend the Intent to Adopt Expedited Rules Without a Public Hearing. As a result, the Notice to Extend was withdrawn.

Around this same time, the Board began developing an official rulemaking list, as required by Minn. Stat. § 14.14, subd. 1a.[23] To do this, the Board sent an email to all persons licensed by the Board (including both active and inactive licensees), totaling approximately 7,000 individuals.[24] The email advised the license holders of the proposed rulemaking and instructed recipients to respond to the email if they wanted to be included on the agency's official rulemaking email list.[25] Approximately 81 people responded by asking to be included on the Board's rulemaking list.[26]

D. Revised Notice of Intent to Adopt Rules and New Additional Notice Plan

On September 20, 2019, the Board submitted for review a Revised Notice of Intent to Adopt Rules Without a Public Hearing, a Revised SONAR, and a "new" Additional Notice Plan under Minn. R. 1400.2060, subp. 2(B). The Revised Notice of Intent to Adopt Rules set a deadline to submit comments and request a hearing on November 15, 2019.[27] The Revised SONAR became available for public review on September 25, 2019.[28]

On September 27, 2019, the Administrative Law Judge approved the New Additional Notice Plan, contingent on the Board complying with seven, specific notice requirements.[29] The Judge also approved the Revised Notice of Intent to Adopt Rules, subject to some specific changes.[30] The Order advised the Board as to its legal obligation

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[23] SONAR at 8.
[24] *Id.*
[25] In her September 27, 2019, Order, the Administrative Law Judge instructed the Board to provide a copy of the email the Board sent to the 7,000 license holders to develop its rulemaking list. *See* Order on Review of Revised Notice of Intent to Adopt and New Additional Notice Plan at FN 19 (Sept. 27, 2019). Despite this instruction, the Board did not provide a copy of this email as part of its submissions for approval of the rule.
[26] SONAR at 8.
[27] Ex. E.
[28] *See* Certificate of Making the Revised SONAR Available to the Public filed by the Board on December 17, 2019.
[29] Order on Review of Revised Notice of Intent to Adopt and New Additional Notice Plan (Sept. 27, 2019).
[30] *Id.*

to republish the rules or seek an order from the Chief Administrative Law Judge waiving this requirement.[31]

On or about September 30, 2019, the Board sent a request to the Chief Administrative Law Judge to omit the text of the proposed rule with the publication of the Revised Notice of Intent to Adopt.[32] Chief Judge Jenny Starr issued an order granting the request on October 1, 2019.[33]

On October 1, 2019, the Board emailed a copy of the Revised Notice of Intent to Adopt Rules, the Revised SONAR, and the proposed rules to the 81 people on the Board's rulemaking list and all parties required to receive notice under the approved new Additional Notice Plan.[34]

On October 3, 2019, the Board emailed to the legislative reference library a copy of the proposed rules, the Revised Notice of Intent to Adopt Rules, and an unsigned and undated Revised SONAR.[35] The Board did not provide for judicial review a copy of the Revised SONAR filed with the legislative reference library.

The Board also does not provide evidence of what was sent to the chairs and ranking minority party members of the legislative and budget committees with jurisdiction over the Board and to the Legislative Coordinating Commission. The Board only submitted photographs of envelopes addressed to three state representatives, two state senators, and the legislative reference library. Therefore, the Board did not provide evidence that it complied with the requirements of Minn. Stat. § 14.116(b). During her review process, however, the Judge was able to confirm that the Board did serve the Revised Notice of Intent to Adopt Rules, Revised SONAR, and Proposed Rules to the chairs and ranking minority party members of the legislative and budget committees with jurisdiction over the Board and to the Legislative Coordinating Commission.[36]

The Board published the Revised Notice of Intent to Adopt Rules in the *State Register* on October 7, 2019.[37]

During the comment period, the Board received eight written comments: three emails in support of the Board's rules, one comment from the Department of Education, one comment from PELSB, and three comments from the University Collaborative.[38] The written comments from the University Collaborative were not provided for review to the Administrative Law Judge but were, instead, summarized by the Board in their response.[39] The Board's summary of stakeholder comments does not meet the requirements of Minn. R. 1400.2310(J).

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[31] *Id.*
[32] Letter to Chief Administrative Law Judge Jenny Starr from Dr. Anthony Kinkel (Sept. 30, 2019).
[33] Order Granting Request to Omit from the Notice the Text of the Proposed Rules (Oct. 1, 2019).
[34] Exs. G, H.
[35] Ex. I.
[36] *See* email from Dr. Kinkel to Administrative Law Judge Ann O'Reilly dated January 2, 2020.
[37] Ex. E.
[38] Ex. J.
[39] Ex. Q.

The Board also noted that it received "oral comments" from the Minnesota Community Education Association, the Minnesota Attorney General's Office, and the Office of the Revisor of Statutes.[40] The Board summarized the comments received in its response to comments included as Exhibit Q in its filings. However, because some parties submitted oral comments, the Judge was unable to compare the comments with the Board's response to determine if the response properly summarized or addressed the comments.

E. Revision of Proposed Rules and Submission to Office of Administrative Hearings

On November 25, 2019, the Board met and approved a majority of the changes presented by commenters.[41] As a result, the Board revised its proposed rules and submitted those revised proposed rules to the Revisor for approval.[42] The revised proposed rules were approved by the Revisor[43] and submitted herein for approval as the Board's "Adopted Rules".[44]

The Board submitted the proposed rules and the Adopted Rules to the Administrative Law Judge for approval on December 12, 2019, completing the filing on December 18, 2019.

In its submissions, the Board includes a Revised SONAR signed and dated November 26, 2019 -- after the date of publication of the Notice of Intent to Adopt Rules.[45] It appears that the November 26, 2019, Revised SONAR is the same Revised SONAR posted on the Board's website on September 25, 2019,[46] and filed with the legislative reference library on or about October 1, 2019.[47] However, the multiple versions of required documentation make it difficult to determine which items comprise the rulemaking record under Minn. Stat. § 14.365.

II. Effect of Procedural Errors

While the early stages of this rulemaking process were plagued by numerous and costly errors, in the end, the Board did make substantial efforts to cure the defects and give interested parties an opportunity to meaningfully participate in this rulemaking process.

The most substantial of the Board's procedural errors is that the Board did not provide any evidence of compliance with the Request for Comments requirements set forth in Minn. Stat. § 14.101. Through her own efforts, the Judge has determined that the

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[40] Ex. Q.
[41] *Id.*
[42] Ex. L.
[43] *See* Revisor's Certificate of Approval of Adopted Rules filed by the Board on December 18, 2019.
[44] Ex. L.
[45] Ex. D.
[46] *See* Certificate of Making the Revised SONAR Available to the Public filed by the Board on December 17, 2019.
[47] The Administrative Law Judge compared the Revised SONAR on file with the legislative reference library with the Revised SONAR signed and dated November 26, 2019. The Judge finds the documents to be the same.

Board did publish its Request for Comments in the *State Register* on April 22, 2019. However, the Board did not comply with the notice and additional notice requirements related to that process.

According to Minn. Stat. § 14.101, subp. 3, "[i]f an agency has made a good faith effort to comply with [Section 14.101], a rule may not be invalidated on the grounds that the contents of the notice are insufficient or inaccurate." Here, the content of, and notice procedure for, the Request for Comments were defective. The Board, however, has since taken good faith efforts to cure the defects and ensure that all interested parties had a meaningful opportunity to participate in this rulemaking.

After receiving directions from the Judge, the Board created a rulemaking list by sending electronic notice to all of its 7,000+ licensees. That email gave the licensees an option to join the rulemaking list, advised them of proposed rule amendments, and explained where the proposed rules could be reviewed. Only 81 people opted to join the rulemaking list.

Thereafter, the Board published a Notice of Intent to Adopt Rules with a full copy of the proposed rules in the *State Register*. While that Notice of Intent to Adopt did not provide sufficient opportunity for comment, it did provide initial notice of the proposed rules, which were published in the *State Register* along with the Notice.

After realizing its errors related to the original Notice of Intent to Adopt, and after significant instruction from the Administrative Law Judge, the Board later published a Revised Notice of Intent to Adopt Rules and complied with an approved, extensive Additional Notice Plan. In the end, the Board complied with the publishing, service, and notice requirements related to the Revised Notice of Intent to Adopt Rules. In addition, the Revised Notice of Intent to Adopt Rules, the Revised SONAR, and the Proposed Rules were made widely available on the Board's website for several months prior to the comment and hearing request deadline. Despite widespread notice of the proposed rules, there were no requests for hearing and only a handful of written comments.

The Administrative Law Judge finds that the defects related to the Request for Comments were substantially cured by the Board's subsequent, good faith efforts to provide notice of the proposed rulemaking to all interested parties through: (1) the published Notice of Intent to Adopt Rules and Proposed Rules in June 2019; and (2) the widespread service and publishing of the Revised Notice of Intent to Adopt Rules in October 2019. As a result, the Board's errors related to the Request for Comments did not deprive any person or entity an opportunity to participate meaningfully in this rulemaking process.

With respect to the Board's submission of a Revised SONAR dated November 26, 2019, the Judge is satisfied that the Board made the same Revised SONAR publicly available for review on September 25, 2019, well in advance of the deadline to comment or request a hearing. The fact that the Revised SONAR was not signed until November 26, 2019, was a harmless error. It did not deprive any person or entity of an opportunity to participate meaningfully in this rulemaking process.

The Administrative Law Judge, therefore, does not disapprove the rules on the grounds of procedural error or defect.

III. Substantive Review of the Proposed Rules

The Administrative Law Judge will address only the rule parts that present defects or as to which changes are suggested. The Judge will first address material defects and disapproved rules, and will then turn to approved rules with suggested modifications.

A. Material Defects and Rule Disapprovals

The following rules are disapproved due to material defects. Where possible, the Administrative Law Judge has attempted to provide recommended changes.

1. Part 3512.0100, Subpart 8: License Definitions

The proposed change to this rule part introduces four new definitions into the rule. One of those definitions is "professional license," which is defined to mean "a two-year initial license or a five-year continuing license. . . ." It does not, however, include provisional licenses (another defined term) or the one-year nonrenewable licenses established in the proposed Rule 3512.2300, subp. 4B (related to lapsed licenses). Therefore, under the defined terms, administrators working under a provisional or one-year nonrenewable license do not have "professional licenses." The proposed rule appears incorrect – they have professional licenses, just not initial or continuing licenses.

Only two subparts [proposed Rules 3512.0200, subp. 3(A) and 3512.0300, subp. 1] use the term "professional license."[48] But the use of the defined term in those subparts makes the rule inconsistent with other provisions in the rules. (*See* further explanation in the discussion of proposed Rules 3512.0200, subp. 3(A). and .0300, subp. 1 below.)

Finally, it is unclear as to what the Board is attempting to accomplish with this proposed revision. Notably, the SONAR does not explain the need for the term, "professional license," or why it is reasonable to include this term in the rules, except to say that defining the terms provide clarity to the rules. The SONAR also does not explain why the term "professional license" excludes provisional licenses or one-year licenses issued by the Board.

It is the Board's burden to make an affirmative presentation of facts establishing the need and reasonableness for proposed rules.[49] Because the Board has failed to provide an explanation of the need and reasonableness of this proposed subpart, and because the definition appears to conflict with other rule provisions, proposed Rule 3512.0100, subp. 8(A) is **DISAPPROVED.**

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[48] Other provisions use the term "initial professional license" and the Judge has suggested changing those references to comply with the new term "initial license." There are two separate defined terms: initial licenses and professional licenses. Using the term "initial professional license" combines the terms and causes unnecessary confusion.

[49] Minn. Stat. § 14.14, subd. 2.

2. Part 3512.0200, subpart 3(A): Kindergarten through Grade 12 Superintendents, Principals, and Directors of Special Education

Proposed Part 3512.0200, subpart 3(A), addresses the educational requirements for superintendents, principals, and directors of special education. As proposed by the Board, Rule 3512.0200, subp. 3(A) reads as follows (emphasis given by the Judge in italics to the problematic provisions):

> A. An applicant for licensure as a superintendent, principal, or director of special education must complete *at a regionally accredited Minnesota graduate school* a specialist or doctoral program of a minimum of 60 semester credits or a program of 60 semester credits beyond a bachelor's degree that includes a master's degree and preparation for completing the program requirements under part 3512.0510 leading to a professional license. *The board must approve each licensure program pursuant to part 3512.2500.*[50]

Under this provision, only graduates from the 14 *Minnesota* colleges and universities with Board-approved administrative programs qualify for licensure in Minnesota. (Notably, these same 14 institutions, which comprise the University Collaborative, were instrumental in devising the rules.) In addition, the Board *must* approve *each* licensure program under part 3512.2500. This means that applicants from graduate schools outside of Minnesota, that have not sought approval by the Board, will not meet the educational requirements for licensure under Rule 3512.0200 -- even though such applicants may be accepted for licensure under Rule 3512.2600.

Under the proposed changes to Rule 3512.2600, graduates from schools outside of Minnesota are, in fact, eligible for licensure if: (1) they have graduated from a regionally accredited institution; (2) they have completed an administrative licensure program recognized by the state in which it was completed as qualifying the person for licensure as a school administrator; (3) the preparatory program the graduate completed is "essentially equivalent" in content and credits to Board-approved programs in Minnesota; and (4) the out-of-state school verifies completion of the program and recommends licensure in the state where the school is located, should licensure be required in that state. (*See* discussion of proposed Rule 3512.2600 below.)

As set forth above, proposed Rule 3512.2600 permits graduates from schools outside of Minnesota to be issued initial licenses. In addition, it does not require that all licensure programs be Board approved. It only requires that out-of-state preparatory programs be "equivalent" in content and credits to Minnesota Board-approved programs. Accordingly, there is a conflict in law between proposed Rules 3512.0200 and 3512.2600.

In addition to conflicting with proposed Rule 3512.2600, the Board has not made an affirmative presentation of facts to establish the need and reasonableness of only allowing graduates from the 14 Minnesota institutions that drafted this rule to be licensed.

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[50] Emphasis added by Administrative Law Judge.

Nor has the Board made an affirmative presentation of facts to establish the need and reasonableness of requiring that all licensure programs be Board-approved.

Not all administrative programs in the United States – including those at some of the best schools in the country – have sought approval of their programs with the Board. In addition, not all qualified applicants for licensure obtain their degrees from a Minnesota institution. Nonetheless, proposed Rule 3512.2600 allows out-of-state graduates, from programs that have not received Board approval, to be licensed. Therefore, a contradiction exists.

Because of the conflict of law presented between proposed Rules 3512.0200, subp. 3(A) and .2600, and because the Board has not established the need and reasonableness of the rule, proposed Rule 3512.0200, subp. 3(A) is **DISAPPROVED**.

To remedy these defects and make Rule 3512.0200, subp. 3(A) consistent with the Board's other rules, the Administrative Law Judge suggests the following revisions:

> A. An applicant for licensure as a superintendent, principal, or director of special education must complete, at a regionally accredited ~~Minnesota graduate school~~ institution, a specialist or doctoral program consisting of a minimum of 60 semester credits or a program consisting of 60 semester credits beyond a bachelor's degree that includes a master's degree and ~~preparation for completing the program requirements under~~ a demonstration of competence in the core areas identified in part 3512.0510 ~~leading to a professional license~~. ~~The board must approve each licensure program pursuant to part 3512.2500.~~ Completion of an administrative licensure program approved by the Board under part 3512.2500 shall be evidence that an applicant has demonstrated competence in the core areas identified in part 3512.0510. Applicants who complete preparatory programs that have not received Board approval under part 3512.2500 must meet the requirements of part 3512.2600.

These changes attempt to remove the inconsistencies with proposed Rule 3512.2600. As written, however, proposed Rule 3512.0200, subp. 3 is **DISAPPROVED.**

3. Part 3512.0505, Subpart. 2(B): License Requirement

Proposed Rule 3512.0505, subp. 2(B) requires that all applicants for licensure as a director of community education "satisfactorily complete a *board-approved* preparation program under subpart 3, leading to licensure of directors of community education."[51]

As discussed below with respect to proposed Rule 3512.2600, requiring the completion of a Board-approved licensure program creates a conflict for candidates who complete out-of-state preparatory programs. Moreover, the SONAR does not provide any explanation for this change or explain why requiring an applicant to complete a Board-approved program is needed and reasonable. Consequently, proposed Rule 3512.0505, subp. 2(B) is **DISAPPROVED**.

[51] Emphasis added.

To remedy this defect, the Administrative Law Judge recommends the following changes to subpart 2(B):

> B. satisfactorily complete a board-approved preparation program ~~under subpart 3,~~ leading to licensure of directors of community education, or obtain approval for licensure under part 3512.2600.

4. Part 3512.0505, Subpart 5: Situational Observation Component

Rule 3512.0505, subpart 5 does not appear to be in the correct location.

Rule 3512.0505 is entitled "Directors of Community Education" and sets out the educational and program requirements for directors of community education, not superintendents, principals, or directors of special education. Subpart 5 of the rule, however, addresses situational observation components of programs for licensure of superintendents, principals, and directors of special education – not directors of community education. The situational observation component for superintendents, principals, and directors of special education is already addressed in Rule 3512.0400, subp. 3. As a result, it renders 3512.0505, subp. 5 duplicative and signifies that subpart 5 is only meant to apply to directors of community education and should, thus, be amended.

As a remedy, the Board can remove this subpart altogether or, if it was intended to apply to directors of community education, replace the terms "for superintendent, principals, or directors of special education" with "directors of special education." Either of these changes are within the scope and are logical outgrowths of the matters announced in the Revised Notice of Intent to Adopt Rules. Therefore, compliance with Minn. R. 1400.2110 would not be required. However, some change is necessary to avoid confusion. As proposed, Rule 3512.0505, subp. 5 is **DISAPPROVED**.

5. Part 3512.0700, Subpart 1: Administrative Licensure Without Teaching Experience for Superintendents, Principals, and Directors of Special Education

Proposed Rule 3512.0700, subp. 1 creates an exemption to the teaching experience requirements set forth in Rule 3512.0200, subp. 2. Once again, the subpart requires that applicants complete a Board-approved licensure program. As explained above, such a requirement creates a conflict with proposed Rule 3512.2600. As a result, this subpart is **DISAPPROVED.**

To remedy this defect, the Administrative Law Judge recommends the following revisions:

> Subpart 1. **Scope.** This part applies to applicants for kindergarten through grade 12 principal, superintendent, or director of special education licensure who complete a board-approved licensure program, or who have received approval for licensure under part 3512.2600, but who lack the teaching experience requirement in part 3512.0200, subpart 2.

6. Part 3512.0800, Subparts 3 and 7: Credential Review Committee and Appeal

Proposed Rule 3512.0800 sets out an "alternative path" for superintendent licensure candidates who do not meet the education, teaching, or field experience requirements of Rule 3512.0200. In lieu of such requirements, a candidate can present evidence of "exceptional qualification."

Under the rule amendments originally proposed by the Board, an applicant must appear before a credential review committee to present evidence of "exceptional qualifications." According to Dr. Kinkel, the credential review committee is an "ad hoc" group of individuals selected by the executive director from the groups identified in the rule. The credential review committee would review the candidate's qualifications and make a recommendation to the executive director, who would then accept or reject the application. If the executive director rejected the application, the candidate could appeal the decision to the full Board.

PELSB submitted comments arguing that the executive director should not be given "absolute power" to make decisions for the Board.[52] PELSB suggested that the decision of the credential review committee be directly appealable to the full Board and that the executive director be removed from the process.[53] In response to PELSB's comments, the Board agreed to replace the executive director in the subpart with a "licensing committee."[54] According to Dr. Kinkel, the licensing committee is a subset of the Board and is comprised of four Board members.

As a result of PELSB's comments, the Board modified the proposed rule as follows (with the post-notice changes denoted in italics):

> Subp. 3. **Credential review committee.** An applicant ~~shall~~ must appear before a credential review committee and present evidence ~~relating to~~ of the applicant's proposed effectiveness as a superintendent. The applicant may present data and information ~~regarding~~ about the applicant's leadership effectiveness ~~shall be presented as~~ through testimony from teachers, parents, students, site council members, community members, and other interested persons. The review committee ~~shall~~ must consist of a licensed administrator appropriate to the field, a college or university administration preparer, and a member of a local school board or person of similar background. The credential review committee ~~shall make a recommendation~~ must recommend to the ~~*executive director*~~ *Licensing Committee* whether to approve or disapprove the applicant's initial application. The ~~*executive director*~~ *Licensing Committee* may accept or reject the credential committee's recommendation based on board-approved criteria. If the ~~*executive director*~~ *Licensing Committee*

[52] Exs. J, Q.
[53] Exs. J, Q.
[54] Ex. Q.

disapproves the application, the applicant may appeal the *Licensing Committee's* decision to the board.

Subp. 7. **Appeal.** ~~If the candidate's initial application is rejected, an appeal may be filed with~~ The applicant may appeal the ~~*executive director's*~~ *Licensing Committee's* decision to the board within 30 days of the denial.

Essentially, the rule will now require two subcommittees: a credential review committee and a licensing committee. The Board asserts that the Attorney General's office suggested a step between the credential review committee and the full Board to protect the due process rights of the candidate. According to the Board, use of the executive director or a separate licensing committee protects due process for the candidate because the candidate is not appealing a decision from the Board back to the Board. The proffered explanation does not make sense.

Under the existing rule, the credential review committee makes a recommendation to the executive director, who then issues a decision on behalf of the Board, which is appealable to the Board. The changes to the rule do not substantially change that process. An applicant is still appealing a decision by four members of the Board (the licensing committee) to the full Board.

The Board's proposed solution of a separate licensing committee just means that a subset of the same Board makes an intermediate ruling that can be appealed to the full Board. But all members of the licensing committee are on the Board. Therefore, the Board's solution is not meaningful.

The Board is advised to review the Minnesota Court of Appeals decision in *In the Matter of the Application of Kimberly Baker*, 907 N.W.2d 208 (Minn. Ct. App. 2018) for a discussion about the possible due process implications that the Board's proposed process could present.

Also, the rule gives no information of the make-up the licensing committee. The existing rule identifies the required members of the credential committee, but not the licensing committee.

Genuine due process would allow a candidate to appeal the credential committee decision to an administrative law judge at the Office of Administrative Hearings under Minn. Stat. ch. 14 (2018). Under the Administrative Rules, the judge then provides a recommendation to the Board. The judge is the neutral third party in the process, ensuring due process for the appellant.

While the Board's decision on which entity should be the intermediate decision-maker is not necessarily a material defect, it is something that the Board should consider revising. The Board could either eliminate the intermediate step (the appeal to the executive director or licensing committee) or keep the licensing committee as an intermediate decision-maker. However, it does not appear that a licensing committee solves the due process problem identified by the Attorney General's Office.

The actual defect in this rule, however, is that it leaves too much discretion to the credential review committee and the Board. It sets out no criteria whatsoever for the committee or Board to use to determine whether a candidate is "exceptionally qualified" and should be excepted from the requirements of Rule 3512.0200.

According to Dr. Kinkel, the Board has not yet established any criteria but was advised by the Revisor's Office to include the words "board-approved criteria" to prevent arbitrary decision-making. However, merely including the words "board-approved criteria" does not achieve that goal. Such criteria must be articulated in the rule to guide decision-making, avoid arbitrary or capricious results, and ensure oversight. Moreover, it avoids an argument that the Board's later-devised criteria are unpromulgated rules. As written, however, this rule is **DISAPPROVED** as it improperly delegates the agency's discretionary powers to another group without providing sufficient criteria to guide decision-making to ensure fair and consistent results.

In revising this rule, the Board should consider including a right to appeal the credential review committee's decision to the Office of Administrative Hearings under Minn. Stat. ch. 14. This would ensure the due process that the Attorney General's Office was recommending and allow the Board to have a recommendation from a neutral third party applying the criteria that the Board must develop. A more thorough discussion of the appellate process is set forth below.

7. Part 3512.0800, Subpart 6: Issuance of License

While the Board adopted changes to subpart 3 of Rule 3512.0800, it neglected to update subpart 6 of the same rule to be consistent with the proposed changes. Subpart 6(A) still references the "executive director's licensure recommendation." Below, highlighted in italics, are the references that will need to be changed to correspond to any changes the Board decides to make to subpart 3 of the rules:

> A. The board must either accept or reject the *executive director's* licensure recommendation. If the board accepts the *executive director's* recommendation to approve licensure, the ~~credential review committee recommendation,~~ board must issue the applicant ~~may be granted~~ a two-year initial license. The board may also identify ~~needed~~ activities ~~which~~ the ~~candidate shall~~ individual must implement during the ~~period of the~~ initial license period to strengthen the individual's skills ~~which may lead to improved~~ and improve the individual's results as a superintendent. ~~This~~ These activities may include a mentoring experience or improving specific skills or competencies ~~that need improvement~~.

With respect to subpart 6(B), the Board also proposes a material change without providing any information in the SONAR to justify the change. In the existing subpart 6(B), a two-year license "*may be* renewed for a five-year continuing license" to an individual granted a two-year licensed under the alternative pathway. In the proposed rule, however, the Board "*must*" issue a five-year continuing license to an individual granted a two-year license under the alternative pathway process. While such a change may well be permissible, the Board has not explained in its SONAR why this material change was

made. Therefore, before the Administrative Law Judge can approve this change, the Board must present an affirmative statement of facts demonstrating that the change is reasonable and necessary.

As proposed, however, Rule 3512.0800, subp. 6 is **DISAPPROVED** as presenting conflict with other subparts of Rule 3512.0800. Because other subparts of Rule 3512.0800 are also disapproved, the Board should take the time to ensure that the entire set of proposals is consistent before resubmitting for approval. A careful, line-by-line review by an experienced rule writer is likewise encouraged.

8. Part 3512.0800, Subpart 7: Appeal

Proposed Rule 3512.0800, subpart 7 reads as follows (with emphasis provided by the Judge in italics):

> Subp. 7 **Appeal.** The applicant may appeal *the executive director's* decision to the board within 30 days of receiving notice of the decision.

To be consistent with the new procedures set forth in subpart 3, this subpart will need to be revised to remove the reference to the executive director with the proper appellate body.

Again, the Administrative Law Judge recommends revising the appellate process to include an appeal to the Office of Administrative Hearings for a recommendation to the Board rather than having a licensing committee from the Board make an intermediary decision.

Notably, denials of a license are already provided a right to appeal under part 3512.1600. That rule permits a right to a "hearing" under Minn. Stat. ch. 14 (the Administrative Procedure Act). Therefore, applicants who are denied a license under the alternative pathway are already entitled to a contested case hearing before an administrative law judge under Minn. Stat. ch. 14. (*See* the discussion of proposed Rule 3512.1600 below.) Accordingly, revising this rule part to be consistent with Rule 3512.1600 is reasonable and would not result in a substantially different rule or require compliance with Minn. R. 1400.2110.

Given the conflict existing in proposed Rule 3512.0800, subp. 7 (related to the reference to the "executive director"), this subpart is **DISAPPROVED**. The Judge suggests that the Board take the time to fully consider the appellate process for alternative pathway applicants before re-submitting the rule for approval.

9. Part 3512.2000, Subparts 1 and 2: Requirements for Issuance of Licenses

Under this proposed rule, only applicants who complete a Board-approved program are eligible for licensure. According to proposed Rule 3512.2000, subp. 1 and 2, to be eligible for a license, "[a]n applicant must provide evidence of satisfactory

completion of a *board-approved program* in the license area" and "complete board-approved licensure programs *in Minnesota institutions* under part 3512.2500."[55]

Currently, there are no out-of-state institutions with Board-approved programs. The only programs that are currently Board-approved are the administrative licensure programs offered by the 14 Minnesota-based schools that comprise the University Collaborative – the group that was instrumental in the development of these rules.

As a result, this rule effectively prevents applicants who attend out-of-state institutions from receiving a license in Minnesota. This is directly contrary to proposed Rule 3512.2600. Rule 3512.2600 permits the licensure of candidates educated in other states, through programs that have not received approval from the Board under part 3512.2500. As a result, subparts 1 and 2 of proposed Rule 3512.2000 conflict with proposed Rule 3512.2600.

In addition, the SONAR does not explain why the Board believes it is necessary and reasonable for the Board to limit licensure only to applicants who are educated in one of the 14 Minnesota-based Board-approved programs.

Because the Board has failed to establish the need and reasonableness of this rule, and because the rule conflicts with proposed Rule 3512.2600, proposed Rule 3512.2000, subps. 1 and 2 are **DISAPPROVED.**

The Administrative Law Judge recommends the following changes to proposed Rule 3512.2000, subps. 1 and 2:

> Subpart 1. **In general.** An applicant must qualify separately for each licensure area for which application is made and provide evidence of satisfactory completion of a board-approved program in the licensure area <u>or establish compliance with part 3512.2600</u>.
>
> ***
>
> Subp. 2. **Initial license.** The initial license issued in any licensure area is a two-year license. The board must issue licenses ~~for administration and supervision in Minnesota schools~~ to persons who meet all requirements of applicable statutes and rules and who either complete board-approved licensure programs ~~in Minnesota institutions~~ under part 3512.2500 <u>or who qualify for licensure under part 3512.2600</u>.

As proposed, however, Rule 3512.2000, subps. 1 and 2 are **DISAPPROVED.**

10. Part 3512.2000, Subpart 5: Conduct Review

Upon receiving comments from PELSB after the publication of the proposed rule, the Board has revised the proposed rule as follows:

[55] Emphasis added.

Subp. 5. **Conduct review.** All applicants for licensure are subject to a criminal history background check as required under Minnesota Statutes, section 122A.18, subdivision 8. License renewals are subject to a conduct review performed by the board. The board may refuse to issue a license or deny a license renewal based on the results of the background check or conduct review. An applicant who is denied a license or license renewal as a result of the background check or conduct review may appeal the board's decision pursuant to part 3512.1600.

The establishment of a "conduct review" is new to the rule. Currently, the rule does not contain any provisions for a conduct review.

Under Minn. Stat. § 122A.18, subd. 8, criminal and Department of Human Services background checks are required for "first-time teaching applicants for licensure." There is no statutory requirement for criminal background checks for teaching or administrative license renewals. As a result, PELSB advised the Board to remove any reference to criminal background checks for license renewals.

The Board, however, seeks to maintain the proposed language related to "conduct review" for all license renewals, but provides no information explaining what a conduct review entails or the standards by which conduct will be assessed.

While it is good policy and practice to conduct a review of all licensees upon renewal, the rule itself lacks sufficient information to ensure that conduct reviews are conducted consistently and fairly for all applicants. Without establishing what a "conduct review" entails, this proposed rule leaves too much unfettered discretion to the Board or to the persons or groups delegated by the Board to conduct such reviews. There are no assurances that the same review would be applied to all renewal applicants and the process could be subject to attack as being unfair, bias, arbitrary, or capricious.

To remedy this material defect, the Board must identify what will be reviewed in the conduct review. Until criteria or details are included in the rule to ensure consistency in the application of "conduct reviews," this subpart is **DISAPPROVED** as giving the Board discretion beyond that which is allowed by law.

11. Part 3512.2050, Subpart A: Provisional Licenses

Proposed Rule 3512.2050 is a new rule related to provisional licenses. The Board adopted additional language suggested by PELSB in its final proposed rule. As proposed, Rule 3512.2050, subp. A, reads:

A. The board may issue a two-year nonrenewable license to an applicant who has not met all Minnesota preparation program requirements. The applicant must enroll and make progress in a board-approved program leading to licensure as a superintendent, a director of special education, or a kindergarten through grade 12 principal at a regionally accredited college or university during the applicant's two-year provisional status. The applicant must:

(1) hold an appropriate a full professional administrative license in another state; or

(2) have completed an applicable preparation program in another state and have a combined total of three years of successful education experience in:

(a) the administrative job for which the license is sought; or

(b) experiences listed in part 3512.0200, subpart 2.

First, it is unclear what is meant by "all Minnesota preparation program requirements." Presumably, this means the program requirements set forth in Rule 3512.0400 and the competencies set forth in Rule 3512.0510. The Board apparently concludes that only the 14 Minnesota-based, Board-approved licensure programs prepare students in the core competencies set forth in Rule 3512.0510. However, the Board does not establish those facts in its SONAR. Moreover, the proposed rule ignores the fact that out-of-state programs that have not been "Board approved" can, indeed, prepare a candidate sufficiently for licensure, as set forth in proposed Rule 3512.2600, so long as the licensure program is "equivalent" in content and credits to the Minnesota Board-approved programs.

Second, the Board asserts that the basis for this rule is "to address Minnesota's shortages of licensed directors of special education and superintendents, especially candidates of color."[56] The Board states that "many of the variance requests" (for variances from the Minnesota-only graduate school requirements) were from "candidates of color."[57] Therefore, instead of issuing variances, the Board seeks to offer provisional licenses for all candidates who do not attend a Minnesota Board-approved graduate school.

It appears that the Board intends to issue only provisional licenses to all out-of-state graduates and require them to attend a Minnesota-based Board-approved licensure program, regardless of what the candidate's out-of-state graduate program entailed. Under proposed Rule 3512.2600, the Board cannot require that applicants attend a Minnesota licensure program if their out-of-state licensure program is "equivalent" under Rule 3512.2600. (This will be further discussed below with respect to proposed Rule 3512.2600.) Under proposed Rule 3512.2600, an out-of-state candidate who meets the requirements is entitled to an *initial license*, not a provisional license.

Because of the conflict of this provision with proposed Rule 3512.2600, and because the Board has failed to establish the need and reasonableness of requiring an applicant to attend a Minnesota Board-approved licensure program, proposed Rule 3512.2050 is **DISAPPROVED.**

[56] SONAR at 36.
[57] *Id.*

To address what the Administrative Law Judge believes the Board is attempting to accomplish in gaining consistency with proposed Rule 3512.2600, the Judge suggests the following changes to subpart A:

> A. The board may issue a two-year, nonrenewable provisional license to an applicant under part 3512.2600 who has not completed a licensure program equivalent in credits or substantially equivalent in content to Board-approved programs ~~met all Minnesota preparation program requirements~~. To be eligible for a provisional license, t~~T~~he applicant must enroll and make progress in a board-approved program leading to licensure as a superintendent, principal, or director of special education~~, or a kindergarten through grade 12 principal at a regionally accredited institution college or university~~ during the applicant's two-year provisional status. To qualify for a provisional license, t~~T~~he applicant must:
>
> (1) hold a full ~~professional~~ administrative license in another state in the applicable administrative licensure area; or
>
> (2) have completed an applicable administrative preparation program in another state, and have a combined total of three years of successful education experience in:
>
> (a) the administrative ~~job~~ position for which the license is sought; or
>
> (b) experiences listed in part 3512.0200, subpart 2.

The insertion of the word "provisional" adds clarity to what kind of license is being issued. The addition of the reference to Rule 3512.2600 and the language set forth in that rule lends clarity to what the Board is attempting to achieve by this rule. Essentially, a provisional license is available to those out-of-state candidates whose licensure program the Board has found was not "equivalent" to Board-approved programs. (The problem with equivalency will be discussed with respect to proposed Rule 3512.2600 below).

The remaining recommended changes are for clarity. The removal of the word "professional," when related to administrative license, is to avoid conflict and confusion with the new defined term "professional license" established in proposed Rule 3512.0100, subp. 8. As proposed, the definition of "professional license" only relates to Minnesota two-year initial and five-year continuing licenses – not out-of-state licenses. Thus, the term "full professional administrative license" could be confusing.

The removal of "kindergarten through grade 12 principal" is to remove unnecessary language because the term "principal" is already defined in Rule 3512.0100 to mean kindergarten through grade 12 principal. The Judge recommends that the Board consider substituting the word "non-provisional" for "full" to address the issue of "emergency credentials" cited in its response to the PELSB comments. The word "full" is ambiguous. The substitution of the word "position" for "job" is merely a stylistic recommendation.

As proposed, however, Rule 3512.2050, subp. A is **DISAPPROVED**.

12. Part 3512.2050, Subpart B: Provisional License Extension

Proposed Rule 3512.2050, subp. B addresses the one-year extension of provisional licenses. It reads:

> B. The board may extend a provisional license issued under this part for one additional school year if the board determines an extension is warranted based on board-adopted criteria.

First, subpart A specifically states that a provisional license is nonrenewable. Subpart B allows an "extension" for one year. In application, it would seem that an extension has the same effect as a "renewal," but this is not a material defect, just an observation.

Second, and more importantly, nowhere in the rule has the Board established the criteria for determining whether a nonrenewable provisional license can be "extended." Simply including the phrase, "based upon board-adopted criteria," does not save a rule from being too discretionary. The criteria must be established in the rule, otherwise there is argument that decisions have been made arbitrarily, inconsistently, or unfairly. Also, if criteria have actually been developed by the Board for extensions, but have not been included in the rule, such criteria could be considered an "unpromulgated rule."

As written, the proposed rule grants the Board too much unfettered discretion. Unless and until the Board identifies the criteria for determining extensions, this provision is **DISAPPROVED**. The Board can revise this rule by including the criteria the Board intends to use.

13. Part 3512.2100: Initial License

Under the proposed rule, the only applicants who are eligible for an initial license are applicants who have completed a Minnesota Board-approved program and are recommended for licensure by *a Minnesota* college or university.

Proposed Rule 3512.2100, subp. A reads as follows:

> A. Licensure applicants must meet the requirements for each administrative area where the applicant seeks licensure. The board must issue an initial license to an applicant who meets all of the following requirements. An applicant must:
>
> (1) fulfill the requirements of part 3512.2000, subparts 1 and 2; and
>
> (2) be recommended for licensure by a board-approved Minnesota college or university which, in making such a recommendation, attests to the applicant satisfactorily completing the approved

> program. An applicant from another state must present to the Minnesota Professional Educator Licensing and Standards Board application intake staff a college or university transcript to be analyzed in order to determine program comparability.

To fulfill the requirements of part 3512.2000, subps. 1 and 2, an applicant must complete a Board-approved licensure program in Minnesota. While the second portion of subpart A seems to acknowledge out-of-state candidates who qualify under proposed Rule 3512.2600, the first part of subpart A obliterates the effect of Rule 3512.2600. Proposed Rule 3512.2600 allows out-of-state candidates to obtain an initial license so long as their out-of-state licensure program is "essentially equivalent" in credits and content to the 14 Minnesota Board-approved programs. It does not require Board approval of the program. Therefore, this rule cannot require that a candidate attend a Minnesota Board-approved program to obtain an initial license. It is simply inconsistent.

Moreover, the Board does not provide any evidence of the need or reasonableness for the proposed changes in its SONAR. Therefore, this provision is unsupported. Consequently, proposed Rule 3512.2100 is **DISAPPROVED**.

Because the SONAR does not explain the bases for changes to part 3512.2100, the Administrative Law Judge is unable to provide a recommendation for clarifying the rule.

14. Part 3512.2400, Subpart 2(C): Appeal of Suspension and Revocation of Licenses

Rule 3512.2400 addresses suspensions and revocations of licenses. Subpart 2 of the rule addresses the procedure for such disciplinary action. Subpart 2(C) appears to address the appeal process but improperly confuses the process set forth in the Minnesota Administrative Procedures Act.

As proposed, the Subpart 2(C) reads:

> C. The Board must hold a hearing conducted according to the rules of the Office of Administrative Hearings unless the licensee waives the licensee's right to a hearing.

Hearings conducted under "the rules of the Office of Administrative Hearings" are contested case hearings conducted by administrative law judges under the Minnesota Administrative Procedures Act. Boards do not conduct such hearings – the Office of Administrative Hearings conducts such hearings. As a result, this provision is confusing. Consequently, it is **DISAPPROVED**. A possible remedy that would protect the due process rights of licensees would be for the Board to develop an appellate procedure like that set forth in the Judge-recommended changes to Rule 3512.1600.

15. Part 3512.2500, Subpart 4: Program Appraisal

The proposed changes to Rule 3512.2500, subp. 4 makes a material change to the rule without providing any explanation in the SONAR. It makes initial licensure visits mandatory, rather than discretionary, changing the word "may" to "must" in the proposed rule.

While this may well be needed and reasonable, the Board does not present any evidence to support the change. While no stakeholder has objected to this change, it remains a material defect and, consequently, proposed Rule 3512.2500, subp. 4 must be **DISAPPROVED**.

16. Part 3512.2600: Licensure for Persons Prepared in States Other than Minnesota

The proposed changes to Rule 3512.2600, subp. 1(B) set forth the criteria for issuing an initial license to a person who is educated in a state other than Minnesota. After publishing the Notice of Intent to Adopt Rules, the University Collaborative submitted comments on the proposed changes to Rule 3512.2600, subpart 1(B), which the Board adopted.

The changes to the rule include, but are not limited to:

(1) the removal of the automatic issuance of an initial license to "persons who complete approved programs in colleges and universities leading to licensure within states which have signed contracts with Minnesota according to the Interstate Agreement on Qualification of Educational Personnel;"

(2) permitting the issuance of initial licenses to applicants who completed preparatory programs in other states that do not require licenses; and

(3) the removal of the requirement to complete the "human relations" program.

Essentially, the changes to the rule are to permit out-of-state applicants an initial license so long as they meet a credit requirement and complete licensure programs that are "essentially equivalent" to Board-approved programs.

There are material problems with the proposed rule. As discussed above, the Board has not made other rule parts consistent with the proposed changes to Rule 3512.2600. First, proposed Rule 3512.2600 does not require out-of-state applicants to complete a Minnesota Board-approved program. Yet various other provisions in the rules require all administrative licensure applicants to complete "Board-approved" programs *in Minnesota*. Therefore, there are material inconsistencies in the rules.[58]

[58] The Administrative Law Judge is not recommending that the Board require all applicants to attend a Board-approved program at a Minnesota institution, as such a requirement would be improper.

Second, the Board infuses confusion in Rule 3512.2600 by inserting different credit requirements for out-of-state candidates than are required for in-state candidates. Under proposed Rule 3512.0200, subp. 3(A), an applicant for licensure as a superintendent, principal, or director of special education who attends a Board-approved Minnesota school must have "a specialist or doctoral program [consisting] of a minimum of 60 semester credits or a program [consisting] of 60 semester credits beyond a bachelor's degree that includes a master's degree. . . ." Yet in proposed Rule 3512.2600, the credit "equivalency" is "30 semester credits beyond a master's degree or 60 semester credits beyond a bachelor's degree, including a master's, specialist, or doctoral degree."

It is not clear why the Board is imposing a different credit requirement for applicants prepared in out-of-state schools. The Board does not explain this discrepancy in its SONAR, other than to say that this language was moved from a different section of the rules. But that old section pre-dates the proposed changes to Rule 3512.0200 involving 60 semester credits and renders the provisions conflicting. Because the Board does not explain why this change is needed and reasonable in its SONAR, it is a defective rule.

Third, the SONAR also does not explain why the Board will grant out-of-state candidates an initial license without first *completing* the credit requirement contained in Rule 3512.0300, subp. 3(A). Under proposed Rule 3512.2600, an out-of-state candidate can obtain the initial license and then complete the credit requirement during the licensing period. Whereas, graduates from Minnesota Board-approved programs must complete the 60-semester-credit requirement before receiving the initial license.

Fourth, proposed Rule 3512.2600 appears to apply to licensure for *all* administrators, including directors of community education. Under Rule 3512.0505, directors of community education do not need anything more than a bachelor's degree. But pursuant to the proposed changes to Rule 3512.2600, an applicant for director of community education would still need to meet the 30/60 semester credit requirement.

Finally, and most problematic, is that, in its response to comments, the Board states – for the first time – that PELSB (the board that apparently handles licensing applications for the Board) has expressed that it is understaffed, underfunded, and lacks the expertise to evaluate applications of out-of-state applicants for "equivalency" of program contents. The Board's "response to comments" states:

> Minnesota is one of only a handful of states to require administrative preparation curriculums to be based on "competencies." In the new rules, there are 99 total competencies [set forth in Rule 3512.0510]. Theoretically, for a candidate from an out-of-state program to meet Minnesota standards, PELSB would have to determine whether the candidate's coursework contained the required competencies and was "essentially equivalent." However, historically, PELSB has not reviewed transcripts for competencies. The agency reports that it would be impossible to have enough staff to review every transcript, obtain every syllabi, and review for every appropriate competency. Furthermore, PELSB staff indicate they are not trained professionals in the academy and do not have the academic background to determine which activities within courses meet the standard for a specific competency.

Similarly, the Board has expressed that, given its small size and lack of funding and resources, it cannot fully review out-of-state applications for content "equivalency." The Board is hoping to potentially delegate this work to Board-approved programs. However, that would be an improper delegation of power and discretion.

Because neither PELSB nor the Board is equipped or prepared to review out-of-state programs for "essential equivalency," the Board has ultimately acknowledged that the rule cannot be effectuated. Therefore, it cannot be considered reasonable.

In sum, proposed Rule 3512.2600 is **DISAPPROVED** because: (1) it lacks an affirmative demonstration of need and reasonableness in the SONAR; (2) it conflicts with other proposed rules requiring completion of a Board-approved Minnesota licensure program [e.g., proposed Rules 3512.0200, subp. 3(A); .0505, subp 2(b); .0700, subp. 1; .2000, subps. 1, 2; .2050, subp. A; and .2100, subp. A]; (3) it lacks evidence that it can be enforced by either PELSB or the Board; and (4) it introduces confusion as to credit equivalency.

Should the Board attempt to revise the rule and bring other rules in compliance, the Administrative Law Judge recommends the following changes:

> B. The board must issue an initial ~~professional~~ license to persons who complete administrative preparation programs in colleges and universities within states outside Minnesota when all of the following criteria are met:
>
> > (1) the college or university where the preparatory program is completed is a regionally accredited ~~by the Association for the Accreditation of Colleges and Secondary Schools~~ institution, as defined by part 3512.0100, subpart 9;
> >
> > (2) the program the applicant completed is recognized by the state where it is located as qualifying the applicant for employment or licensure as ~~an administrator or for licensure~~ a school superintendent, principal, or director within that state;
> >
> > (3) the program the applicant completed is equivalent in credits and ~~essentially~~ substantially equivalent in content to board-approved programs ~~offered by Minnesota colleges and universities~~ under the board rules governing the licensure field, including preparation in the core competencies established in part 3512.0510. ~~A person licensed under this part must achieve credit equivalency with persons licensed in Minnesota by the time the person's initial professional license expires.~~ For superintendents, principals, and directors of special education, c~~C~~redit equivalency includes completion of a specialist or doctoral program consisting of a minimum of 60 semester credits or a program consisting of ~~30 semester credits beyond a master's degree or~~ 60 semester credits beyond a bachelor's degree, including a master's ~~specialist, or doctoral~~

> degree. To determine content equivalency, the board may consult with board-approved preparation programs; and
>
> (4) the college or university offering the program verifies that the applicant completed the ~~an approved~~ administrative preparation program at that institution and recommends the applicant for a license if licensure is required by that state.

Removal of the word "professional" from subpart 1(B) is to ensure consistency with the term "initial license," defined in proposed Rule 3512.0100, subp. 8. Inserting "all of" ensures clarity that each of the criteria must be met. The recommended changes related to a "regionally accredited institution" is to maintain consistency throughout the rule and reference the defined term, as recommended by the Administrative Law Judge above. The recommended changes to subpart 1(B)(2) provide clarity. The Judge recommends exchange of the word "essentially" with "substantially," as "substantially" is more commonly used in law for comparing items. The recommended removal of the ability to obtain credit equivalency in two years is to prevent conflict with the issuance of provisional licenses under proposed Rule 3512.2050 (which allows an applicant time to obtain credit equivalency). The recommended removal of the word "approved" in subpart 1(B)(4) is to prevent confusion with licensure programs approved by the Board under Part 3512.2500. Finally, the Judge recommends changing the credit equivalency to be consistent with proposed Rule 3512.0200, subp. 3(A).

The Board is advised that, before resubmitting the rules for approval, the Board must ensure consistency of proposed Rule 3512.2600 with all other proposed rules. As proposed, however, Rule 3512.2600 is **DISAPPROVED**.

17. Part 3512.5300: Variance

Rule 3512.5300 addresses variances to Board rules. It adopts, in large part, the text in Minnesota Statutes related to variances from rules set forth in Minn. Stat. §§ 14.055 and 14.056.

The Administrative Law Judge recommends that the Board revise the last paragraph of subpart 3 to correspond to the statutory language contained in Minn. Stat. § 14.055, subd. 3, as follows:

> Pursuant to Minnesota Statutes, section 14.055, subdivision 3, the board must issue a variance from a rule if the applicant provides evidence that applying the rule to the applicant's individual circumstances would not serve ~~the~~ any of the purposes of the rule. The board may not issue a variance under any circumstances if the variance would compromise the purpose of the rule or the variance would prejudice the substantial legal or economic rights of any person or entity.

This change does not make the rule substantially different and incorporates the exact language of the statute.

In revising its variance rule, the Board proposes to repeal subpart 5, which sets forth the notice requirements for variances. The reason for the repeal is that the Board believes a variance is "burdensome" on school districts.[59] According to the Board, school districts "have long disregarded these notice requirements because of the logistical hardship it places on districts. . . ."[60] In addition, the Board notes that it "has not enforced this provision for over a decade."[61] The Board notes that the notice requirements are "onerous."[62]

Unfortunately for the Board, Minnesota law requires notice for all rule variances. Minn. Stat. § 14.056 specifically requires the following when a variance petition is received by an agency or board:

> Subd. 3. **Notice.** In addition to any notice required by other law, an agency *shall make reasonable efforts* to ensure that persons or entities who may be affected by the variance have timely notice of the request for a variance. The agency may require the petitioner to serve notice on any other person or entity in the manner specified by the agency.[63]

This statute makes reasonable notice a mandatory part of the rule variance process.

A Board cannot abrogate by rule what the legislature has established in statute. While the Board is authorized by law to impose notice requirements more onerous than that required by Minn. Stat. 14.056, subd. 3, the Board cannot remove all notice requirements required by statute. Nor should the Board make a practice of failing to comply with the law. The Board should discuss with its legal counsel what changes can be made to subpart 5 to make it less burdensome for school districts. However, as proposed, the repeal of Rule 3512.5300, subp. 5 is **DISAPPROVED** because it conflicts with state law.

The Board also proposes changes to subpart 11 of the rule, as it relates to variances for school districts that are unable to find licensed applicants for the director of community education. The change relocates portions of current Rule 3512.0505, subp. 9 to this subpart, requiring a district to follow the variance process rather than issue a letter of approval of an exception. However, the revision takes out the current requirement that the school district certify that no licensed director of community education applied for the position. The reasoning behind this change is that the Board does not want to force districts to hire an available licensed director if he/she is not a "good fit" for the district when a more suitable, unlicensed candidate applies.[64]

This may or may not be good policy, but it would seem that if a licensed applicant applied for the position, the district would need to explain why that licensed individual was not suitable for the position as part of its variance application. This could place school districts in a difficult position to explain why an unlicensed applicant is more suitable than

[59] Ex. D at 44.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] Emphasis added.
[64] SONAR at 17.

a licensed applicant. The Board may wish to give more thought to this rule change before it resubmits proposed Rule 3512.5300 for approval.

B. Rules Approved Subject to Recommended Revisions

The following rules are approved, subject to the Administrative Law Judge's recommended revisions. The Board should consider these changes when resubmitting the rules for approval.

1. 3512.0100: Definitions

Having carefully reviewed the proposed rules, the Administrative Law Judge recommends that the Board include another defined term to its list of definitions to ensure consistency in the rule. That term is "regionally accredited institution." The Judge has attempted to define the term, as follows, based upon submissions from the Executive Director:

> Subd. 9. **Regionally accredited institution**. "Regionally accredited institution" means a college or university accredited by the Higher Learning Commission, Middle States Commission on Higher Education, New England Association of Schools and Colleges, Northwest Commission on Colleges and Universities, Southern Association of Colleges and Schools, or Western Association of Schools and Colleges.

While chapter 3512 uses the term "regionally accredited" frequently when referring to graduate schools, colleges, and universities, neither proposed nor existing rules define this term. To avoid confusion and later disputes, it is respectfully recommended that the Board define the term and use it consistently throughout the rules.

The Board is likewise advised to review the entire rule and find all references to "regionally accredited" and change the reference to "regionally accredited institution" to ensure consistency. The Judge has attempted to do this for the Board, as set forth below, but this work should continue through later redrafting of these rules.

This proposed change would not result in a substantially different rule and is a logical outgrowth of the substance of the published proposed rules.

2. Part 3512.0200, Subpart 1: Scope

Proposed Rule 3512.0200, subp. 1 requires that persons working as administrators have a license for the type of administration the person is performing. The Administrative Law Judge advises that the rule would read clearer if the Board would keep the fragment, "as a superintendent, principal, or special education director," in the last sentence of the subpart. The basis for this recommendation is that the phrase "appropriate license" becomes ambiguous without identifying the type of licenses to which it is referring. The Judge suggests the following language:

> Subpart 1. **Scope**. A person working as a superintendent, assistant superintendent, principal, assistant principal, special education director, or

assistant special education director must hold the appropriate license as a superintendent, principal, or special education director.

Subject to this recommended change, proposed Rule 3512.0200, subp. 1 is **APPROVED**. This recommended change would not result in a substantially different rule.

3. Part 3512.0300, Subpart 1: License Required

Proposed Rule 3512.0300, subp. 1 is one of the only rule parts that actually utilizes the defined term "professional license." It requires a "professional license" for all persons whose duties include 50 percent or more work as an administrator. Recall, however, that the proposed rules define "professional license" as only an "initial license" or a "continuing license." Consequently, persons who hold provisional licenses or nonrenewable one-year licenses would not be allowed, under this proposed rule, to perform the work of an administrator. This is where the defined term "professional license" is problematic, as set forth above.

Also, the last sentence of Rule 3512.0300, subpart 1 is confusing and appears to have a grammatical error.

To remedy these defects, the Administrative Law Judge suggests correcting Subpart 1, as follows:

> A person must hold the appropriate administrative ~~professional~~ license if 50 percent or more of the person's duties involve assisting the superintendent, principal, or director of special education with administration of personnel, employee supervision, employee evaluation, and curriculum implementation~~,~~ or, notwithstanding Minnesota Statutes, section 122A.40, subdivision 8, any of the person's duties includ~~ing~~e the duties listed in Minnesota Statutes, section 179A.03, subdivision 17.

The change from "including" to "include" is a simple grammatical change that does not change the substance of the rule. The change from "professional license" to "administrative license" is to prevent conflict with the Board's defined term, "professional license," which does not include those who hold provisional or one-year non-renewable licenses.

The Administrative Law Judge also recommends that the Board revise the second paragraph of subpart 1 to be consistent with the new defined term "initial license." The recommended change is set forth below:

> The board may issue an initial ~~professional~~ license for each administrative licensure area for which the applicant seeks licensure provided the applicant meets requirements for licensure as a superintendent of schools, as a school principal, or as a director of special education.

There is no defined term "initial professional license." The actual defined term is "initial license." (*See* proposed Rule 3512.0100, subp. 8.)

Because other rules allow administrators with provisional licenses and one-year nonrenewable licenses to work as superintendents, principals, and special education directors, proposed subpart 1 is inconsistent, causes confusion, and does not appear to accomplish the intended objective. Accordingly, proposed Rule 3512.0300, subp. 1 is **APPROVED**, subject to the suggested changes as set forth herein. Should the Board adopt these recommended changes, they would not result in a substantially different rule.

4. Part 3512.0400, Subpart 1: Field Experience

This subpart addresses field experience requirements but is unclear as to which licensure program it applies. Therefore, it is recommended that the Board clarify the subpart as follows:

> Subp. 1. **Field Experience**. A board-approved licensure program <u>for superintendents, principals, and directors of special education</u> must include a 320-hour field experience. . . .

It is apparent that the Board did not intend any of Rule 3512.0400 to apply to directors of community education, because requirements for field experience and situational observation for community education directors are already established in Rule 3512.0505. Rule 3512.0400, however, is not limited to superintendents, principals, and directors of special education.

To remedy this defect, the Administrative Law Judge also recommends that the Board change the name of 3512.0400 to "Program Requirements for Superintendents, Principals, and Directors of Special Education," and include the language identified above.

The changes recommended by the Judge are in conjunction with the change recommended for Rule 3512.0505, subp. 5. If the Board accepts these changes, they will not result in a substantially different rule.

Subject to the Judge's recommended revisions, Rule 3512.0400, subp.1 is **APPROVED**.

5. Part 3512.0505, Subpart 2(A): License Requirement

In conjunction with the Judge's recommendation related to the defined term "regionally accredited institution," the Judge recommends that Rule 3512.0505, subp. 2(A) be amended as follows:

> A. hold a baccalaureate degree from a regionally accredited <u>institution</u> ~~college or university~~;

Subject to this recommended change, this subpart is **APPROVED**. If the Board accepts this change, it will not result in a substantially different rule.

6. Part 3512.0510, Subpart 1(H)(7): Core Leadership Competencies

Proposed Rule 3512.0510, subp. 1(H)(7) reads as follows (including the modifications adopted by the Board in response to the Department of Education):

> (7) promote and support instructional practice consistent with knowledge of child learning and development, intellectually challenging, authentic to student experiences, recognizes student strengths, and differentiated and personalized.

There is a verb paralleling issue with this provision. It can be remedied as follows:

> (7) promote and support instructional practice that is consistent with knowledge of child learning and development, is intellectually challenging, is authentic to student experiences, recognizes student strengths, and is differentiated and personalized.

If the Board accepts the Administrative Law Judge's recommendation, these changes can be made without resulting in a substantially different rule. This is a technical suggestion and not a defect. Accordingly, Rule 3512.0510, subp. 1(H)(7) is **APPROVED**, subject to this technical suggestion.

7. Part 3512.0510, Subpart 1(K)(5): Core Leadership Competencies

It is recommended that proposed Rule 3512.0510, subp. 1(K)(5) be amended as follows:

> (5) demonstrate an understanding of, and utilize appropriate technology in, problem analysis.

Should the Board accept this small grammatical change, it would not result in a substantially different rule or require compliance with Minn. R. 1400.2110. This is a technical suggestion and not a defect. Accordingly, Rule 3512.0510, subp. 1(K)(5) is **APPROVED**, subject to this technical suggestion.

C. Part 3512.0700, Subpart 4: Administrative Licensure Without Teaching Experience for Superintendents, Principals, and Directors of Special Education

For clarity, and to be consistent with other rules using the same terminology, it is recommended that proposed Rule 3512.0700, subp. 4 be amended as follows:

> Subp. 4 **Teaching internship requirement.** An applicant must have experience and knowledge in curriculum, school organization, philosophy of education, early childhood education, and elementary, middle or junior high, and senior high schools.

This is a technical suggestion and not a defect. Accordingly, Rule 3512.0700, subp. 4 is **APPROVED**, subject to this technical suggestion.

8. Part 3512.0800, Subpart 2: Procedures for Licensure

Proposed Rule 3512.0800, subp 2 adds the sentence, "A candidate also may consult with a board-approved program." It is unclear what this sentence is contributing to the rule. The Board states that it was added to incorporate feedback from a legislator who wanted out-of-state candidates to be able to work with one of the 14 Minnesota Board-approved licensure programs in preparing their applications. However, it does not appear to add substance to the rule.

In revising the rules, the Board should consider the need for this provision.

9. Part 3512.0800, Subpart 4: Leadership Experience

Proposed Rule 3512.0800, subp. 5 reads:

> Subp. 5 **Education**. The candidate ~~shall~~ must have an undergraduate degree from a regionally accredited institution and broad formal preparation at the post-baccalaureate level including a master's degree or equivalent in areas such as those listed in subpart 2.

The proposed change does not change the current rule in any way. However, in its comments, PELSB suggested that the existing rule should be changed to be consistent with the proposed changes to Rule 3512.0200, subp. 3(A).

Under proposed Rule 3512.0200, subp. 3(A), a candidate for licensure as a superintendent must have completed "a specialist or doctoral program [consisting] of a minimum of 60 semester credits or a program [consisting] of 60 semester credits beyond a bachelor's degree that includes a master's degree. . . ." Under the "alternative pathway," however, a superintendent candidate must only have a bachelor's degree and a "master's degree or equivalent" in certain areas.

The Board states that it will not revise this part based upon PELSB's comments because the alternative pathway is specifically meant to qualify candidates who do not meet the educational requirements for superintendents set forth in part 3512.0200, subp. 3, but who offer demonstrated leadership experiences obtained through other means. According to the Board, this alternative pathway will allow more candidates to seek superintendent positions and diversify the applicant pool. This is a policy choice delegated to the Board by the legislature and it is a sound one.

For clarity, and to prevent future challenges, the Board may wish to include a sentence specifically stating that the educational requirements set forth in part 3512.0200, subp. 3(A) do not apply to the alterative pathway. Without such change, however, proposed Rule 3512.0800, subp. 4 is still **APPROVED**.

10. Part 3512.1200: Continuing Education Programs for Directors, Principals, and Superintendents

After publishing notice of the proposed rules, the Board's legal counsel recommended some changes to Rule 3512.1200 that the Board subsequently adopted, including removing references to the executive director and changing an inaccurate rule reference in subpart 2. *See* Board's Response to Comments at Exhibit Q, page 7.

It does not appear that the Board's adopted change is reflected in the adopted rules. Therefore, before resubmitting the rules for approval, the Board should have an experienced rule writer carefully review the adopted rules line-by-line to ensure all changes are reflected.

As appearing in the Revisor's approved adopted rules, Rule 3512.1200 is **APPROVED**.

11. Part 3512.1300: Procedures for Voluntary Surrender of Licenses

The Board has adopted changes recommended by PELSB into its proposed rule based upon an affirmative showing of the obsolete language in existing subpart 1(B) and 1(C). However, proposed subpart 1(B) is not clear. This subpart references the payment of a processing fee "under part 3512.2000." Rule 3512.2000 only imposes a processing fee for applications for issuance or renewal of licenses, not the surrender of licenses.

Rule 3512.2000 further references Rule 8710.0200, which also only references the processing fee for initial teaching licenses and renewals, not the surrender of a license. The Judge queries whether proposed subpart 1(B) is necessary. It does not appear that there is a processing fee established for the surrender of licenses. Either way, this subpart should be reviewed and clarified, if necessary.

This is a technical defect that the Board may correct without resulting in a substantially different rule. Subject to the Administrative Law Judge's suggestion, proposed Rule 3512.1300 is **APPROVED**.

12. Part 3512.1600: Appeals

Proposed Rule 3512.1600 relates to the right of an applicant to appeal a denial of a license. The Administrative Law Judge recommends that the proposed rule be clarified to ensure due process rights to the applicant under Minn. Stat. ch. 14.

The Judge recommends the following language:

> Subpart 1. **Licensure denials.** A person denied an administrative license may appeal the denial to the board under the contested case procedures set forth in Minnesota Statutes, chapter 14 ~~to the board~~.
>
> Subpart 2. **Appeal request.** To appeal the denial of an administrative license, an applicant ~~A person entitled to a hearing under this part~~ must file

a written request for a hearing with the executive director within 30 days of receiving notice of the denial. Upon receiving the request for hearing, the board will notice a contested case hearing before an administrative law judge under Minnesota Statutes, chapter 14. An applicant's ~~F~~failure to file a written request for a hearing within 30 days constitutes a waiver of the person's right to a hearing. The board's decision upon appeal is final, subject to an applicant's right to review by the Minnesota Court of Appeals under Minnesota Statutes, sections 14.63 to 14.68. ~~The board's decision is final.~~

The suggested changes clarify the procedures set forth in Minn. Stat. ch. 14 and further clarify an appellant's right to an appeal to a court of law.

A proposed, subpart 1 references Minn. Stat. ch. 14 (appeals to the Office of Administrative Hearings) but seems to indicate that the appeal is only to the Board, skipping the contested case processes set forth in Minn. Stat. ch. 14. Consequently, the subpart is confusing. There would be no reason to reference Minn. Stat. ch. 14 and a "hearing" if the Board did not intend for the applicant to have rights to a contested case hearing before an Administrative Law Judge under chapter 14.

The changes recommended herein are for clarification only and do not result in a substantially different rule. In addition, they are logical outgrowths of the rules noticed. Subject to the recommended changes, proposed Rule 3512.1600 is **APPROVED**.

13. Part 3512.2300, Subpart 3: Renewal of Continuing Licenses

The Board has revised subpart 3 of this rule after its publication. The changes are based upon comments from PELSB and upon discovering that the Board had erroneously omitted a sentence in the proposed rule. The Administrative Law Judge recommends the following changes to the proposed rule to ensure consistency in the rules:

Subp. 3. **Renewal of continuing licenses**. The board must renew the continuing license of an applicant who provides evidence of completing 125 clock hours of approved administrative and supervisory continuing education earned according to part 3512.1200 during the five-year period immediately before renewing the continuing license. The board must approve continuing education programs~~,~~ and the clock hours an applicant may earn in each program according to part 3512.1200. An applicant may apply relevant courses successfully completed at a regionally accredited institution ~~colleges and universities~~ toward the clock-hour requirement. Coursework done at a regionally accredited institution ~~college or university~~ does not require prior approval. One quarter college credit equals 15 clock hours~~;~~ and one semester college credit equals 20 clock hours. An applicant must meet the renewal requirements during the five-year period of each continuing license, and no clock hours shall carry forward into any subsequent five-year licensure period. The applicant may appeal to the board for a continuing education variance under part 3512.5300 to allow credits the applicant earned outside the five-year period to count toward the 125-clock-hour requirement.

PELSB opposes the last sentence of this subpart related to a continuing education variance. PELSB's comment was, "How are [the Board] and PELSB assuring that people are not using clock hours they used for their last renewal again?"[65] PELSB's comment is a reasonable one.

The Board asserts that the basis for this last sentence is to give administrators an opportunity for a variance in cases of "unplanned emergencies," such as "being deployed overseas, a health crisis, or . . . divorce."[66] While these may be reasons why an administrator cannot meet the 125-hour requirement in five years, the Board does not explain why or if it will allow a licensee to use hours reported in the prior reporting period.

Despite these shortcomings, the rules set out explicit procedures for variances. For a licensee to avail herself to this exception, the licensee must seek a variance, which entails a fairly rigorous review process. During that review, the Board can ensure that the administrator is not "double-counting" continuing education credits during two reporting periods.

Because the Board is incorporating the variance procedure into this rule, proposed Rule 3512.2300, subp. 3 is **APPROVED** over the objection of PELSB. Ultimately, the wisdom of such an exception is left to the Board.

14. Part 3512.2300, Subpart 4: Lapsed Licenses

The proposed changes to this subpart insert a new requirement that licensees who allow their licenses to lapse for more than 60 days apply for a variance from the Board while the Board renews the license. PELSB asserts that this provision is "punitive," hard to enforce, and prolongs the renewal process.[67] The Board responds that such a provision serves as a necessary "deterrent to administrators forgetting to renew a license."[68] Because the Board has a process for variances in its rules, this provision is within the discretion of the Board to impose. However, for purposes of clarity, the Administrative Law Judge recommends the following non-substantive change to the adopted rule:

> Subp. 4. **Lapsed license.** If an applicant allows a continuing license to lapse for more than 60 days and the applicant is currently employed as an administrator or supervisor, the applicant must obtain a variance from the board while the board ~~it~~ renews the license. If the applicant was not employed as an administrator or supervisor during the year immediately before applying to renew the license, the applicant must demonstrate to the board that the applicant:

This change reinstates prior language, as published, and, thus, does not require compliance with Minn. R. 1400.2110.

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[65] Exs. J, Q.
[66] Ex. Q at 12.
[67] Exs. J, Q.
[68] Ex. Q at 13.

The Judge notes that Rule 3512.2300, subp. 4(B) references a one-time, nonrenewable, one-year license not identified in the new definitions of licenses set forth in proposed Rule 3512.0100, subp. 8. The Board should evaluate this issue to ensure consistency in the rules before resubmitting the rules for approval.

Subject to the recommended changes, proposed Rule 3512.2300, subp. 4 is **APPROVED**. The recommended changes do not result in a substantially different rule.

15. Part 3512.2400, Subpart 7(B) and 7(C): Issuance or Reinstatement of License After Suspension

The changes to Rule 3512.2400, subparts 7(B) and 7(C), as proposed, are confusing. To clarify the rule, the Administrative Law Judge recommends the following changes:

> B. If the person's suspended license is an initial license that has not lapsed during the suspension, the person may resume administrative or supervisory functions for whatever period of time remains on that initial license after the suspension expires, provided that the person presents reliable evidence to the board that the person met all terms and conditions the board imposed as prerequisites for reinstatement.
>
> C. If the suspended license is a continuing license that has not lapsed during the suspension, the person may resume administrative or supervisory functions for whatever period of time remains on the continuing license after the suspension expires, provided that ~~after~~ the person presents reliable evidence to the board that the person met all terms and conditions the board imposed as prerequisites for reinstatement.

Subject to these revisions, proposed Rule 3512.2400, subps. 7(B) and 7(C) are **APPROVED**. These recommended changes will not result in a substantially different rule.

16. Part 3512.2500, Subpart 2(K): Content of Program Description

For clarity, the Administrative Law Judge recommends that proposed Rule 3512.2500, subp. 2(K) be revised as follows:

> K. include program review data as mandated by ~~the legislature and board~~ Minnesota Statutes, section 122A.091, subdivision 1(c), and describe how that data are utilized.

This recommended change expressly identifies the "program review data mandated by the legislature." This recommended change will not result in a substantially different rule. Subject to this recommendation, proposed Rule 3512.2500, subp. 2(K) is **APPROVED**.

17. Part 3512.2500, Subpart 5: Conditional Approval

For clarity, the Administrative Law Judge recommends the following non-substantive change to Rule 3512.2500, subp. 5:

> Subp. 5 **Conditional approval.** If the board conditionally approves a licensure program, the board must reconsider the licensure program's approval status after verifying that the board's stated conditions are met. If the board's stated conditions are not met within the ~~established time lines~~ timelines established by the board, the board must withdraw its conditional approval.

Subject to this recommended change, proposed Rule 3512.2500 is **APPROVED**. This recommended change does not result in a substantially different rule.

18. Part 3512.2700: REPEALED

The Board proposes to repeal the existing Rule 3512.2700 related to the human relations requirements. However, there is nothing in the proposed or adopted rules, as approved by the Revisor's Office, that this rule is repealed. The Board should remedy this issue with the Revisor's Office as part of its resubmission of rules.

IV. Conclusion

Because various rule provisions have been disapproved, the Administrative Law Judge is submitting her Report to the Chief Administrative Law Judge for her review pursuant to Minn. Stat. § 14.26, subd. 3(b) and Minn. R. 1400.2300, subp. 6.

A.C.O.