

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Professional Educator Licensing and Standards Board Governing the Issuance, Renewal, and Validity of Teaching Licenses; Licensure via Portfolio; Tiered Licensure; and Technical Changes to Teaching Licenses

**REPORT OF THE CHIEF
ADMINISTRATIVE LAW JUDGE**

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 (2018), and Minn. R. 1400.2240, subp. 4 (2017). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule should not be approved.

Based upon a review of the record in this proceeding, the Chief Administrative Law Judge hereby approves in all respects the findings in the Report of the Administrative Law Judge dated August 6, 2018.

The changes or actions necessary for approval of the disapproved rules are as identified in the Administrative Law Judge's Report.

If the Board elects not to correct the defects associated with the proposed rules, the Board must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2018).

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

Dated: August 16, 2018



TAMMY L. PUST
Chief Judge

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PROFESSIONAL EDUCATOR LICENSING AND STANDARDS BOARD

In the Matter of the Proposed Rules
Relating to Issuance, Renewal, and
Validity of Teaching Licenses; Licensure
via Portfolio; Tiered Licensure; and
Technical Changes to Teaching Licenses

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

Administrative Law Judge Barbara Case conducted a hearing in this rulemaking proceeding for the Professional Educator Licensing and Standards Board (PELSB or Board). The hearing commenced at 9:30 a.m. on June 8, 2018, at the Minnesota Department of Education (Department), Conference Center A, 1500 Highway 36 West, Roseville, Minnesota. The hearing continued until everyone present had an opportunity to speak concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act (MAPA).¹ The Minnesota Legislature designed the rulemaking process to ensure that state agencies have met all requirements of Minnesota law for adopting rules. Those requirements include evidence that the proposed rules are necessary and reasonable and that any modifications made by the agency after the proposed rules were initially published do not result in the rules being substantially different from what the agency originally proposed.

The rulemaking process includes a hearing when a sufficient number of persons request one or when ordered by the Board. The hearing is intended to allow the Board and the Administrative Law Judge reviewing the proposed rules to hear public comments regarding the impact of the proposed rules and consider what changes might be appropriate.

The Board's hearing panel included the following members: Anne Krafthefer, Board Chair; Alex Liuzzi, Executive Director of PELSB; Debby Odell, interim director of licensing at PELSB; and Emily Busta, PELSB staff. A total of 62 individuals signed the hearing register.²

The Board received written comments on the proposed rules from 63 members of the public prior to the hearing.³ The Board did not file a preliminary response to the pre-

¹ Minn. Stat. §§ 14.131-.20 (2018).

² See Rule Hearing Register (June 8, 2018) (on file with the Minn. Office Admin. Hearings).

³ See Exhibit (Ex.) 8 (Written Comments).

hearing comments. After the hearing, the Administrative Law Judge kept the administrative record open for an additional 20 calendar days, until June 28, 2018, to allow interested persons and organizations, as well as the Board, to submit written comments. Seven members of the public submitted written comments at the hearing.⁴ Twenty-four members of the public made comments at the hearing.⁵ Forty-five members of the public submitted post-hearing comments.⁶

The Board did not file a post-hearing response to the comments made at the hearing. The Board filed additional comments and proposed additional rule changes. Thereafter, the record remained open for an additional five business days, until July 6, 2018, to allow interested persons and the Board to file a written response to any comments received during the initial comment period.⁷ The Board did not submit a rebuttal during the rebuttal period but did file additional comments. Two rebuttal comments were submitted by members of the public.⁸ The hearing record closed on July 6, 2018.⁹

SUMMARY OF CONCLUSIONS

The Board has established that it has the statutory authority to adopt the proposed rules, and that the rules are necessary and reasonable, except for the following proposed rules in which the Administrative Law Judge finds defects:

- a. **Rule 8710.0310** (Definitions):
 - (1) Subpart 1G. “Good cause;”
 - (2) Subpart 1J. “Professional license from another state.”

- b. **Rule 8710.0311** (Tier 1 License):
 - (1) Subparts 2B, 4B, 5B, 6B (“acceptable” applicants);
 - (2) Subparts 2C(1), 4D(2), 5C(1), 6D(1) (mentorship program);
 - (3) Subpart 6C(2) (good cause);
 - (4) Subparts 2D, 4E, 5D, 6C, 6E (emergency placements);
 - (5) Subpart 6 (additional renewals)

- c. **Rule 8710.0312** (Tier 2 License):
 - (1) Subpart 6B (good cause).

⁴ Ex. A (Letter from the Minnesota Business Partnership, June 5, 2018); Ex. B (Written Comments of the Minnesota Association of Colleges for Teacher Education, undated); Ex. C (Comments of Paul Spies, Ph.D., June 8, 2018); Exs. D and E (Comments by the American Music Therapy Association and information on the Individuals with Disabilities Education Improvement Act, undated); Ex. F (Statement of Kristi Weidlein); Ex. G (Statement of Outfront Minnesota, June 8, 2018).

⁵ See Public Hearing Transcript (Pub. Hrg. Trans.) (on file with Minn. Office Admin. Hearings).

⁶ See eComments Report on Public Comments – Initial and Rebuttal (July 6, 2018) (on file with Minn. Office Admin. Hearings).

⁷ See Minn. Stat. § 14.15, subd. 1.

⁸ See Rebuttal Comments submitted through eComments on June 29, 2018, and July 2, 2018.

⁹ Pursuant to Minn. Stat. § 14.15, subd. 2 (2018).

- d. **Rule 8710.0314** (Tier 4 License):
 - (1) Subpart 2B(1) (conventional, nonconventional, or alternative teacher preparation program).
- e. **Rule 8710.0320** (Out-of-Field Permission):
 - (1) Subpart 2A (“acceptable” applicants);
 - (2) Subpart 2C (emergency placements);
 - (3) Subpart 4C (“acceptable” applicants); and
 - (4) Subpart 5 (additional renewals).
- f. **Rule 8710.6000** (Speech-Language Pathologist):
 - (1) Subpart 1b (waiver for Tier 2 License).
- g. **Rule 8710.6200** (School Psychologist):
 - (1) Subpart 1c (Tier 2 license duration).
- h. **Rule 8710.6400** (School Counselor):
 - (1) Subpart 1bC(3) (day-to-day supervision);
 - (2) Subpart 1cB (renewal).

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

FINDINGS OF FACT

I. Nature of the Proposed Rules

1. PELSB oversees and implements teacher licensing for the state of Minnesota. In order to improve the state’s teacher licensure system, the 2017 Legislature established PELSB by enacting laws combining the Board of Teaching and the Minnesota Department of Education’s Teacher Licensure Division.¹⁰ The legislation included a new tiered licensure system for licensing teachers in Minnesota and a directive to PELSB to adopt rules to implement the system.¹¹

2. This rulemaking is the Board’s effort to comply with the Legislature’s directive that the Board “must adopt rules relating to fields of licensure”¹² and specifically to implement sections 120B.363, 122A.05 to 122A.09, 122A.092, 122A.16, 122A.17, 122A.18, 122A.181, 122A.182, 122A.183, 122A.184, 122A.185, 122A.186, 122A.187, 122A.188, 122A.20, 122A.21, 122A.23, 122A.26, 122A.28, and 122A.299.¹³

3. In 2016, the Office of the Legislative Auditor (OLA) made recommendations to the Legislature regarding teacher licensure. The Auditor found that:

¹⁰ 2017 Minn. Laws 1st Spec. Sess. ch. 5, art. 12, §§ 4-12.

¹¹ *Id.*; Minn. Stat. 122A.09, subd. 9 (2018).

¹² Minn. Stat. § 122A.09, subd. 9.

¹³ *Id.*, subd. 9; Statement of Need and Reasonableness (SONAR) at 2.

- Having two agencies responsible for teacher licensing (the Department of Education and the Board of Teaching) made it difficult to hold either accountable for licensing decisions;
- Constantly changing and poorly defined teacher licensure laws made the licensing requirements difficult to understand;
- Multiple exceptions to licensure requirements led to loopholes and meaningless standards; and
- Applicants had not been provided with sufficient information about why they were denied licensure.¹⁴

4. The Legislative Auditor recommended that the Legislature:

- Consolidate all teacher licensure activities into one state entity;
- Clarify statutes regarding teacher licensure requirements; and
- Restructure the teacher licensure system to ensure consistency and transparency.¹⁵

5. Additionally, the Legislative Auditor recommended that licensure denial letters specifically state deficiencies identified in an applicant's application and that the entity in charge of appeals should make sure that the appeal process is consistent with the law.¹⁶

6. The Legislature passed legislation in June 2017 redesigning teacher licensure and creating a tiered licensure structure.¹⁷ The law abolished the Board of Teaching (BOT) and created PELSB to whom it gave the authority to adopt a tiered licensure system to replace the current licensing system. Before BOT was abolished it created draft rules reflecting the tiered licensure system. Those draft rules were a starting point for the current proposed rules.¹⁸

7. According to the Board, the proposed rules:

- Make technical changes to Minn. R. 8710.0301; .4725 and .4825;
- Develop guidelines aligned to Minn. Stat. §§ 122A.181-184 for application, renewal, and processing of tiered licensure in Minn. R. 8710.0311 to 8710.0314;

¹⁴ Ex. 12 at ix (Office of the Legislative Auditor Evaluation Report on Minnesota Teacher Licensure to the Legislature, Summary, dated March 2016).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See 2017 Minn. Laws 1st Spec. Sess. ch. 5.

¹⁸ SONAR at 1 (April 2018).

- Propose a licensure type aligned to Minn. Stat. § 122A.09, subd. 10(a) and (b) in Minn. R. 8710.0321;
 - Propose a licensure type aligned to Minn. Stat. § 122A.09, subd. 9(b) in Minn. R. 8710.0320;
 - In accordance with Minn. Stat. § 122A.18, subd. 7a, propose to revise substitute teacher licensure in Minn. R. 8710.0325-.0326;
 - In accordance with Minn. Stat. § 122A.18, subd. 10, propose guidelines for licensure via portfolio in Minn. R. 8710.0330;
 - Revise licensure renewal rules parts 8710.7000, .7100 and .7200 to align with Minn. Stat. § 122A.187.¹⁹
8. The Board also proposes to repeal the following rules:
- Minn. R. 8700.7620, which authorizes a teacher qualification assessment process maintained by the Commissioner of Education. This rule is replaced by proposed rule 8710.0330 (Teacher Licensure via Portfolio Application);
 - Minn. R. 8710.0330, subps. 1, 1a, 2, 2a, 2b, 3, 5, 6, 7, 8, 9, 10, and 11, previous versions of issuance, renewal and validity of license types, replaced by proposed rule 8710.0310;
 - Minn. R. 8710.0600, governing licenses that no longer exist;
 - Minn. R. 8710.1000, governing substitute teachers replaced by proposed rules 8710.0325 and .0326;
 - Minn. R. 8710.1050, governing intern licenses that no longer exist;
 - Minn. R. 8710.1250, governing temporary limited licenses that no longer exist;
 - Minn. R. 8710.1400, governing personnel variances replaced by 8710.0320;
 - Minn. R. 8710.1410, governing renewable licenses that no longer exist; and
 - Minn. R. 8710.7100, subp.2, relating to the scope of substitute teaching licenses, replaced by Minn. R. 8710.0325 and .0326.²⁰

¹⁹ SONAR at 1.

²⁰ SONAR at 1 and 2.

II. Rulemaking Legal Standards

9. In a rulemaking proceeding, the agency must establish the need for and reasonableness of the proposed rules by an affirmative presentation of facts.²¹ To support a rule, an agency may rely on legislative facts, including general facts concerning questions of law, policy, and discretion, or it may simply rely on interpretation of a statute or stated policy preferences.²²

10. The Board prepared a SONAR in support of the proposed rules. At the hearing, the Board primarily relied on the SONAR for the affirmative presentation of facts in support of the proposed rules. The SONAR was atypically organized by particular words and phrases rather than by rule part, which made the SONAR difficult to understand. However, this did not prevent numerous members of the public from commenting on the rule. The Board somewhat remedied the confusing SONAR by submitting a rule-by-rule analysis during the comment period.

11. Although there is evidence in the record that the Board responded to prehearing comments from legislators and stakeholders, the Board did not respond to written comments received into the hearing record and on eComments from the public.²³ This made the Board's rationale for its choices, at times, difficult to discern.

12. A rule must be "rationally related to the objective sought to be achieved."²⁴ Thus, any inquiry as to a rule's reasonableness requires "a searching and careful inquiry of the record to ensure that the agency action has a rational basis."²⁵ The agency must "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."²⁶

13. Although reasonable minds might disagree about the wisdom of a certain course of action, it is not the Administrative Law Judge's role to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency.²⁷ Therefore, "a reviewing court will not substitute its judgment if

²¹ Minn. Stat. § 14.14, subd. 2 (2018); Minn. R. 1400.2100 (2017).

²² See *Mammenga v. Dep't of Human Servs.*, 442 N.W.2d 786, 791-92 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

²³ The Minnesota Court of Appeals has said that "An agency must respond in a manner that states the main reasons for its decision and explains why the agency reached the decision it did. *Pub. Citizen, Inc. v. Fed. Aviation Admin.*, 988 F.2d 186, 197 (D.C.Cir.1993). We consider this standard to be implicit in the provisions of MAPA, which permits the public to submit comments to test a proposed rule. Minn. Stat. § 14.14, subd. 2a. An agency must respond to questioning "in order to explain the purpose or intended operation of a proposed rule, or a suggested modification, or for other purpose if material to the evaluation or formulation of the proposed rule." *Id.*

²⁴ *Builders Ass'n of Twin Cities v. Minn. Dep't of Labor and Industry*, 872 N.W.2d 263, 268 (Minn. Ct. App. 2015) (quotation omitted).

²⁵ *Id.*

²⁶ *Pettersen*, 347 N.W.2d at 244.

²⁷ See *Minn. Env'tl. Science and Econ. Review Bd. v. Minn. Pollution Control Agency*, 870 N.W.2d 97, 102 (Minn. Ct. App. 2015) ("An agency decision, including rulemaking, enjoys a presumption of correctness and a court should defer to an agency's expertise and special knowledge." (quotation omitted)).

an agency can demonstrate that it has complied with rulemaking procedures and made a considered and rational decision.”²⁸

14. In addition to need and reasonableness, the Administrative Law Judge must also assess whether: the agency complied with the rule-adoption procedures; the proposed rules grant undue discretion; the agency has statutory authority to adopt the rules; the rules are unconstitutional or illegal; the rules involve an undue delegation of authority to another entity; or the proposed language does not constitute a rule.²⁹

15. If changes to the proposed rule are made by the agency or suggested by the Administrative Law Judge after original publication of the rule language in the *State Register*, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed. Minn. Stat. § 14.05, subd. 2 (2018) sets forth the applicable standards to determine whether the changes create a substantially different rule. Under the statute, a modification does not make a proposed rule substantially different if the differences are within the scope of the matter announced in the notice of hearing and are in character with the issues raised in that notice; the differences are a logical outgrowth of the contents of the notice of hearing and the comments submitted in response to the notice; and the notice of hearing provided fair warning that the outcome of the rulemaking proceeding could be the rule in question.³⁰

16. In determining whether modifications result in a rule that is substantially different, the Administrative Law Judge must consider whether: persons who will be affected by the rule should have understood that the rulemaking proceeding could affect their interests; the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of hearing; and the effects of the rule differ from the effects of the proposed rule contained in the notice of hearing.³¹

III. Procedural Requirements of Chapter 14

A. Publications

17. On February 26, 2018, the Board published a Request for Comments on possible amendments to the Rules Governing Issuance, Renewal, and Validity of Teacher Licenses; Tiered Licensure; Licensure via Portfolio; and Technical Changes in the *State Register*.³²

18. On May 7, 2018, the Board published the Notice of Hearing on the proposed rules in the *State Register*.³³

²⁸ *Id.* at 98.

²⁹ Minn. R. 1400.2100.

³⁰ Minn. Stat. § 14.05, subd. 2(b).

³¹ *Id.*, subd. 2(c).

³² Ex. 1 (Request for Comments); 42 Minn. Reg. 1024, 1024-5 (Feb. 26, 2018).

³³ Ex. 5 (Notice of Hearing); 42 Minn. Reg. 1369, 1373 (May 7, 2018).

19. The Board certified that on May 7, 2018, it mailed or emailed the Notice of Hearing to all persons on the Board's rulemaking mailing list established by Minn. Stat. § 14.14, subd. 1a (2018).³⁴

20. On May 8, 2018, the Board requested that the Chief Judge assign an Administrative Law Judge to hold a rule hearing for the proposed rules.³⁵

21. On May 8, 2018, the Board also requested approval of its Additional Notice Plan.³⁶

22. On May 11, 2018, the Administrative Law Judge issued an Order denying the Board's request for approval of its Additional Notice Plan. In a memorandum accompanying the Order, the Administrative Law Judge explained that Minn. R. 1400.2060 (2017) provides that "if the agency requests approval of its Additional Notice Plan, it must make the request and receive approval *before* it publishes the request for comments or the notice of proposed rules."³⁷ The Board published its Notice of Hearing in the *State Register* on May 7, 2018, prior to the Office of Administrative Hearing's receipt of the Board's request for review of the Additional Notice Plan.³⁸ Under the rule, the Board's act of publishing its notice effectively deprived the Administrative Law Judge of the authority to review the Additional Notice Plan.³⁹

23. The Board certified the accuracy of the mailing list as of June 5, 2018.⁴⁰

24. The Board certified that it provided notice of its proposed rules and rulemaking hearing according to the Additional Notice Plan.⁴¹ On May 22, 2018, the Department:

- Mailed a copy of the SONAR to the Legislative Reference Library as required by Minn. Stat. §§ 14.131, .23 (2018);⁴² and
- Provided notice of the rulemaking to legislative chairs and minority leaders as required by Minn. Stat. § 14.116 (2018).⁴³

³⁴ Ex. 6 (Certificates of Mailing the Notice of Hearing and Certificate of Accuracy of the Mailing List).

³⁵ Letter from Alex Liuzzi to Chief Administrative Law Judge (April 30, 2018) (on file with the Minn. Office Admin. Hearings). The letter was dated April 30, 2018 but was received at the Office of Administrative Hearings on May 8, 2018.

³⁶ *Id.*

³⁷ Emphasis added.

³⁸ Ex. 5 (Notice of Hearing). See 42 Minn. Reg. 1373- 1401 (May 7, 2018).

³⁹ Order on Request for Review of Additional Notice Plan (May 11, 2018).

⁴⁰ Ex. 6 (Certificates of Mailing the Notice of Hearing and Certificate of Accuracy of the Mailing List).

⁴¹ Ex. 7 (Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan).

⁴² Ex. 4 (Certificate of Mailing the SONAR to the Legislative Reference Library and Letter to the Legislative Reference Library).

⁴³ Ex. 9 (Certificate of Sending Notice to legislative chairs, minority leaders, and the Legislative Coordinating Commission). The Board sent the Notice electronically on May 7, 2018, and by mail on May 22, 2018.

25. A public hearing on the proposed amended rules was held on June 8, 2018, in Roseville, Minnesota. During the hearing, the Board submitted the following documents, which the Administrative Law Judge received into the hearing record:

- Exhibit 1: Request for Comments published in the *State Register* on February 26, 2018 (42 Minn. Reg. 1024);
- Exhibit 2: Proposed rules amending Minnesota Rules Chapter 8700 and 8710 including the Revisor's approval for publication;
- Exhibit 3: SONAR, including Attachments;
- Exhibit 4: Certificate of Mailing the SONAR to the Legislative Reference Library (with a copy of the transmittal letter to the Legislative Reference Library);
- Exhibit 5: Notice of Intent to Adopt Rules as mailed on May 1, 2018, and as published in the *State Register* May 7, 2018 (42 Minn. Reg. 1369,1373);
- Exhibit 6: Certificate attesting that the Board mailed the Notice of Hearing to persons and associations on the Department's rulemaking list and the certificate of the accuracy of the mailing list;
- Exhibit 7: Certificate of Additional Notice Mailing;
- Exhibit 8: All written comments on the proposed rules received by the Board during the post publication of the hearing notice⁴⁴ and all comments received regarding the Board's prior proposed rules;
- Exhibit 9: Certificate of Notice to Legislators;
- Exhibit 10: Summary of Proposed Rule Changes;
- Exhibit 11: Copy of 2017 Minn. Laws 1st Spec. Sess. ch.5, arts. 3-12;
- Exhibit 12: Copy of the OLA's 2016 Evaluation Report titled "Minnesota Teacher Licensure;" and
- Exhibit 13: Certificate of Letter to Minnesota Management and Budget (MMB).

⁴⁴ The Board also included comments received during its prior rulemaking effort; however, the Administrative Law Judge did not reference those comments in this Report because they were in regard to different proposed rules.

26. In addition to the documents submitted by the Board, a number of additional exhibits were submitted by members of the public and received into the hearing record.⁴⁵ Most of these submissions mirrored or supplemented spoken comments.

27. The Administrative Law Judge finds that the Board has met the procedural requirements imposed by the above-referenced laws and rules.

B. Additional Notice

28. Minn. Stat. §§ 14.131, .23 require that the SONAR contain a description of an agency's efforts to provide additional notice to persons who may be affected by the proposed rules.

29. The Certificate of Mailing the Additional Notice Plan states that the Board provided notice to over 50 education-related interest groups and organizations which are listed in the Additional Notice Plan.⁴⁶

30. The Administrative Law Judge did not approve the Board's Additional Notice Plan because the request for review was filed after publication of the Notice of Hearing.⁴⁷

31. As noted above, the Board certified that it provided notice of the proposed rules to all individuals and organizations included on their rulemaking mailing list, as well as to the individuals and entities identified in the Additional Notice Plan.⁴⁸

32. The Administrative Law Judge finds that the Board's Additional Notice Plan was adequate to provide notice to those who might be impacted by the proposed rules.

C. Statutory Authority

33. The Legislature granted the Board authority to adopt these rules in Minn. Stat. § 122A.09, subd. 9(a) as amended by 2017 Minn. Laws 1st Spec. Sess. ch. 5, Arts. 3, § 1 and 12, §§ 11 and 20. The statute states that PELSB must adopt rules subject to the provisions of chapter 14 to implement sections 120B.363, 122A.05 to 122A.09, 122A.092, 122A.16, 122A.17, 122A.18, 122A.181, 122A.182, 122A.183, 122A.184, 122A.185, 122A.186, 122A.187, 122A.188, 122A.20, 122A.21, 122A.23, 122A.26, 122A.28, and 122A.29.

⁴⁵ Ex. A (Letter from the Minnesota Business Partnership, June 5, 2018); Ex. B (Written Comments of the Minnesota Association of Colleges for Teacher Education, undated); Ex. C (Comments of P. Spies, Ph.D., June 8, 2018); Exs. D and E (Comments by the American Music Therapy Association and information on the Individuals with Disabilities Education Improvement Act, undated); Ex. F (Statement of K. Weidlein); Ex. G (Statement of Outfront Minnesota, June 8, 2018).

⁴⁶ Ex. 7 (Certificate of Mailing, May 7, 2018).

⁴⁷ See Order on Request for Review of Additional Notice Plan (May 11, 2018).

⁴⁸ Ex. 7 (Certificate of Additional Notice Mailing).

34. The Legislature directed that:
- The Board must adopt rules relating to the fields of licensure,⁴⁹ including a process for granting permission to a licensed teacher to teach in a field that is different from the teacher's field of licensure without change to the teacher's tier level;
 - The Board must adopt rules relating to the grade levels that a licensed teacher may teach;
 - If a rule adopted by the Board is in conflict with a session law or statute, the law or statute prevails and terms adopted in rule must be clearly defined and must not be construed to conflict with terms adopted in statute or session law;
 - The SONAR must include a description of a proposed rule's probable effect on teacher supply and demand; and
 - The Board must adopt rules only under specific statutory authority.⁵⁰

35. The statute also directs the Board to review all rules adopted by the Board of Teaching and amend or repeal rules not consistent with statute. The Board was also directed to review all teacher preparation programs approved by the Board of Teaching to determine whether the approved programs meet the needs of Minnesota schools.⁵¹

36. The statute also direct the Board to adopt rules to implement a statewide credentialing system for education paraprofessionals.⁵²

37. The Administrative Law Judge concludes that the Board has the statutory authority to adopt the proposed rules.

D. Notice Practice

1. Notice to Stakeholders

38. On May 7, 2018, the Board provided a copy of the Notice of Hearing to its official rulemaking list (maintained under Minn. Stat. § 14.14) and to stakeholders identified in its Additional Notice Plan.⁵³

39. A hearing on the proposed rules was held on June 8, 2018.

⁴⁹ Minn. Stat. § 122A.09, subd. 9 states that the Board must adopt rules to implement sections: 120B.363, 122A.05 to 122A.09, 122A.092, 122A.16, 122A.17, 122A.18, 122A.181, 122A.182, 122A.183, 122A.184, 122A.185, 122A.186, 122A.187, 122A.188, 122A.20, 122A.21, 122A.23, 122A.26, 122A.28, and 122A.29.

⁵⁰ 2017 Minn. Laws 1st Spec. Sess. Ch. 5, art. 12, § 11.

⁵¹ *Id.* at § 20.

⁵² *Id.* at art. 3, § 1.

⁵³ Ex. 6 (Certificate of Mailing and Certificate of Accuracy of Mailing List).

40. The Administrative Law Judge concludes that the Board failed to fulfill its responsibility to mail the Notice of Hearing “at least 33 days before the . . . start of the hearing” by one day.⁵⁴ However, the Administrative Law Judge must disregard a procedural error if the the error did not deprive any person or entity of an opportunity to participate meaningfully in the process.”⁵⁵

41. That the Board provided sufficient notice of the hearing to allow meaningful participation is evidenced by the fact that the hearing was attended by 62 people and more than 80 comments were received. Furthermore, one additional day of notice is insignificant especially in light of the large number of affinity groups the Board notified.

42. Therefore, the Administrative Law Judge finds that missing the Board’s deadline for noticing the hearing by one day was harmless error and did not deprive any person or entity of an opportunity to meaningfully participate in the process.

2. Notice to Legislators

43. Minn. Stat. § 14.116(b) requires the agency to send a copy of the Notice of Hearing and the SONAR to certain legislators when it mails its Notice of Hearing to persons on its rulemaking list and pursuant to its additional notice plan.

44. On May 7, 2018, the Board sent a copy of the Notice of Hearing and the SONAR to certain legislators and the Legislative Coordinating Committee as required by Minn. Stat. § 14.116.⁵⁶

45. The Administrative Law Judge concludes that the Board fulfilled the requirements of Minn. Stat. § 14.116(b).

3. Notice to the Legislative Reference Library

46. Minn. Stat. § 14.23 (2018) requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

47. On May 7, 2018, the Board mailed a copy of the SONAR to the Legislative Reference Library.⁵⁷

48. The Administrative Law Judge concludes that the Board met the requirement of Minn. Stat. § 14.23 that it send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent is mailed.

⁵⁴ Minn. R. 1400.2080, subp. 6 (2017). “A notice of hearing . . . must be mailed at least 33 days before the end of the comment period or the start of the hearing.” *Id.*

⁵⁵ Minn. Stat. 14.15, subd. 5(1).

⁵⁶ Ex. 9 (Certificate of Notice to Legislators - Affidavit of Service, May 7, 2018, and Transmittal Letter, May 22, 2018).

⁵⁷ Ex. 4 (Certificate of Transmittal Letter to Legislative Library).

E. Impact of Farming Operations

49. When rules are proposed that affect farming operations, Minn. Stat. § 14.111 (2018) requires that a copy of the proposed rule amendments be given to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*. In addition, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

50. The Board states that it did not provide notice to the Commissioner of Agriculture because the rules do not affect farming operations.⁵⁸

51. The Administrative Law Judge concludes that the Department was not required to comply with the additional notification requirements imposed by Minn. Stat. §§ 14.111, .14, subd. 1b, because the proposed rules do not affect farming operations.

IV. Regulatory Analysis in the SONAR

52. Minn. Stat. § 14.131 requires an agency adopting rules to consider eight factors in its SONAR. The Board's analysis of each of these factors are discussed below.

A. A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule, and classes that will benefit from the proposed rule.

53. The Board states that the proposed rules simplify and clarify the teacher licensure process.⁵⁹ As a result, persons applying for licensure and those seeking to renew their licenses will benefit from the more streamlined license application process.⁶⁰ According to the Board, the new online licensure process and the reduction in complicated and confusing licensure provisions under the former rules will benefit teachers, school districts, and the Board.⁶¹

54. The Board states that current teachers with a standard license will benefit from the proposed rules because, in most cases, they will be automatically transferred to Tier 4 licensure.⁶² In order to transition to the new licensure system, these teachers will be granted an extra year before they are required to renew their license. The negative effect of the proposed rules to these teachers will be the disruption caused by needing to learn and adapt to a new licensure and renewal system.⁶³

55. The Board states that, under the proposed rules, current teachers with a non-standard license and individuals on a special permission will be provided Tier 1 and

⁵⁸ SONAR at 9.

⁵⁹ SONAR at 7.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² SONAR at 3.

⁶³ *Id.*

Tier 2 options if offered a teaching position by a district.⁶⁴ These teachers will also benefit from having an extra year before having to transition to the new tiered system. With respect to costs, the Board notes that the proposed rules impose additional application fees with new license types.⁶⁵

56. The Board asserts that the Tier 1 and Tier 2 options under the proposed rules benefit aspiring teachers by providing clarity on paths into the classroom before completing teacher preparation.⁶⁶ The Board notes that the Tier 3 option adds pathways to full licensure without formal teacher preparation.⁶⁷ However, the Board also notes that teachers with less preparation leave teaching at a faster rate than do better prepared individuals.⁶⁸

57. The Board states that the proposed rules benefit career and technical education teachers and career pathway teachers by removing the requirement of a bachelor's degree and allowing for certification, associate's degree, or five years of experience.⁶⁹ However, individuals without a bachelor's degree will not be able to work as a teacher-of-record unless in a career pathway field. This includes individuals enrolled in the "Grow Your Own" teacher preparation programs.⁷⁰ The Board identifies no benefits in the proposed rules for these individuals.⁷¹

58. The Board states that under the proposed rules, teachers with out-of-state credentials will be required to pass Minnesota-specific content and pedagogy exams before receiving a Tier 3 license. This requirement does not apply to out-of-state teachers who are offered a teaching position in Minnesota before seeking licensure.⁷² Teachers with credentials from other states will benefit from the removal of the difficult requirement of aligning their teacher preparation program requirements with Minnesota's requirements. The proposed rules also remove the human relations and reading strategies requirements for these applicants.⁷³

59. The Board states that the rules provide flexibility and clarity in the hiring process for school districts. The proposed rules allow varied pathways into teaching without teacher preparation, including ways in which licensed candidates with full teacher preparation do not need to be considered for a position.⁷⁴ The Board admits that some job posting periods will be longer and the proposed rules levy costs for teacher mentors and permission fees.⁷⁵

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ SONAR at 3.

⁷² SONAR at 2-3.

⁷³ SONAR at 4.

⁷⁴ *Id.*

⁷⁵ *Id.*

60. The Board also states that the proposed rules will diminish school districts' ability to continue "Grow your Own" teacher preparation programs. These programs move paraprofessionals into teaching through residency experiences. The Board asserts that the programs will be harmed because the proposed rules disallow teachers who do not hold, at a minimum, a bachelor's degree from being a "teacher-of-record."⁷⁶

61. Finally, the Board asserts that the rules' increased paths to licensure may negatively impact teacher preparation programs.⁷⁷

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

62. The Board estimated the following costs:

- \$2,039,000 to create a new online application system in alignment with the new rules;
- Staff time to implement the new system;
- Staff for background checks and additional support staff, for which the Board estimates the cost to be \$80,000;
- Staff for the portfolio review process at an ongoing cost of \$76,000 per year;
- An information officer at an ongoing cost of \$40,000 per year; and
- Staff to align the school administrator rules to the new teacher rules.⁷⁸

63. The Board anticipates revenue from license application fees will increase by \$171,000.⁷⁹

C. A determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

64. The Board was directed by the Legislature to adopt rules and the Board states that the costs of the proposed rules are necessary to comply with the statute.⁸⁰ The Board notes, however, that it did engage in discussions with stakeholders on how to

⁷⁶ SONAR at 3.

⁷⁷ *Id.*

⁷⁸ SONAR at 5. The Board notes that the \$2,039,000 cost for the new online application system is "already allocated in statute."

⁷⁹ *Id.*

⁸⁰ SONAR at 5-6.

balance rules that may increase costs with the need to acquire and maintain quality teachers in the classroom.⁸¹

D. A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

65. The Board states that it worked with stakeholders to consider alternative methods of achieving the purpose of the rules. According to the Board, the language that is proposed is a compromise between the requirements to ascertain quality and ease for applicants and school districts.⁸²

E. The probable costs of complying with the proposed rules including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

66. The Board identifies costs to applicants for application fees, costs for additional teacher development related to the cultural competency rule, costs related to some program redesign and realignment of advising requirements by teacher preparation providers, and costs to districts in filling out licensure applications and mentorship for Tier 1 teachers.⁸³

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

67. The Board asserted that if the proposed rules are not adopted, Minnesota Statutes, section 122A will remain vague, without a clear process for implementation or definitions to guide districts and teachers.⁸⁴ The Board contends that the potential confusion in teacher licensing that would result if the proposed rules are not adopted could cost school districts tens of thousands of dollars in time spent working through an undefined teacher licensing process.⁸⁵

G. An assessment of differences between the proposed rule and existing federal regulations and the need for and reasonableness of each difference.

68. The Board indicates that there are two areas where the proposed rules may differ from federal regulations.⁸⁶ The first area concerns special education funding. The Board states that federal requirements regarding which teachers may work with students

⁸¹ *Id.* at 5.

⁸² SONAR at 6.

⁸³ *Id.*

⁸⁴ SONAR at 7.

⁸⁵ *Id.*

⁸⁶ *Id.*

receiving special education services may conflict with the proposed Tier 1 and Tier 2 preparation requirements.⁸⁷ According to the Board, this conflict may cause school districts to be out of compliance with federal requirements and result in confusion and lawsuits regarding adequate services offered to special education students.⁸⁸ The Board did not further address this issue.

69. The second area concerns teacher preparation reporting. The Board states that federal reporting for teacher preparation providers requires evidence of completion rates for graduates as well as different assessment data on each candidate.⁸⁹ Because the proposed rules remove teacher preparation as a requirement for licensure, this may affect how many candidates complete teacher preparation programs and will impact data reporting for these categories.⁹⁰

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

70. The Board asserts that “the proposed rules add significantly to the requirements for teacher licensure and renewal. In adopting these rules, many other rules are removed that clarify and streamline teacher licensure.”⁹¹ However, the Board also asserts that “once the changes are incorporated into a new online licensure system and stakeholders are made aware of the changes, the effect of the added rules should be offset by the reduction in complicated and confusing old licensure structures.”⁹²

71. The Administrative Law Judge finds that the Board has adequately considered the potential alternatives and probable costs associated with the proposed rules and has otherwise complied with the eight-factor analysis required by Minn. Stat. § 14.131.

I. An assessment of the proposed rules’ probable effects on teacher supply and demand.

72. Minnesota Statutes, section 122A.09, subd. 9, requires the Board to include a description of the probable effect the proposed rule will have on teacher supply and demand.

73. The Board indicates that the proposed rules implementing the new licensing system should increase the supply of teachers.⁹³ The Board states that the statutory streamlined review process under Tier 1 for individuals without any formal teacher preparation will result in an increase in individuals hired through this tier in areas where there is a teacher shortage. However, the Board notes that the requirement of a bachelor’s degree will remove a large pool of candidates who currently are teaching as

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ SONAR at 10.

community experts or are enrolled in teacher preparation Grow Your Own programs. According to the Board, these individuals made up nearly 40 percent of non-licensed community experts in the 2017-2018 academic year.⁹⁴

74. The Board states that the Tier 2 process provides additional pathways into the classroom for individuals who have not completed teacher preparation. Individuals that may have sought teacher preparation and moved to a standard license will now have the opportunity to teach prior to completing formal teacher preparation. This should increase the supply of teachers. However, the Board cautions that some research has shown that individuals who do not complete formal teacher preparation are less likely to be retained.⁹⁵

75. The Board also notes that the changes to out-of-state licensure are likely to increase the supply of teachers by removing the requirement of parity with Minnesota teacher preparation. However, the Board states that the requirement that out-of-state licensed and prepared teachers must pass a Minnesota-specific content and pedagogy exam before receiving a mobile license (Tier 3) is likely to decrease the supply of teachers.⁹⁶

76. Finally, the Board states that the proposed rule's combination of two current substitute license types into one should make it easier for districts to find substitutes for short-call assignments. The proposed rule's interim emergency permission should also allow demand to be met when districts have an immediate hiring need and supply of more qualified teachers is low.⁹⁷

V. Performance-Based Regulation

77. The MAPA requires that an agency describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems set forth in Minn. Stat. § 14.002 (2018).⁹⁸ A performance-based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and provides maximum flexibility for the regulated party and the agency in meeting those goals.⁹⁹

78. In its SONAR, the Board states that "the new online application system should allow the [Board] to more easily track applicant and teacher data. The proposed rules provide a clear tiered licensure structure that can track applicants and active teachers and their movement in the tiered system."¹⁰⁰

79. The Administrative Law Judge notes that the majority of the proposed rules are required with specificity in the enabling legislation and finds that the Board has met

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ SONAR at 11.

⁹⁷ *Id.*

⁹⁸ Minn. Stat. § 14.131.

⁹⁹ Minn. Stat. § 14.002.

¹⁰⁰ SONAR at 8.

the requirements set forth in Minn. Stat. § 14.131 for consideration and implementation of the legislative policy supporting performance-based regulatory systems.

VI. Consultation with the Commissioner of Minnesota Management and Budget

80. Under Minn. Stat. § 14.131, an agency is required to “consult with the Commissioner of Management and Budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.”

81. In its SONAR, the Board states that it will consult with MMB prior to publishing the Notice of Intent to Adopt Rules.¹⁰¹ The Notice of Intent to Adopt Rules was published in the *State Register* on May 7, 2018.¹⁰² The Board did not request MMB review the proposed rules until June 11, 2018.¹⁰³

82. MMB reviewed the Board’s proposed rules and SONAR for any potential costs and benefits to local units of government. In a response to the Board dated June 21, 2018, MMB concluded the proposed rules would have minimal fiscal impact on local units of government. MMB further found that PELSB had adequately considered local government costs.¹⁰⁴

83. The Administrative Law Judge finds that the Department fulfilled their obligation to consult with MMB as required by Minn. Stat. § 14.131.

VII. Compliance Costs for Small Businesses and Cities

84. Under Minn. Stat. § 14.127 (2018), an agency must “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.

85. The Board determined that the probable costs to a small business or city will not exceed \$25,000.¹⁰⁵

86. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.127, and approves that determination.

VIII. Adoption or Amendment of Local Ordinances

87. Under Minn. Stat. § 14.128 (2018), an agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply

¹⁰¹ SONAR at 9.

¹⁰² Ex. 5; 42 Minn. Reg. 1373 (May 7, 2018).

¹⁰³ Email from Alex Liuzzi to MMB (June 11, 2018) (on file with the Minn. Office Admin. Hearings).

¹⁰⁴ Email from Amelia Cruver, MMB, to A. Liuzzi (June 21, 2018) (on file with the Minn. Office Admin. Hearings), along with attached memorandum.

¹⁰⁵ SONAR at 10.

with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.¹⁰⁶

88. The Board determined that local governments will not be required to adopt or amend an ordinance or other regulation to comply with the proposed amendments. The Board points out that the rules apply only to the issuance, renewal, and validity of teacher licenses and involve only the Board, local school districts, and local school boards.¹⁰⁷

89. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128, and approves that determination.

IX. Analysis of the Proposed Rules

90. The remainder of this Report focuses on the portions of the proposed rules that received significant critical comment or otherwise require examination. The Report will not discuss each proposed rule and rule subpart in equal depth. Proposed rules that provoked no controversy and that were reviewed by the Administrative Law Judge and found to be needed, reasonable, and supported by an affirmative presentation of the facts in the record will not be discussed in this Report.

91. The Administrative Law Judge has read and considered every comment made by a member of the public. However, for efficiency in summarizing the comments, the Administrative Law Judge did not cite to each comment when comments from different people or organizations addressed essentially the same argument. The Administrative Law Judge has attempted to ensure that all germane arguments are acknowledged and addressed in this Report.

92. After addressing general comments about the rulemaking, the Report turns to a part-by-part analysis of those proposed rules that attracted public comment.

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

A. General Need and Reasonableness Analysis

94. The Board's rules are proposed in response to legislation passed in 2017, in which the Legislature directed the Board to promulgate rules and provided extensive direction on what the rules were to contain.¹⁰⁸

¹⁰⁶ Minn. Stat. § 14.128, subd. 1.

¹⁰⁷ SONAR at 10.

¹⁰⁸ 2017 Minn. Laws, 1st Spec. Sess. Ch. 5, art. 3. Now codified as Minn. Stat. § 122A.09, subd. 9.

95. The proposed rules will amend Minnesota Rules, chapter 8710, by revising and clarifying the requirements for the four levels of teaching licenses available in Minnesota.

B. Adequacy of Notice and Adequacy of Public Participation in the Rule Development Process

96. A total of 62 people signed the hearing register at the hearing in this matter.¹⁰⁹ Twenty-four individuals commented at the public hearing¹¹⁰ and 63 written comments were received, some of which were signed by multiple individuals.¹¹¹

97. The rulemaking record demonstrates that the Board made reasonable efforts to inform interested members of the public that it was beginning rulemaking on these proposed rules. Commenters have not criticized the public notice of the hearing or the SONAR as inadequate.

98. The Administrative Law Judge concludes that the Board's Notice of Hearing in this proceeding was adequate to give the public notice of the proposed rulemaking. In addition, the Administrative Law Judge concludes that all interested parties had notice of the proposed rules and an opportunity to participate in the rule development process.

C. Overview of the Rules

99. In March 2016, the OLA released a report critical of the state's teacher licensure system as implemented by the BOT and the Minnesota Department of Education.¹¹² In response to the report, the 2016 Legislature appointed a study group to make recommendations for restructuring and consolidating all teacher licensure activities into a single state agency.¹¹³

100. Upon review of the study group's recommendations, the 2017 Legislature effectively dissolved the BOT, created PELSB, and enacted a complete overhaul of the state's teacher licensure system, including a detailed restructure of license types and standards. Signed into law effective May 30, 2017, the legislation (2017 Legislation) encompassed 35 pages of revisions to over 59 separate statutory sections, most with individualized effective dates.¹¹⁴

101. The proposed rules are the result of the Board's efforts to comply with the Legislature's directives that it develop established rules for: a four-tiered licensure system for teaching licenses with their respective qualifications; durations and renewal limits; a

¹⁰⁹ See Hearing Register (June 8, 2018) (on file with the Minn. Office Admin. Hearings).

¹¹⁰ See Pub. Hrg. Trans. (June 8, 2018) (on file with the Minn. Office Admin. Hearings).

¹¹¹ Ex. I; Summary of eComments (on file with the Minn. Office Admin. Hearings).

¹¹² Minn. Office of the Legis. Auditor, *Minnesota Teacher Licensure* (Mar. 2016).

¹¹³ 2015 Minn. Laws ch.189, art. 24, § 24.

¹¹⁴ 2017 Minn. Laws, 1st Spec. Sess. ch. 5, art. 3, 12.

process for licensure by portfolio; teacher licensure assessment; license form requirements; the process for licensure denials and appeals; and other aspects of teacher licensing.

X. Rule-by-Rule Analysis

102. Some of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not address each proposed rule. Rather, the following discussion focuses on those proposed rules about which commentators raised a genuine dispute as to the reasonableness of the Board's regulatory choice or that otherwise require closer examination.

A. Proposed Changes Subsequent to the Published Rules

103. The Board made changes to a few portions of the proposed rules subsequent to the publication of the rules.¹¹⁵

104. The Board removed the fee provision in proposed Minn. R. 8710.0310, subpart 9.¹¹⁶ Under Minn. Stat. § 16.1283 (2018), the Board must obtain legislative approval to charge fees. Based on Minn. Stat. § 122A.21, the Board only has authority to charge \$57 for the issuance, renewal, or extension of a teaching license and \$300 for a portfolio review.

105. The Board also modified proposed Minn. R. 8710.0313, subpart 4(a) and 8710.0314, subpart 5(A) regarding Tier 3 and Tier 4 licensure to remove language regarding use of "another identified district-aligned evaluation" as part of the application renewal requirements.¹¹⁷

106. In proposed Minn. R. 8710.6200, subpart 2, the Board added language to the Tier 3 license requirements for school psychologists to allow for an additional credential from the National Association of School Psychologists.¹¹⁸

107. Under the renewal provisions of proposed Minn. R. 8710.0311, subpart 4(D)(2), 8710.0312, subpart 4 (A)(1), and 8710.7200, subpart 2a(A)(1), the Board removed language stating that cultural competency training would be "aligned to board adopted criteria."¹¹⁹ Instead, the Board proposed to adopt a definition for cultural competency training into rule.¹²⁰

¹¹⁵ Ex. 10 (Proposed Rule Changes dated June 15, 2018); see also Board's Attachment to Rebuttal Comment (July 2, 2018) (eComments).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Board's Attachment to Rebuttal Comment (July 2, 2018) (eComments). The Board notes that these changes were made on June 29, 2018.

¹²⁰ *Id.*

108. Under proposed Minn. R. 8710.7200, subpart 2a(B)(4), the Board removed the requirement of evidence of professional development in the area of technology integration for Tier 3 and Tier 4 licensure based on the lack of statutory authority for this requirement, except as listed for teacher preparation programs.¹²¹

109. The Board modified the language in proposed Minn. R. 8710.0310, subpart 1 (L) to add “full-time, or the equivalent” to the definition of “student teaching” in order to better align the definition of student teaching equivalency to the statutory requirements for teacher preparation.¹²²

110. Under proposed Minn. R. 8710.6200, subpart 1b(C)(3), the Board removed the requirement of “day to day” supervision for a school psychologist Tier 2 license applicant in order to align with national standards.¹²³

111. The Board modified the language in proposed Minn. R. 8710.0310, subpart 2, by adding a new section (E) to clarify the meaning of “conduct review.” The new section (E) states:

All applicants for licensure and 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 conduct review. An applicant who is denied a license or license renewal as a result of the conduct review may appeal the board’s decision pursuant to subpart 6.¹²⁴

112. In proposed Minn. R. 8710.0310, subpart 4, the Board deleted the following language:

Applicants may obtain a license in a lower licensure tier only if they hold a Tier 2 license in one licensure field and a district requests to hire the applicant for a different licensure field in which the applicant does not meet the requirements for a Tier 2 license. A teacher may simultaneously hold a Tier 1 and a Tier 2 license under this subpart.

The Board explained that it made this change due to concerns regarding collective bargaining requirements and conflicts with statutory requirements allowing for teachers to teach outside of their field while remaining in the same tier.¹²⁵

113. The Board added “Tier 2” to the list of tiers that can retain tier classification while teaching outside of their field under Rule 8710.0320, subparts 1, 2(A)(1), 2(A)(6)(a), 2(A)(6)(b), 2(A)(6)(c), 2(B), 4(C)(1), 4(C)(2), 4(C)(3), and 5.¹²⁶

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Board’s Attachment to Rebuttal Comment (July 2, 2018) (eComments).

¹²⁵ *Id.*

¹²⁶ *Id.*

114. The Board made a minor technical edit to the cross-reference in Rule 8710.0320, subpart 2(A)(6)(c) on “out of field permission” requirements.¹²⁷

115. The Board modified language in proposed Minn. R. 8710.7200, subpart 2a(A) regarding areas for professional reflection and growth to add “including but not limited to” certain areas in order to allow for more flexibility.¹²⁸

116. The Board modified a reference in proposed Minn. R. 8710.7200, subpart 2a(A)(2) in order to conform with the statutory language.¹²⁹

117. The Board added interim permission language in all applicable rule parts, including Rule 8710.0311, subpart 4(E), subpart 5(D), and subpart 6(E), covering Tier 1 initial and subsequent renewal requirements, and Rule 8710.0320, subparts 4(C)(1) and 4(D), regarding “out of field permission” renewals.¹³⁰

118. The Administrative Law Judge finds this paragraph regarding “emergency placements” to be defective whenever it appears in the proposed rules because: the standard for emergency is not specifically articulated. The rule grants the Board unfettered discretion by referring to “Board-adopted minimum criteria” without articulating the criteria. In addition, the proposed rule provides that the length of the permission is until “the first possible review by the full board.” Such an indefinite length of time grants too much discretion of the Board.

119. The Board modified language governing the licensure requirements under proposed Minn. R. 8710.9010, subpart 2(B) for Career Pathways teacher applicants to align with all other content area standards for demonstration of “standards for effective practice.”¹³¹

120. The Board modified the language in proposed Minn. R. 8710.0311, subpart 2(B)(2) to align with the language in “out of field permission” and to permit school districts to hire a Tier 1 qualified individual instead of a Tier 3 teacher licensed in a different field.¹³²

121. The Board also made a technical grammatical change to proposed Minn. R. 8710.0320, subpart 2(A)(6)(a).

122. Unless otherwise noted above or in the specific rule section, the Administrative Law Judge finds that the clarifications, technical changes and removal of

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Board’s Attachment to Rebuttal Comment (July 2, 2018) (eComments).

¹³² *Id.*

the fee subpart are reasonable, do not substantially change the proposed rules, and are within the scope of the rulemaking.¹³³

123. The remainder of this report will address those remaining proposed rules upon which the public commented or which nonetheless required analysis:

B. Rule 8710.0310, subpart 1D: Cultural competency training definition

124. The Board proposes definitions to clarify terms used both in statute and in later rule parts in order support the implementation of the tiered licensure statute.¹³⁴

125. The Board proposes to define “cultural competency training” to mean:

A training program that promotes self-reflection and discussion including but not limited to all of the following topics: racial, cultural, and socioeconomic groups; American Indian and Alaskan native students; religion; systemic racism; gender identity, including transgender students; sexual orientation; language diversity; and individuals with disabilities and mental health concerns. Training programs must be designed to deepen teachers' understanding of their own frames of reference, the potential bias in these frames, and their impact on expectations for and relationships with students, students' families, and the school communities, consistent with Interstate Teacher Assessment and Support Consortium (InTASC) standards and Minnesota Statutes, section 120B.30, subdivision 1, paragraph (q).¹³⁵

126. The Board explained that “there is no definition of ‘cultural competency training’ in statute. According to the Boars, a definition is needed to describe how the training of cultural competence should be implemented and to set clear expectations to districts of what the training should include.” The Board maintains that “[i]t is a reasonable rule as it fits within the statutory definition of cultural competence (120B.30, subd. 1, paragraph (q)) and focuses on a teacher’s professional growth and interactions with students and families versus a knowledge-based approach of cultural understanding.”¹³⁶

127. The Board also explained that because Minn. Stat. §§ 122A.181, subd. 3(b)(3) (2018) and 122A.187 (2018) require cultural competency training aligned with the definition of cultural competence in Minn. Stat. § 120B.30, subd. 1(q) (2018), the Board worked with stakeholders to identify what teacher training on cultural competence should include.¹³⁷

¹³³ Minn. Stat. § 14.05, subd. 2(b)(2)(1) (stating that a modification does not substantially change a proposed rule if “the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice”).

¹³⁴ Rule by Rule Analysis provided by Alex Liuzzi at PELSB (June 20, 2018) (eComments) (also on file with the Minn. Office of Admin. Hearings) (Rule by Rule Analysis).

¹³⁵ Ex. 2 (Proposed Rules) at 1.

¹³⁶ Rule by Rule Analysis at 1.12.

¹³⁷ SONAR at 13 (April, 2018).

128. Minn. Stat. § 120B.30, subd. 1(q) states that “For purposes of statewide accountability, ‘cultural competence,’ ‘cultural competency,’ or ‘culturally competent’ means the ability of families and educators to interact effectively with people of different cultures, native languages, and socioeconomic backgrounds.”

129. In the SONAR, the Board states it worked with stakeholders to identify, more specifically, what teacher training on cultural competence should include. The Board believes that the proposed definition includes a more specific “listing of cultural groups to support teachers to recognize the role of cultural [sic] in interactions, and to foster positive interactions.” The Board explained that “the current gap in graduation rates and test scores, as well as the growing rate of students of color and stagnant rate of teachers of color, all underscore the need to incorporate these groups within the defined training.”¹³⁸ The Board also stated that “the definition includes language about implicit bias and systemic racism to ensure a deeper understanding of the impact a teacher and school can have on students. The areas of ‘culture’ included provide more detail than statute to ensure that all aspects of student identity and culture are addressed in this training.”¹³⁹

130. Opponents of the Board’s proposed definition argued against it on both procedural and substantive grounds. Opponents contend that the Board exceeded its rulemaking authority. They assert that the proposed rule, if adopted, would exceed, conflict with, not comply with, and/or grant the Board discretion beyond what is allowed by the enabling statute.¹⁴⁰ Further, opponents argued that the Board’s definition conflicts with the definition already contained in Minn. Stat. § 120B.30, subd. 1(q), which states that cultural competency means “the ability of families and educators to interact effectively with people of different cultures, native languages, and socioeconomic backgrounds.”¹⁴¹

131. Opponents also object to the proposed definition on the substantive ground that the definition requires applicants to be trained in concepts and categories that the statute does not contemplate, and in areas that the commenters contend are controversial ideological theories.¹⁴²

132. Proponents of the Board’s proposed definition argue that the definition will help teachers meet the needs of a diverse student population.¹⁴³

133. Members of the Legislature weighed in for and against the proposed definition. Senators Pratt, Kiffmeyer, Utke, Relph, Nelson, Anderson, Benson, Mathews,

¹³⁸ *Id.*

¹³⁹ *Id.* at 13-14.

¹⁴⁰ Ex. 8 (Written Comments). Comments by Meredith Campbell, Minnesota Family Council (June 8, 2018); Comments by Coleman Law and Consulting (June 8, 2018).

¹⁴¹ Ex. 8. Comments by James S. Ballentine and Renee Carlson, North Star Law and Policy Center (June 8, 2018).

¹⁴² Ex. 8. Comments by Katherine Kersten, Center for the American Experiment (undated, received at June 8, 2018, hearing).

¹⁴³ Hearing Ex. G (Statement of Outfront Minnesota, June 8, 2018).

Koran, Hall, Eichorn and Westrom, all of whom participated in legislating the changes to the teacher licensing law, argued that the proposed definition “exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other law,” in violation of Minn. R. 1400.2100 because it includes far more elements than required by Minn. Stat. § 120B.30, subd. 1 (q). These Senators state that because the enabling statute already provides a definition of cultural competency, the Board cannot create a different definition without conflicting with statute. These Senators also asserted that the Board has reduced school district flexibility, politicized, complicated, micro-managed and over-burdened a locally flexible legislative requirement.¹⁴⁴

134. Senators Kent, Cwodzinski, Eiger, Tomassoni, Clausen, Hoffman, Torres Ray, and Wiklund commented in favor of the proposed definition. These Senators argued that the rule fills in the gaps to give clarity to districts about what the training should entail for teachers. These Senators assert that:

[a]n alternative definition being suggested means teachers will have less training to deal with students in a rapidly changing school environment that includes a student body that is 30 percent students of color when at the same time we have a Minnesota teacher population that is 97 percent white. Our teachers need a robust cultural competency rule that will help them meet the needs of an increasingly diverse and rapidly changing student body.¹⁴⁵

135. Other commenters responded to the criticisms of the proposed definition by arguing that the Board has not changed the definition of “cultural competence training” because that exact term has not been defined by the Legislature.¹⁴⁶ The Board and commenters pointed out that the definition is the product of extensive discussions between stakeholders and Board members and reflects a contemporary approach to cultural competency training.¹⁴⁷

136. The Dean and staff of the University of Minnesota College of Education and Human Development (University of Minnesota) notes that cultural competency training was added to all tiers in the new licensing structure in place of the human relations coursework previously required of all Minnesota teacher candidates.¹⁴⁸ Minn. Stat. § 122A.23 (2018) required that applicants from other states “successfully completed all

¹⁴⁴ Letter of Senator Eric Pratt (June 8, 2018) (on file with Minn. Office Admin. Hearings); Letter of Senators Kiffmeyer, Utke, Relph, Nelson, Anderson, Benson, Mathews, Koran, Hall, Eichorn and Westrom (June 8, 2018) (on file with Minn. Office Admin. Hearings).

¹⁴⁵ Letter of Senators Kent, Cwodzinski, Eiger, Tomassoni, Clausen, Hoffman, Torres Ray, and Wiklund (June 7, 2018) (eComments).

¹⁴⁶ Comment of Dr. P. Spies (July 2, 2018) (eComments); Ex. 8. Written Comment by Deborah Dillon, Dean, and others, University of Minnesota, College of Education and Human Development (June 15, 2018).

¹⁴⁷ Ex. 8. Education Minnesota (Letter, June 6, 2018).

¹⁴⁸ Ex. 8. Written Comment by Deborah Dillon, Dean, and others, University of Minnesota, College of Education and Human Development (June 15, 2018); Comment by Education Minnesota (June 6, 2018). Some commenters referenced Minn. R. 8710.0400 as the source for the standards.

exams and human relations components required by the” Board. Minn. Stat. § 122A.23, subds. 1 and 2, which required applicants licensed in other states to complete human relations exams and components, was repealed effective July 1, 2018.¹⁴⁹ However, the goals for human relations teacher training are still present in Minn. R. 8710.2000 (2017).

137. The University of Minnesota notes that according to Minn. Stat. § 122A.40, subd. 8(3) (2018), staff development “must be based on professional teaching standards established in rule” and that those standards are in Minn. R. 8710.2000, subp. 4 standard 3. In addition, Minn. R. 8710.2000, subp. 4, requires teachers to show verification of completing a teacher preparation program, approved under chapter 8705, regarding understanding diverse learners. According to the rule the teacher must, among other things:

- Understand how to recognize and deal with dehumanizing biases, discrimination, prejudices, and institutional and personal racism and sexism;
- Understand how a student's learning is influenced by individual experiences, talents, and prior learning, as well as language, culture, family, and community values;
- Understand the contributions and lifestyles of the various racial, cultural, and economic groups in our society;
- Understand the cultural content, world view, and concepts that comprise Minnesota-based American Indian tribal government, history, language, and culture;
- Understand cultural and community diversity; and know how to learn about and incorporate a student's experiences, cultures, and community resources into instruction;
- Know about community and cultural norms;
- Use information about students' families, cultures, and communities as the basis for connecting instruction to students' experiences;
- Develop a learning community in which individual differences are respected; and
- Use teaching approaches that are sensitive to the varied experiences of students and that address different learning and performance modes.

¹⁴⁹ Ex. 8. Written Comment by Deborah Dillon, Dean, and others, University of Minnesota, College of Education and Human Development (June 15, 2018).

138. The University of Minnesota also states that “those standards in Minn. R. 8710.2000, subp. 4 standard 3 address the same areas of focus identified in the proposed definitions for cultural competency training and are in alignment with the InTASC standards, with section 120B.30, subd. 1, paragraph (q).”¹⁵⁰

139. The teacher licensing statutes require cultural competency training in three statutes and for each license tier.¹⁵¹ In each instance the Legislature referred to cultural competency training that is consistent with the Legislature’s definition in section 120B.30, subd. 1 (q).

140. Administrative agencies have the authority to fill in the gaps in the framework of regulatory statutes and to implement and make specific the language of a statute. An agency cannot, however, adopt a conflicting rule.¹⁵²

141. A rule must be disapproved if it exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by its enabling statute or other applicable law.¹⁵³

142. In construing the statutes of this state, “words and phrases are construed according to the rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition.”¹⁵⁴

143. The word “cultural” is not a technical term. The word itself is an adjective which means of or relating to culture and so can only be fully understood or defined in relationship to the word culture. The *Merriam-Webster Dictionary* defines culture as the customary beliefs, social forms, and material traits of a racial, religious, or social group;

¹⁵⁰ Ex. 8. Written Comment by Deborah Dillon, Dean, and others, University of Minnesota, College of Education and Human Development (June 15, 2018).

¹⁵¹ Minn. Stat. § 122A.181, subd. 3(b)(3), stating a district must show that “the teacher holding the Tier 1 license participated in cultural competency training consistent with section 120B.30, subdivision 1, paragraph (q), within one year of the board approving the request for the initial Tier 1 license.” Minn. Stat. § 122A.182, subd. 3, stating that “Before a Tier 2 license is renewed for the first time, a teacher holding a Tier 2 license must participate in cultural competency training consistent with section 120B.30, subdivision 1, paragraph (q).” Minn Stat. § 120B.30, subd. 1, stating that Applicants for license renewal for a Tier 3 or Tier 4 license under sections 122A.183 and 122A.184, respectively, who have been employed as a teacher during the renewal period of the expiring license, as a condition of license renewal, must present to their local continuing education and relicensure committee or other local relicensure committee evidence of work that demonstrates professional reflection and growth in best teaching practices, including among other things, cultural competence in accordance with section 120B.30, subdivision 1, paragraph (q).

¹⁵² *GH Holdings, LLC v. Minnesota Dept. of Commerce*, 840 N.W.2d 838 (Minn. Ct. App. 2013).

¹⁵³ Minn. R. 1400.2110, sub. D. (2017).

¹⁵⁴ Minn. Stat. § 645.08(1) (2018).

also: the characteristic features of everyday existence (such as diversions or a way of life) shared by people in a place or time.”¹⁵⁵

144. The *American Heritage College* dictionary defines culture as “the totality of socially transmitted behavior patterns, arts, beliefs, institutions, and all other products of human work and thought.”¹⁵⁶

145. The Board admits that the Legislature defined “cultural competency” at Minn. Stat. § 120B.30, subd. 1 (q), but argues that a definition of cultural competency training is necessary because that specific term is not defined in statute.

146. Members of the legislative committee that passed the statute regarding cultural competency training commented with opposing points of view on whether the proposed rule meets their intentions. These differing viewpoints supports the conclusion that the term “cultural competency” even when defined as “the ability of families and educators to interact effectively with people of different cultures, native languages, and socioeconomic backgrounds” is not so unambiguous as to engender no differences of interpretation. Therefore, it is reasonable that the Board propose a more detailed definition of that training with a goal of having Minnesota teachers who are able to deal effectively with a diverse student and family population.

147. The Administrative Law Judge finds that the Board has affirmatively presented sufficient facts to adequately support the need for and reasonableness of the proposed rule. The Department has fully explained its methods and the reasons for its choices. Therefore, the Department has demonstrated that the proposed rule is necessary and reasonable.

148. However, rather than creating a new definition of cultural competency training, the Board could have defined it in alignment with Minn. R. 8710.2000. Minnesota Rule 8710.2000 provides greater clarity about the purpose and requirement of cultural competency training than the Board’s proposed rule. It is also less proscriptive regarding naming specific groups and therefore does not leave out any potential group while at the same time affording flexibility to the districts to focus on their areas of greatest need. The rule has the additional advantage of already being in place and written for the purpose the Board seeks in its proposed rule. Therefore the Administrative Law Judge strongly recommends that the Board replace its proposed rule with the language already set forth in Minn. R. 8710.2000.

149. The Administrative Law Judge also notes that the reference to the InTASC standards in the proposed rule must be revised to the requirements of Minn. Stat. § 14.07, subd. 4 (2018), because the Board is incorporating these standards by reference. According to the statute “an incorporation by reference must identify the title, author, publisher, and date of publication the standard or material to be incorporated; must state

¹⁵⁵ <https://www.merriam-webster.com/dictionary/culture:Merriam-Webster> online dictionary, last accessed July 15, 2018.

¹⁵⁶ The American Heritage College Dictionary (3rd ed. 1993).

whether the material is subject to frequent change; and must contain a statement of availability.”

C. Rule 8710.0310, subpart 1G: Good cause definition

150. The Board proposes to define “good cause” to mean an applicant is unable to meet the requirements of a higher licensure tier due to the lack of a reasonable path to a higher licensure tier or the path to a higher licensure tier cause an undue burden on the applicant, as approved or denied by the board.

151. The Board contends that the definition of good cause is needed to provide context for how the Board will review additional Tier 1 and Tier 2 license applications beyond the established limits in statute. Because both statutes allow the Board to consider “good cause,” the Board maintains it is reasonable to identify “the clear benchmark of an inability to move the next tier while leaving open the possible causes.”¹⁵⁷

152. The Board further explains that the term “good cause” is used in proposed Rules 8710.0311, subd. 6.C(2), .0312, subp. 6(B), and .0320, subp. 5, and that, therefore, to ensure consistent application of criteria for districts to obtain additional renewals for Tier 1, Tier 2, and out-of-field applicants when a teacher with a higher tier or licensed in the field applicant is available, a clear definition of “good cause” is needed. The Board believes that the proposed definition provides a clear statement regarding what information is needed from the district regarding the applicant before approving additional renewals.¹⁵⁸

153. In support of the Board’s proposed definition, Education Minnesota asserted that this definition is necessary because Minn. Stat. § 122A.181 states that a Tier 1 license “may not be renewed more than three times, unless the requesting district or charter school can show good cause for additional renewals,” but the Legislature did not provide a definition of “good cause.” In addition, Minn. Stat. § 122A.182 (2018) states, “[T]he board must issue rules setting forth the conditions for additional renewals after the [Tier 2] license has been renewed three times.” The definition of “good cause” in the Proposed Rules establishes criteria for PELSB to consider when a district or charter school requests more than three renewals of a Tier 1 or 2 license. It allows either the district or charter school or the applicant to explain why the applicant was unable to move to a higher tier of licensure while holding a Tier 1 or 2 license. Education Minnesota and other stakeholders support this definition because it creates an expectation that individuals with Tier 1 or 2 licenses will make progress toward a Tier 3 or 4 license while also allowing them to maintain a Tier 1 or 2 license under extenuating circumstances where the candidate has no reasonable path to a higher licensure tier.¹⁵⁹

154. There were no comments made in opposition to the proposed definition.

¹⁵⁷ Rule by Rule Analysis by A. Liuzzi at PELSB (June 20, 2018) (eComments).

¹⁵⁸ SONAR at 14.

¹⁵⁹ Comments of Education Minnesota (June 6, 2018) (on file with Minn. Office Admin. Hearings).

155. A rule is required to be sufficiently specific to put the public on fair notice of what its provisions require.¹⁶⁰ In addition, discretionary power may be delegated to administrative officers “[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.”¹⁶¹

156. A definition of “good cause” is needed if the Board continues to rely on the term in multiple parts of the statute. However, the Board’s proposed definition is vague and does not articulate the requirements necessary for an applicant to establish good cause. Furthermore, the definition provides the Board with unrestricted discretion in the application of the good cause exception. The proposed definition does not explain what facts might constitute good cause,¹⁶² an “undue burden” or “lack of reasonable path to licensure.” Furthermore, the proposed definition does not explain when an application for an exception must be made or the time frame for the Board to respond.

157. The proposed definition contains vague terms, grants the Board unfettered discretion, and does not describe the procedures to be followed when a request for a good cause exception is made. Concerns about applicants’ difficulty understanding license requirements, the length of time applicants waited for responses, and insufficient transparency regarding the Board of Teaching’s licensing decisions was, in part, why the Legislature created the current Board.¹⁶³ The identified deficiencies and vagueness in the rule make the proposed rule defective.

D. Rule 8710.0310, subpart 1J: Professional License From Another State

158. The Board proposes to define “professional license from another state” to mean a teaching license from another state that allows the individual to be a teacher of record based on completion of a state-approved conventional, nonconventional, or alternative teacher preparation program from another state or licensure via a portfolio process in another state aligned to 8710.0330 and Minn. Stat. 122A.18, subd. 10.

159. The Board states that “the definition of professional license from another state is needed to clarify the difference between *any* license from another state and one that would be considered ‘professional.’ Without a standard national definition of ‘professional license,’ this rule is needed. The rule is reasonable because it aligns this out-of-state granted license with Tier 3 requirements, ensuring that a license from another

¹⁶⁰ *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

¹⁶¹ *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); accord *Anderson v. Commissioner of Highways*, 126 N.W.2d 778, 780 (Minn. 1964).

¹⁶² Many rules and statutes use the term good cause but provide examples of what the term means. See for example, Minn. R. 1105.0200 (2017), regarding the licensing of accountants, which states, “The board may make exceptions for reasons for individual hardship including health, military service, foreign residency, or other good cause.”

¹⁶³ Ex. 12 (Office of the Legislative Auditor Evaluation Report on Minnesota Teacher Licensure to the Legislature, Summary, dated March 2016).

state aligned to the qualifications of a Minnesota Tier 1 or Tier 2 is not granted a Tier 3 license in Minnesota.”¹⁶⁴

160. Senator Eric Pratt, Chair of the Senate Education Policy Committee, commented that “the definition of a professional teaching license from another state should not include a requirement that the license be based on the completion of a teacher preparation program. The effect of defining a professional teaching license this way is to eliminate one of the pathways to a Tier 3 license established in statute.”¹⁶⁵

161. Under Minn. Stat. § 122A.183, subd. 2 (2018), there are five separate pathways to a Tier 3 license. The second identified pathway is “completion of a state-approved preparation program” The fourth pathway is “a professional teaching license from another state”¹⁶⁶ Senator Pratt states that “by defining a professional teaching license as a license that is based on the completion of a teacher preparation program, pathway (4) is made equivalent to pathway (2), essentially eliminating one of the pathways to licensure set in statute.”¹⁶⁷ Senator Pratt maintains that the Board cannot use a definition to add a requirement, which effectively eliminates one of the pathways established in statute.¹⁶⁸

162. The Board did not directly respond to Senator Pratt’s comments but the Board stated in its SONAR the following:

Many states provide provisional or emergency licenses with little or no teacher preparation, sometimes allowing an individual to test into licensure or with a certain number of years teaching that content. Aligning this definition to criteria for receiving a license in Minnesota is needed for parity and to prevent individuals from obtaining a license without training in another state in order to convert the license to a full Minnesota license without meeting other requirements. A Tier 1 and Tier 2 Minnesota license would be aligned to those licensure types from other states. The definition was changed from a much earlier draft to ensure that a licensure via portfolio process in another state similar to that in Minnesota could be used. “Renewed indefinitely” was removed from the preliminary draft as it would limit professional licensure types from other states that are limited, and did not provide any additional purpose not already included in the definition One concern was voiced that the definition here inherently aligns to another Tier 3 pathway (out-of-state preparation), and thus does not align with the intent of statute. The challenge with this rule is that many states do not use “professional” in defining and separating licensure types. The board believes the intent of adding “professional” in statute was to ensure that licensure types that did not meet a high level of expectation would not be

¹⁶⁴ Rule by Rule Analysis by A. Liuzzi at PELSB (June 20, 2018) (eComments).

¹⁶⁵ Ex. 8. Comments of Senator Eric Pratt (March 23, 2018).

¹⁶⁶ Minn. Stat. § 122A.183, subd. 2.

¹⁶⁷ Ex. 8. Comments of Senator Pratt (March 23, 2018).

¹⁶⁸ *Id.*

transferred to a Tier 3 “professional” license in Minnesota. Stakeholders agreed that, because teacher preparation includes approved alternative teacher preparation and licensure via portfolio pathways, this definition best ensures licenses from out of state meet minimum requirements for full licensure.¹⁶⁹

163. Senator Pratt addressed the Board’s point, stating:

The intent of including pathway (4) as a separate and distinct pathway from (2) was to acknowledge that there are experienced teachers from other states who obtain a professional teaching license through an alternative pathway. Adding the term “professional” in front of “license” was a suggestion by the former Board of Teaching that the Legislature accepted to ensure that this pathway was only available to out-of-state teachers who had obtained a professional level license in their state.

164. The Administrative Law Judge finds that, the term “professional license” is not clear on its face, and requires a definition because it is used in the statute and will be applied by the Board. A definition is required to distinguish the meaning of a teaching license from another state from a professional teaching license from another state. However the Board’s definition is defective on two grounds. First, as Senator Pratt noted, the Board’s proposed definition appears to require that all out-of-state applicants have gone through a teacher preparation program. This requirement conflicts with the statute which permits applicants with a “professional license” from another state to become teachers in Minnesota without the qualification that they must have completed a teacher preparation program. Second, the Board’s definition uses terms “conventional,” “nonconventional,” and “alternative,” which are ambiguous in this context and are not elsewhere defined.

165. Administrative agencies have the authority to fill in the gaps in the framework of regulatory statutes and to implement and make specific the language of a statute. An agency cannot, however, adopt a conflicting rule.¹⁷⁰

166. The Board’s proposed definition is defective because it conflicts with the enabling statute and because it is unconstitutionally vague.¹⁷¹

E. Rule 8710.0310, subpart 2: Teaching licenses, in general

167. The proposed subpart governs general requirements for teaching licenses.

168. The subpart reiterates the requirement for criminal background checks on license applicants found in Minn. Stat. § 122A.18 (2018). The statute itself contains more detail about the scope of the background check than does the proposed rule.

¹⁶⁹ SONAR at 15; Ex. 3.

¹⁷⁰ *GH Holdings, LLC v. Minnesota Dept. of Commerce*, 840 N.W.2d 838 (Minn. Ct. App. 2013).

¹⁷¹ See Minn. R. 1400.2100 (E) (2017).

169. The Board added the requirement that the renewal of a teaching license also requires a background check if one was not completed on the license holder within the previous five years.

170. This subpart also states that the appeal rights which currently exist in Minn. R. 8710.0900 also apply to an applicant denied a specific licensure tier.

171. No Comments were received about these general provisions.

172. The proposed rule is needed to clarify certain responsibilities of the Board and to alert applicants to the background check procedure and their appeal rights.

F. Rule 8710.0311: Tier 1 License

173. Minnesota Statute § 122A.18, subd. 1, requires the Board to issue licenses to candidates who meet the qualifications for Tier 1 licenses.

174. This proposed rule delineates the requirements that must be met by the applicant, school district, and the Board before a Tier 1 license may be issued.

175. Previously, school districts were permitted to hire “community experts”¹⁷² to teach. Tier 1 licensure is similar to the now repealed community expert provisions. Like community experts, except for those teaching in career and technical education fields, Tier 1 applicants must hold a bachelor’s degree or an equivalent credential for applicants from outside of the United States.¹⁷³

1. Position Postings

176. In support of the proposed rule the Board states that “the majority of the rule part is directly from statute.”¹⁷⁴

177. The rule requires that a district hiring a Tier 1 licensed individual must have posted the position for at least 15 days on the Board-approved statewide job board.¹⁷⁵ For first, second, and third and subsequent renewals, the rule requires that the position be posted on the Board-approved statewide job board for at least 60 days.¹⁷⁶

178. The Board explained that in order to comply with the position posting requirement of Minn. Stat. § 122A.181, subd. 1(3)(ii), the Board needed to propose a uniform length of time for jobs to be posted. The Board stated that 15 days is a reasonable timeframe because a district may use a short-term substitute teacher for 15 days while

¹⁷² Minn. Stat. § 122A.25 (2018), *repealed by* 2017 Minn. Laws ch. 5, art. 3, § 36(b) (effective July 1, 2018).

¹⁷³ Proposed Minn. R. 8710.0311, subp 2A.

¹⁷⁴ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

¹⁷⁵ Proposed Minn. R. 8710.0311, subp. 2.B.(1).

¹⁷⁶ Proposed Minn. R. 8710.0311, subps. 4A, 5A.

trying to find a candidate. The Board justified the longer posting time for subsequent renewals, stating that in those cases the districts will know in advance that they have an open position.¹⁷⁷ The Board also noted that the longer time will allow teachers to look for these open positions.

179. One commenter opposed the specific requirements for posting, asserting that the Board “should align with statute by requiring hiring districts to post the position, without exceeding statute by defining the length of time that a position must be posted.”¹⁷⁸

180. The Legislature specifically directed the Board to promulgate rules to implement the tiered licensure system.¹⁷⁹ The proposed posting timelines fall squarely within the Board’s jurisdiction and responsibility to adopt rules “setting forth the nature and requirements of all formal and informal procedures related to” its official duties.¹⁸⁰

181. The proposed timelines are needed and reasonable because they provide a clear and uniform standard for the legislative requirement that positions be posted before a Tier 1 applicant is hired.

2. Subparts 2B, 4B, 5B, 6B: Acceptable Applicants

182. The legislation which created the Tier 1 teaching credential states that a district may hire a teacher on a Tier 1 license if the district is unable to hire “an acceptable teacher with a Tier 2, 3, or 4 license.”¹⁸¹ The legislation does not define the term acceptable nor does the legislation delineate whether a district or the Board is vested with the discretion to determine who is “acceptable.”

183. In the proposed Tier 1 licensure rule and in the rules for the subsequent tiers, the Board delineates three specific circumstances in which a school district may hire a Tier 1 teacher: (1) no Tier 2, 3, or 4 licensed individuals applied for the position; (2) no Tier 2, 3, or 4 individuals accepted the position; or, (3) all Tier 2, 3, or 4 individuals had a record of disciplinary action with the Board.¹⁸²

184. If none of the three criteria are met, the Board proposes to provide another path for a district to hire a Tier 1 applicant. The proposed rule part states:

If the hiring district cannot meet the requirements of [the three delineated circumstances], the district must provide justification to be reviewed by the board for approval or denial. The justification must include why no Tier 2, 3, or 4 licensed applicant was acceptable for the position. Failure by a district

¹⁷⁷ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

¹⁷⁸ Comment of EdAllies (May 30, 2018) (posted as an attachment in eComments).

¹⁷⁹ Minn. Stat. § 122A.09, subd. 9 (2018)

¹⁸⁰ Minn. Stat. § 14.06(a) (2018).

¹⁸¹ Minn. Stat. § 122A.181, subd. 1(3)(ii)(2018).

¹⁸² Proposed Minn. R. 8710.0311.

to provide justification constitutes grounds for the board to deny a request for a Tier 1 license, at the sole discretion of the board.¹⁸³

185. The Board states that “the process for the Board to review individual cases is needed to ensure that situations which do not fit within the clear inability to find an acceptable teacher can be reviewed on a case-by-case basis by the full board.”¹⁸⁴

186. EdAllies objected to the Board’s definition of “acceptable” in this provision, stating that if the Board is going to define “acceptable” it must create an objective standard of what is acceptable. EdAllies asserts that the definition should be consistently applied and should not depend on the subjective discretion of the Board.¹⁸⁵

187. Education Minnesota supports the proposed rule and commented that it is needed because the statute does not explain how a district or charter school would demonstrate that any higher tiered applicants were not “acceptable.”¹⁸⁶ Education Minnesota is concerned that some districts may hire a Tier 1 teacher over a higher qualified teacher because the Tier 1 teacher is less costly and is hired on an at-will basis. Education Minnesota states that the Board currently receives requests to hire community experts even when many higher credentialed teachers have applied for the vacant position.

188. As noted under the definition for “good cause,” a rule is required to be sufficiently specific to put the public on fair notice of what its provisions require.¹⁸⁷ In addition, discretionary power may be delegated to administrative officers “[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers.”¹⁸⁸

189. The Administrative Law Judge finds that the Board has the authority to define the word “acceptable” so it can administer the Tier 1 licensing statute. Leaving the definition to each district would not provide a clear, understandable and generally applicable standard for administering teaching credentials.

190. However, the Administrative Law Judge finds that the Board’s proposed criteria for reviewing applications on a “case-by-case basis” does not provide a standard that is reasonably clear. The proposed language creates a phantom standard that is subject to the whim and caprice of the Board. Because it is vague and does not supply a transparent and comprehensible standard for the public, the Administrative Law Judge

¹⁸³ *Id.*

¹⁸⁴ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

¹⁸⁵ Comment of EdAllies (May 7, 2018) (eComments).

¹⁸⁶ Comments of Education Minnesota (June 6, 2018) (eComments).

¹⁸⁷ *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

¹⁸⁸ *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); *accord Anderson v. Commissioner of Highways*, 126 N.W.2d 778, 780 (Minn. 1964).

finds that the final paragraph in proposed rule 8710.0311, subparts 2B, 4B, and 5B, is defective.

191. There are a number of ways the Board could remedy this defect. For example, the Board could choose to delete the sections noted above throughout its rules. Deleting the defective paragraph would clarify that a hiring district may hire a Tier 1 candidate where there are no higher level candidates who apply for or accept the position or when a higher tiered applicant has a record of disciplinary action with the Board. The Board might also choose to consider what other objective facts might make a higher Tiered candidate unacceptable and describe them with specificity. Whatever correction the Board takes must make it clear to districts, applicants, and the general public exactly what will constitute an unacceptable higher tiered candidate.

3. Subparts 2C(1), 4D(2), 5C(1), 6D(1): Mentorship Program

192. Subpart 2C(1) requires that a district seeking to hire or renew a Tier 1 teacher must affirm that the applicant will participate in a mentorship program aligned with Board-adopted criteria by the time of renewal. The rule also requires that, upon the application to renew a Tier 1 position, the district must show that the Tier 1 applicant participated in “a mentorship program aligned to board-adopted criteria.”

193. The Board states that “Board-adopted criteria for mentorship is needed to clarify what a ‘mentoring program’ must include to meet this requirement. It is reasonable because it allows the board to develop criteria that does not place an undue burden on districts and can adapt quickly with changing research on effective mentorship for new teachers.”¹⁸⁹

194. Senator Eric Pratt, citing Minn. Stat. § 122A.70 (2018), states:

[The] statute is clear on teacher mentorship requirements for districts. Requiring districts to have a mentorship program as a condition of licensing would amount to legislating through rule, and it would affect that ability of every school district in Minnesota to hire a single teacher. Furthermore, the Board cannot make a rule that is inconsistent with statute by requiring that only Tier 1 teachers participate in mentorship programs. Statute explicitly requires that teachers at every tier level must participate in their district’s mentoring program.¹⁹⁰

195. Senator Eric Pratt further notes various statutes that refer to mentorship programs:

- Minn. Stat. § 122A.182, subd. 7(a) states that “a teacher holding a Tier 2 license must participate in the employing district or charter school’s mentorship and evaluation program”

¹⁸⁹ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

¹⁹⁰ Ex. 8. Letter of Senator Eric Pratt (June 8, 2018).

- Minn. Stat. § 122A.183, subd 4 states that a teacher holding a Tier 3 license must participate in the employing district or charter school’s mentorship and evaluation program”
- Minn. Stat. § 122A.184, subd. 3 states that “a teacher holding a Tier 4 license must participate in the employing district or charter school’s mentorship and evaluation program”

196. Senator Pratt next states that “a teacher cannot participate in a program that does not exist . . . [T]he requirement that teachers at every license tier participate in a district’s mentorship program does not authorize the Board to require districts to have a mentorship program.”¹⁹¹

197. EdAllies also states that Minnesota Statute § 122A.70, subd. 1, only encourages school districts to develop mentorship programs but does not require them. Therefore, EdAllies argues the proposed rule forecloses the hiring of Tier 1 teachers by districts that do not have a mentorship program.¹⁹²

198. Minn. Stat. § 122A.70 directs the Board to provide grants to districts interested in “developing or expanding a mentorship program.”¹⁹³

199. Minn. Stat. § 122A.181, subd. 6(a) (2018) states that “a teacher holding a Tier 1 license must participate in the employing district or charter school’s mentorship program and professional development.” The most reasonable reading of the statute is that it requires Tier 1 teachers to participate in a mentorship program and that a district that does not have a mentorship program cannot hire a Tier 1 applicant. If the Legislature had intended the requirement to be permissive it could have used “may” in place of “must,” thereby turning the mentorship program from a requirement into an option. In the alternative, the Legislature could have inserted “if any” after “mentorship program” in the relevant provisions. Since it did not do so it is reasonable to conclude that the word “must” means that a Tier 1 teacher must participate in a mentorship and professional development program. Read together the statutes state that mentorship programs are not mandatory for districts but they are required in order to license Tier 1 teachers. Districts that wish to employ Tier 1 teachers will necessarily maintain a mentorship program.

200. Although the Board’s proposed rule requirement that Tier 1 teachers participate in mentorship programs is reasonable, the section of the rule related to that requirement is defective as drafted because it does not provide a standard that is clear and objective. The phrase “a mentorship program aligned with Board-adopted criteria” does not provide clear standards for the district or the applicant. The phrase does not make it clear whether the “Board-adopted criteria” has been adopted or does not yet exist. Because the Board stated that the phrase allowed the Board to change the criteria to

¹⁹¹ *Id.*

¹⁹² Comment of EdAllies (May 7, 2018) (eComments).

¹⁹³ Minn. Stat. § 122A.70, subd. 2.

keep up with the latest research and did not provide the criteria, the Administrative Law Judge concludes that the criteria is not yet formulated. The rule does not provide a clear rule that the general public can understand. Instead, it rests on a standard that does not exist or may change at the whim of the Board. Unclear standards and shifting processes for licensure were central concerns noted by the legislative committee and the Legislative Auditor when they recommended the Board of Teaching be disbanded and the licensure rules be rewritten.¹⁹⁴

201. The Board may correct the defect is by striking the phrase “aligned with Board-adopted criteria.”

4. Subparts 2D, 4E, 5D, 6D and 6E: Emergency Placements and Good Cause

202. In three parts of the proposed Tier 1 rule,¹⁹⁵ at subparts 2D, 4E, 5D and 6E, the Board proposes language as follows:

A committee of board staff designated by the board must review applications that meet board criteria for an emergency placement under this subpart within two business days. The committee may immediately issue an interim permission for a Tier 1 license based on board-adopted minimum qualifications criteria pending a review by the board. The interim permission expires at the first possible review by the full board. The board must review applications after the position has been posted on the board-approved statewide job board for 15 days.

203. In subpart 6C, the Board proposes similar language as follows:

If the hiring district cannot meet the requirements [that the teacher is a career and technical teacher or in a licensure identified as a shortage area] the district must provide good cause justification for why the applicant should receive Tier 1 renewals. The good cause justification must include why an applicant has not obtained a licensure in a higher licensure tier. Failure by a district to provide good cause justification constitutes grounds for the board to deny a request for additional Tier 1 renewals, at the sole discretion of the board.

204. The Board supports these provisions, stating, “An interim permission was added to the posting rule to ensure that districts who have immediate openings to put a Tier 1 individual in the classroom pending the posting and pending the review by the board. It is reasonable because it meets the needs of districts without taking away the posting requirements.”¹⁹⁶

¹⁹⁴ See *generally* Ex. 12 (Office of the Legislative Auditor Evaluation Report on Minnesota Teacher Licensure to the Legislature, Summary, dated March 2016).

¹⁹⁵ Proposed Minn. R. 8710.0311.

¹⁹⁶ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

205. Education Minnesota supports the proposed language, stating that it addresses concerns raised about the 15-day posting requirement.¹⁹⁷

206. For reasons discussed above in the discussion about “good cause”, the use of the term in proposed rule subpart 6C grants the Board unfettered discretion, and does not describe the procedures to be followed when a request for a good cause exception is made.

207. Further, the Board has not defined “emergency placement.” Further, the terms “immediately” and “first possible review” do not provide definite timelines. The subparts that use the term are vague, grant the Board unfettered discretion, and do not describe the procedures to be followed when a request for an emergency placement is made.

208. The Administrative Law Judge finds that the proposed subparts are unconstitutionally vague and the Board has not shown that the proposed subparts are needed or reasonable.

5. Subpart 6: Additional Renewals

209. The Board proposes that for more than three renewals of a Tier 1 licensure all of the provisions of the earlier part of the rule be met. In addition, the hiring district must show that the teacher is in a career and technical education field or is teaching in a licensure area identified as a shortage area in Minn. Stat. § 122A.06.

210. The Board did not provide a statement or any analysis in support of this subpart.

211. The Minnesota Commission of Deaf, Deafblind, and Hard of Hearing Minnesotans argues that proposed subpart 6 could have “dire implications, for example in a rural community, a student could have a teacher serving in a the shortage area of Deaf, Deafblind and Hard of Hearing for the full thirteen years of their education.” The Commission proposes that the rule should be revised so that any renewal past the third year would require the candidate to enroll in a state-approved teacher preparation program.¹⁹⁸ The Commission points out that other tiers have limits on renewal and that short call substitutes also have a time limit.

212. The Administrative Law Judge finds that the Board did not make an affirmative presentation of facts establishing the need for and reasonableness of the

¹⁹⁷ Comments of Education Minnesota (June 6, 2018) (eComments).

¹⁹⁸ Letter from the Minnesota Commission of Deaf, Deafblind, and Hard of Hearing Minnesotans (June 11, 2018) (eComments).

proposed subpart.¹⁹⁹ Because the record does not demonstrate the need or reasonableness of the rule subpart, the subpart is defective.

A. Rule 8710.0312: Tier 2 License

213. The Board states that the majority of this rule part comes directly from statute.²⁰⁰ Minn. Stat. § 122A.182 governs Tier 2 licenses and clearly sets forth the requirements for and the limitations on Tier 2 licensure.²⁰¹

214. In general, Tier 2 licenses allow individuals to teach in Minnesota if they have a bachelor's degree and are enrolled in a Minnesota-approved teacher preparation program or if they have a master's degree. Tier 2's coursework requirements gives credit to teaching experience and preparation programs from other states.²⁰² However, a Tier 2 license is limited to the content matter indicated on the application for the initial Tier 2 license and a Tier 2 license does not bring an individual within the definition of a teacher under Minn. Stat. § 122A.40, subd. 1 (2018) (Definition of Teacher for contractual purposes) or Minn. Stat. § 122A.41, subd. 1(a) (2018) (Definition of Teacher under the Teacher Tenure Act).²⁰³

215. The statute states that the Board must approve a request for a Tier 2 license in a specified content area if the candidate has a bachelor's degree and has completed at least two of five coursework requirements.²⁰⁴ A career and technical education teacher need not have a bachelor's degree but must have: an associate's degree; a professional certification; or five years of relevant work experience.²⁰⁵

216. The statute states that an initial Tier 2 license is valid for a term of two years and may be renewed three times. The statute directs the Board to issue rules "setting forth the conditions for renewal after the initial license has been renewed three times."²⁰⁶

217. No comments were received regarding the Board's proposed Tier 2 license criteria. Comments were received regarding Tier 2 licensing of service providers, such as Speech Language Pathologists and School Psychologists, and these are addressed below under the rules regarding these specific service providers.

218. For reasons explained under proposed rule 8710.0310, subp. 1G, the use of the term "good cause" makes proposed rule part 8710.0312, subd. 6. B. defective. The Board may cure the defect by revising the definition of good cause as described above.

¹⁹⁹ Minn. Stat. § 14.14, subd. 2. At the public hearing the agency shall make an affirmative presentation of facts establishing the need for and the reasonableness of the proposed rule.

²⁰⁰ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁰¹ Minn. Stat. § 122A.182.

²⁰² Minn. Stat. § 122A.182, subd. 2.

²⁰³ See *generally* Minn. Stat. § 122A.182 and specifically subd. 5.

²⁰⁴ Minn. Stat. § 122A.182, subds. 1 and 2.

²⁰⁵ Minn. Stat. § 122A.182, subd. 1.

²⁰⁶ Minn. Stat. § 122A.182, subd. 3.

G. Rule 8710.0313: Tier 3 License

219. The Board states that the majority of its proposed rule comes directly from statute.²⁰⁷

220. In general, a Tier 3 license allows, in addition to candidates who have completed a Minnesota-approved teacher preparation program, candidates with a teaching license from another state to be Minnesota teachers.²⁰⁸ In addition, completion of another state's teacher preparation licensure, licensure by portfolio and three years of teaching under a Tier 2 license are all paths to a Tier 3 license.²⁰⁹

221. Comments received about Tier 3 licensure discussed whether Tier 3 licensure should be the lowest tier allowed for certain areas of licensure, such as school nurse. These areas are typically known as "related services." These comments will be discussed in the relevant licensure rule parts.

222. Education Minnesota supports the proposed Tier 3 license rule, noting that it closely mirrors the statutory requirements in Minn. Stat. § 122A.183. The organization further notes that where there is a variation, there was consensus from many stakeholders that the proposed rule was needed and reasonable to fill in gaps in the statutory language.²¹⁰

223. The Minnesota Association of Colleges for Teacher Education (MACTE) commented that pathway (5) "removes any requirement of a board-approved conventional or alternative teacher prep program in this state or another. We recommend this section provide only the first 4 pathways and delete lines 17.21-17.24."²¹¹

224. The University of Minnesota commented in depth on the proposed Tier 3 rule, noting that the "current language in statute is problematic and further clarification is needed in rule." In general, the University of Minnesota finds a lack of parity between the five pathways to Tier 3 licensure and especially has concerns about pathways four and five. These comments include:

- If Tier 2 teachers are not continuing contract teachers then their evaluators are not held to § 122A.40, subd. 8 or § 122A.41, subd. 5 criteria;
- Option (4) for becoming a Tier 3 teacher is to hold an out-of-state license, have taught two years, and have received good evaluations. This does not meet Minnesota's criteria for effective teaching requirements. The College of Education suggests that current

²⁰⁷ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁰⁸ Minn. Stat. § 122A.183, subd. 2.

²⁰⁹ *Id.*

²¹⁰ Comments of Education Minnesota (June 6, 2018) (eComments).

²¹¹ Ex. 8. Comments of MACTE (June 8, 2018).

requirements for Minnesota prepared teachers should be taken into consideration by the Board when reviewing applicants' out-of-state professional licensure and evaluation requirements;

- Option 5 requires two years of teaching as a Tier 2 teacher and having received good evaluations. The College of Education states that this requirement does not necessarily meet Minnesota's effective teaching requirements because the evaluations do not necessarily provide evidence of meeting Minnesota's standards of effective practice. There is no guarantee of consistency between Minnesota's district evaluation frameworks to ensure this pathway provides evidence of meeting the standards for teachers licensed at Tier 3 in Minnesota. A tier 2 teacher may not have completed any coursework; therefore, this pathway lacks parity to other Tier 3 pathways which do require content and pedagogy.

225. According to statute, one option for the coursework portion of Tier 3 licensure is "three years of teaching experience under a Tier 2 license and evidence of summative teacher evaluations that did not result in placing or otherwise keeping the teacher on an improvement process pursuant to section 122A.40, subdivision 8, or section 122A.41, subdivision 5."²¹²

226. The Board's proposed rule subpart aligned with the statute's coursework option states: "at least three years of experience teaching as the teacher of record aligned to the licensure sought under a Tier 2 license and presents evidence of summative teacher evaluations that did not result in placing or otherwise keeping the teacher on an improvement process aligned to the district's teacher development and evaluation plan."²¹³ The proposed subpart is aligned with the statute and, therefore, needed and reasonable.

227. As noted above in the discussion of the proposed definition of "professional license" the Board's proposed rule uses the terms "conventional," "nonconventional," and "alternative" that are ambiguous and are not elsewhere defined, thus creating a defect in the proposed rule.

H. Rule 8710.0313: Tier 4 License

228. The Board states that the majority of this rule comes directly from statute and that it is needed to have a rule that explains adding an additional Tier 4 license.

229. The Board also explains that Licensure via portfolio allows an individual to receive a Tier 3 license. That individual cannot move to a Tier 4 unless they have completed teacher preparation. However, an individual already on a Tier 4 license needs the ability to add a license aligned to their Tier 4 through the licensure via portfolio

²¹² Minn. Stat. § 122A.183, subd. 2(5).

²¹³ Proposed Rule 8710.0313, subp. 2(C)(5).

process. This rule ensures that an individual is not in conflict with Minn. Stat. § 122A.09, subdivision 9(b), as it ensures an individual is not simultaneously on two separate tiers.²¹⁴

230. No comments were received on this rule.

231. As noted above in the discussion of the proposed definition of “professional license,” the Board’s proposed rule uses the terms “conventional,” “nonconventional,” and “alternative” that are ambiguous and are not elsewhere defined, thus creating a defect in the proposed rule. Other than that defect, the proposed rule is needed and reasonable because it implements the statute and provides clarity to the field and the general public.

I. Rule 8710.0320: Out-Of-Field Permission

232. The Board explains that Out-of-Field Permission is similar to the current personnel variance used often by teachers and districts, and is authorized by Minn. Stat. § 122A.09, subd. 9(b). The Innovation Program Permission is similar to the experimental waiver currently used by alternative and project-based schools and is authorized by Minn. Stat. § 122A.09, subd. 10(b). These permissions provide to individuals with pedagogy training the ability to teach outside of their content area.²¹⁵

233. According to the Board, “Out-of-Field Permissions presume an intent of the district to attempt to hire a teacher licensed for assignment prior to placing this individual in the classroom. Stakeholders had multiple conversations about ensuring good faith effort to find a teacher licensed for the assignment.”²¹⁶

234. The Board also explains that “[l]anguage was added in the final draft to clarify that an individual who receives a Tier 3 or 4 license in career and technical education or career pathways without a bachelor's degree cannot receive an out-of-field permission or innovative permission to teach in a field that requires a bachelor's degree. This follows the restrictions of individuals without a bachelor's degree in other tiers.”²¹⁷

235. The Board also states that Stakeholders debated the duration and amount of renewals for an Out-of-Field Permission. The Board believes keeping the duration at one year aligns to the current personnel variance and will ensure districts continue to seek teachers licensed for the assignment. The Board also approved extending the number of renewals for a teacher over the course of their career to five (with four renewals) instead of the current practice of three (with two renewals). Districts have the ability to request additional renewals with good cause justification.²¹⁸

²¹⁴ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

²¹⁵ SONAR at 30.

²¹⁶ SONAR at 20.

²¹⁷ SONAR at 30.

²¹⁸ SONAR at 31.

236. The Board further stated:

This rule follows current practice found in MN Rule 8710.1400 Subp. 2. It defines that the permission is bound to licensure area and the district requesting the permission. The other rule allows a district to place a licensed teacher in a summer school only position outside their licensure area without this counting as a permission against them. Summer school only positions are difficult to fill and without this option, districts may have to look for individuals with no training to fill these positions under a Tier 1.²¹⁹

237. Education Minnesota maintains that the proposed rule is necessary because Minn. Stat. § 122A.09, subd. 9(b) requires the Board adopt rules relating to fields of licensure, including a process for granting permission to a licensed teacher to teach in a field that is different from the teacher's field of licensure without change to the teacher's license tier level. Education Minnesota states that it is not aware of any other statutory provisions relating to out-of-field permissions. According to Education Minnesota, the proposed rules largely maintain the requirements currently in place for out-of-field permissions or variances under Minn. R. 8710.1400.²²⁰

238. Education Minnesota also stated that it:

believes the 15-day posting requirement is reasonable because an out-of-field permission is outside the content area in which an individual is licensed to teach. In order to ensure that students have access to teachers who are knowledgeable in their content area, it is reasonable to require school districts to attempt to hire an individual licensed to teach a particular assignment before they receive an out-of-field permission from PELSB. As with Tier 1, PELSB has accommodated concerns about districts needing to make emergency hires or assignment changes by allowing staff to approve emergency placements within two business days.²²¹

239. No other comments were received regarding out-of-field placements.

240. The Administrative Law Judge finds that the following subparts of proposed Rule 8710.0320 are defective: subp. 2A (final paragraph regarding acceptable applicants); subp. 2C (emergency placements); subp. 4C (on renewals, final paragraph regarding acceptable applicants); and subp. 5 (additional renewals). These rule subparts are all defective for reasons explained above under the proposed good cause definition and the proposed Tier 1 Teacher license rule. These subparts do not provide clear, generally applicable standards that will ensure uniform application. Therefore the standards are not understandable by districts, applicants, or the general public. Relatedly, the proposed rules grant the Board unfettered discretion to formulate future standards on a case-by-case basis.

²¹⁹ *Id.*

²²⁰ Ex. 8. Comment of Education Minnesota (June 6, 2018).

²²¹ *Id.*

J. Rule 8710.0330 Teacher Licensure Via Portfolio Application

241. In support of this proposed rule, the Board states that:

the licensure via portfolio process is an effective tool to allow individuals with non-traditional training to become licensed teachers. The pathway that requires only three years of experience and no improvement plan was concerning that this individual received a single supervisor's approval and would be given a fully mobile license (Tier 3) without any evidence provided to the regulatory entity for teacher licensing - PELSB. The board has authority to adopt rules around licensure renewal and saw this as a path to get the individual into a Tier 3 license and then, using their first individual growth and development plan, evidence meeting the standards before remaining on a Tier 3.²²²

242. The Board also states that "it is necessary to outline the application requirements for licensure via portfolio to emphasize that there are two parts: (1) submitting the portfolio(s); and (2) applying for a license. The background check is required to apply for any license, and these rules clarify that."²²³ The Board also explains that the process includes, first, a review of the portfolios and, then, the application process.²²⁴

243. The Board further explains that:

An initial license via portfolio keeps a teacher at a Tier 3. However, if an individual has completed teacher preparation and is on a Tier 4, the portfolio process can be used to add a license aligned to the teacher's tier because the requirement for teacher preparation was already met by their initial license. The only requirement that is content-specific when adding a Tier 4 license is the content and pedagogy exams. This aligns with language in Minn. Stat. 122 A.09, subdivision 9(b), and stakeholder interpretation.²²⁵

244. One commenter described her experience trying to add a licensure area to her current license. She found the Board's responses to be confusing and conflicting. She states, "[O]ne answer told me to proceed with license by portfolio for a level 3 license. Another person told me I could not hold a level 4 (Language Arts) license and a level 3 Early Childhood License. There even seemed to be confusion about whether the 'approved teacher preparation program' on the portfolio option included classroom experience and workshop/continuing ed., or only college-level classes." The commenter asked that the rule be made clear and understandable for applicants.²²⁶

²²² SONAR at 28.

²²³ SONAR at 18.

²²⁴ SONAR at 32.

²²⁵ SONAR at 30.

²²⁶ Comment of Jennifer Heimark (May 8, 2018) (eComments).

245. Senator Nelson attached a March 23, 2018 letter of Senator Pratt to her comments.²²⁷ In the March 23, 2018 letter, Senator Pratt comments that the “statute requires the Board to establish a portfolio process that allows a candidate to obtain *any teacher license* in Minnesota Statutes 122A.81, subdivision 1. This includes Tier 1, 2, 3, and 4 licenses. The current rule draft currently only establishes a process for a candidate to obtain a Tier 3 license or add a Tier 4 license content area.”

246. Minn. Stat. § 122A.18, subd. 10 states: “The Professional Educator Licensing and Standards Board must adopt rules establishing a process for an eligible candidate to obtain any teacher license under subdivision 1, or to add a licensure field, via portfolio. The portfolio licensure application process must be consistent with the requirements in this subdivision.”

247. The Board explains that “the limitation of licensure via portfolio to Tier 3 and Tier 4 is reasonable because the statute identifies the need for an individual to complete and be recommended for a pedagogy and content portfolio. If an individual meets that requirement, they would receive a Tier 3 or 4 license. Thus, a portfolio process aligned to Tier 1 and Tier 2 would be in conflict with statute. Also, a Tier 1 and Tier 2 license represents a district’s analysis of an individuals’ preparedness for the classroom, and this evidence provided for board review. A portfolio process is the evidence of an individual meeting the state requirements for licensure.”

248. The Board’s explanation aligns with the statutory requirements set forth in the four licensure tiers. Tiers 1 and 2 do not allow an applicant to meet the coursework requirements though submission of a content-specific licensure portfolio. Tiers 3 and 4 do allow an applicant to meet the coursework requirements though submission of a content-specific licensure portfolio.

249. The proposed rule complies with the statutes and the Board has demonstrated the need for, and reasonableness of, the rule.

K. 8710.6000-.6400 Related-Service Licensees Generally

1. Authority to Issue Specific Rules for Related-Service Professions

250. The Board’s proposed rules include amendments to Minn. R. 8710.6000-.6400 to specify the requirements for related-service applicants (speech-language pathologists, school nurses, school psychologists, school social workers, and school counselors) to obtain teacher licenses. Under Minn. Stat. § 122A.06, subd. 2, related-service professionals must be defined as teachers, a requirement codified in Minn. R. 8710.0310, subp. 1K, and more specifically in Minn. R. 8710.6000-.6400.

²²⁷ Letter from Senator Nelson (June 7, 2018) (eComments).

251. The Board writes that the “nature of related service licenses is very different from classroom teacher licenses in that there are other licensing and accrediting bodies involved, master-level entry requirements, other prevailing statutes, and subject matter standards” specific to certain professionals; thus, the Board decided to maintain a rules framework in which each related-service profession is covered by its own rule.²²⁸

252. Under the proposed rules, each related-service profession has been aligned to the tier system implemented by the Legislature. Under the proposed rules, no related-service professionals may be licensed at Tier 1. The Board comments that “[r]elated services professionals work with extremely vulnerable children, so they are all excluded from Tier 1.”²²⁹ The Board also testified at the public hearing that the requirements of Tier 1 licensure generally do not apply to related-service professions.²³⁰ Three of the related-service professions may be licensed at Tier 2, and all five may be licensed at Tiers 3 and 4.

253. Education Minnesota comments that separate rules covering each related-service profession were “necessary because individuals working in public schools in these fields are required by existing rules (Minn. R. 8710.6000-6400) to hold licenses with PELSB, but are not specifically mentioned within the tiered licensure law.” Education Minnesota states that “[p]rofessional organizations and licensing boards representing these related service occupations all supported maintaining licensure by PELSB for a variety of reasons, including the uniqueness of practicing these occupations within an educational setting that many of the related service rules address.” Education Minnesota maintains that “[s]takeholders representing related service providers also strongly supported requiring related service professions to hold Tier 3 or 4 licenses due to the heightened student safety concerns these providers are trained to address, and the belief that Tiers 1 and 2 would not ensure that these professionals have appropriate training.”²³¹

254. The Minnesota Rural Education Association (MREA) contends that the Board had no statutory authority to adopt a specific definition of “related service professional.” The MREA asserts that Minn. Stat. § 122A.18 required the Board to allow related-service professionals to obtain licenses at all four tiers. MREA argues that, even if other statutory license provisions conflict with the Board’s statutory authority, the Board has no authority to invoke those statutes to prevent licensure at Tiers 1 and 2, but rather must be directed to ask the Legislature to resolve the statutory conflict.²³²

255. In an earlier comment, MREA wrote that the Board had neglected its statutory duty to evaluate data regarding the “proposed rule’s probable effect on teacher supply and demand” as required by Minn. Stat. § 122A.09, subd. 9(e). MREA examined

²²⁸ SONAR at 34.

²²⁹ SONAR at 25.

²³⁰ Pub. Hrg. Tr. at 18 (Test. of Alex Liuzzi).

²³¹ Letter from Denise Specht, Education Minnesota (June 6, 2018) (on file with Minn. Office Admin. Hearings).

²³² Letter from Dr. Fred Nolan, Minnesota Rural Education Association (June 29, 2018) (on file with Minn. Office Admin. Hearings).

MDE data showing that related-service positions were difficult to fill and suggested that covering this demand “is precisely what a Tiered license system is designed to do.”²³³

256. The Minnesota School Boards Association (MSBA) comments that the proposed rules contradict Minnesota statute “by denying the full range of tiered licensure for related service positions.” According to MSBA, because Minn. Stat. § 122A.15, subd. 1, defines “teachers” to include related-service personnel, and because Tiers 1 and 2 apply to all teachers under the tiered licensure system, the Board does not have the authority to exclude related-service personnel from Tiers 1 and 2.²³⁴

257. Minn. Stat. § 122A.15, subd. 1, defines “teachers” to include “counselors, school psychologists, school nurses, school social workers, . . . and speech therapists.”

258. The Legislature directed the Board to “adopt rules” to implement tiered-licensure legislation²³⁵ and provided no mechanism for a teacher to obtain a license without an assignment to a tier. Thus, to conform to the mandate of the Legislature, the Board must align the related-service professions to the tiers.

259. The five related-service professions identified by the Board are distinct among non-direct-instruction positions because, as discussed below in relevant subsections, they implicate other statutory licensing frameworks; different professional associations, accreditation bodies, and requirements; and separate subject-matter standards.

260. The tiered statutory framework clearly contemplates a distinction between teachers who do and do not “provide direct instruction.”²³⁶ For instance, Minn. Stat. § 122A.187, subd. 5, directs the Board to adopt rules requiring teachers renewing for Tiers 3 or 4 to undergo certain reading preparation, but exempts from this requirement “[t]eachers who do not provide direct instruction including, at least, counselors, school psychologists, school nurses, school social workers, audiovisual directors and coordinators, and recreational personnel.”

261. It must be presumed that when the Legislature passed the tiered licensure legislation, it was aware of the existing rules governing the five related-service professions, Minn. R. 8710.6000-.6400.²³⁷ These rules have been in place since at least 2001. The separation between related-service professions and classroom instructors, therefore, is not a novel innovation. The Legislature, did not direct the Board to repeal separate standards for related-service professionals. Instead, the Legislature indicated

²³³ Letter from Dr. Fred Nolan, Minnesota Rural Education Association (June 1, 2018) (on file with Minn. Office Admin. Hearings).

²³⁴ Letter from Kirk Schneidawind, MSBA (June 28, 2018) (on file with Minn. Office Admin. Hearings).

²³⁵ Minn. Stat. § 122A.09, subd. 9(a), (b).

²³⁶ Minn. Stat. § 122A.187, subd. 5.

²³⁷ *Pecinovsky v. AMCO Ins. Co.*, 613 N.W.2d 804, 809 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000) (Legislature presumed to act with full knowledge of the state of the law when it enacts new legislation).

that it contemplated and credited the distinction between direct- and non-direct-instruction teachers.

262. The Administrative Law Judge concludes that the Board has statutory authority to adopt specific licensure rules for the five related-service professions. Because the Legislature created no mechanism for a teacher license to be obtained outside of the tier system, the rules for related-service professionals must be aligned to the tiers created by the Legislature. Because the professional requirements for the related service professionals are governed by separate statutes and boards, the Administrative Law Judge concludes that the Board was required to align each profession with the tiers that give effect to all of the laws and rules applicable to each profession.

2. Authority to Exclude All Related-Service Professions from Tier 1

263. Minn. Stat. § 122A.18, subd. 1, requires the Board to “issue [Tier 1 through Tier 4] teacher licenses to candidates who meet the qualifications prescribed by this chapter.”

264. Requirements for a candidate to get a Tier 1 license under Minn. Stat. § 122A.181 are minimal and, in terms of substantive educational qualifications, require the candidate to have “the necessary skills and knowledge to teach in the specified content area” and a “bachelor’s degree to teach a class or course outside a career and technical education or career pathways course of study.” This language does not align with the professional requirements of the related-services professions because it would allow vastly underqualified candidates to apply for those positions.

265. The Administrative Law Judge concludes that the Board has the statutory authority to prohibit Tier 1 licenses in the related-service professions. The alignment of each related-service profession with Tiers 2 through 4 will be discussed below in relevant parts.

3. Authority to Exclude All Related-Service Professions from Content, Pedagogy, and Basic Skills Examinations

266. Each related-service profession rule has a subpart excluding applicants in those professions from being required to pass content, pedagogy, or basic skills examinations.²³⁸

267. The Board explains that “there are not MTLE content and pedagogy exams that are designed for these related service areas”; that most related-service teachers are required to pass different tests and obtain licenses through other boards; and that the basic skills tests have never been required of related-service teachers.²³⁹

²³⁸ See Minn. R. 8710.6000, subp. 1a; Minn. R. 8710.6100, subp. 1a; Minn. R. 8710.6200, subp. 1a; Minn. R. 8710.6300, subp. 1a; Minn. R. 8710.6400, subp. 1a (2017).

²³⁹ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

268. No comments pertaining to these subparts were submitted.

269. The Legislature required the Board to adopt content, pedagogy, and basic-skills examinations under Minn. Stat. § 122A.185. The language of that statute makes clear that it does not apply to the related-service professions. For instance, the provision requiring the Board to adopt rules for examining teachers' basic reading, writing, and mathematics skills states that it applies to Tier 4 licensees who "provide direct instruction to pupils,"²⁴⁰ and the section requiring the Board to adopt rules for examining teachers on pedagogy "does not apply if no relevant content exam exists."²⁴¹

270. The Administrative Law Judge concludes that the statutes governing content, pedagogy, and basic-skills examinations do not apply to the related-service professions, and thus the Board has the authority to exempt related-service applicants and licensees from these examination requirements.

L. Rule 8710.6000: Speech-Language Pathologist

1. Subpart 1a: Exceptions

271. This subpart states that a speech-language pathologist is not eligible to hold a Tier 1 or Tier 2 license. The Board's authority not to issue related-services licenses at Tier 1 is discussed above, in the section titled "Authority to Exclude All Professions from Tier 1," and its authority to create a Tier 2 waiver process is discussed in the section immediately following this one.

272. The Administrative Law Judge concludes that the Board's proposed subpart 1a is needed and reasonable.

2. Subpart 1b: Waiver for Tier 2 License

273. This subpart allows a hiring district to request a waiver from the Board to obtain a Tier 2 license issued under Rule 8710.0312 if the hiring district: (1) shows that the position was posted for at least 15 days on the Board-approved statewide job board; (2) shows that no Tier 3 or 4 licensed speech-language pathologists applied for the position; (3) provides justification for why no alternative options for having a licensed speech-language pathologist are available; (4) provides the Board with the applicant's credentials; and (5) details the support and supervision the applicant will receive.

274. Under the proposed rule, district applications would be reviewed by the Board at regular board meetings and approved or denied "pursuant to board-adopted criteria."

²⁴⁰ Minn. Stat. § 122A.185, subd. 1(a).

²⁴¹ *Id.*, subd. 1(b).

275. Under the proposed rule, the hiring district would have to affirm that the applicant would participate in an aligned development and evaluation model under Minn. Stat. § 122A.40, subd. 8, or 122A.41, subd. 5, or, if statutory models were not practicable, to another district-aligned evaluation.

276. The Board states that “[t]hese rules are needed and reasonable to balance the needs of the district with the requirements of the profession and recognizes that related services and content teaching are different at the core.”²⁴² The Board also states that it can “make determinations for issuing or denying a Tier 2 license on a case-by-case basis.”²⁴³ The Board writes that “there is not a defined list of requirements for a Speech Language Pathology Tier 2 license by design” and that “[t]he language allows the board to consider these licenses on a case-by-case basis.”²⁴⁴ The Board relates the need for Tier 2 speech-language pathologists to a “shortage” of that profession, “particularly in rural areas,” and states that this rule “provides balance” between addressing that shortage and “providing students with highly qualified professionals.”²⁴⁵

277. The Minnesota Speech-Language-Hearing Association (MNSHA) recommends that speech-language pathologists be licensed only at Tiers 3 and 4, reflecting the professional standards and master’s-level degree required under Minnesota Statutes chapter 148, the complex array of responsibilities that speech-level pathologists have, and the vulnerable populations of students receiving speech-language pathologist services.²⁴⁶ MNSHA and another commenter stated at the public hearing that they believed that speech-language pathologist licenses should be limited to Tiers 3 and 4.²⁴⁷

278. The Southwest West Central Service Cooperative (SWWC) comments that it has received excellent service from speech-language pathologists employed as interns on limited licenses and advises that such practice should be allowable under the new rules.²⁴⁸

279. MREA comments that 50% of reporting districts found speech-language pathologists “very difficult to hire,” and that 14% of reporting districts were unable to fill positions. MREA believes that all related-service professionals should be eligible for all tiers of licenses, and that the Board exceeded its statutory authority to the extent it excluded related-service professionals from Tiers 1 and 2.²⁴⁹

²⁴² Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁴³ *Id.*

²⁴⁴ SONAR at 21.

²⁴⁵ SONAR at 25.

²⁴⁶ Comment of MNSHA (June 7, 2018) (on file with Minn. Office Admin. Hearings).

²⁴⁷ Pub. Hrg. Tr. at 29-32 (Comment of Jeremy Braun); 40-42 (Comment of Stephanie Bordewick on behalf of MNSHA).

²⁴⁸ Letter from Dr. Mary Palmer, SWWC (June 8, 2018) (on file with Minn. Office Admin. Hearings).

²⁴⁹ Letter from Dr. F. Nolan, MREA (June 1, 2018) (on file with Minn. Office Admin. Hearings).

280. The Board comments that:

Minn. Statute 148.513 prohibits the practice of speech language pathology unless licensed and protects the title. The statute does, however, provide an exception for school personnel licensed by the Professional Educator Licensing and Standards Board under Minnesota Rules, part 8710.6000. With the flexibility granted to PELSB by 148.513, and in order to address both the needs of rural districts to fill vacancies in this identified shortage area and maintain high standards, the board created a waiver process for Tier 1 and Tier 2 licenses in Speech Language Pathology.²⁵⁰

281. Minn. Stat. § 148.511 states that section 148.513 “do[es] not apply to school personnel licensed by [PELSB] and practicing within the scope of their school license under Minnesota Rules, part 8710.6000.”

282. Minn. Stat. § 148.513, subd. 3, states that “[n]othing in sections 148.511 to 148.5198 prohibits the practice of any profession or occupation licensed, certified, or registered by the state by any person duly licensed, certified, or registered to practice the profession or occupation or to perform any act that falls within the scope of practice of the profession or occupation.”

283. The Administrative Law Judge interprets these provisions of chapter 148 as authorizing the Board to create, via Rule 8710.6000, its own framework for licensing speech-language pathologists who work in schools, and authorizing those professionals to practice speech-language pathology and title themselves as speech-language pathologists.

284. The Administrative Law Judge concludes that the Board’s licensing of Tier 2 speech-language pathologists, while relying largely on licensure under chapter 148 for the purposes of Tiers 3 and 4, is consistent with chapter 148 governing speech-language pathologist licensing.

285. Concerns about applicants’ difficulty understanding license requirements, the length of time applicants waited for responses, and insufficient transparency regarding the Board of Teaching’s licensing decisions was, in part, why the Legislature created the current Board.²⁵¹

286. The Board’s rules require a district to “provide justification for why no alternative options for having a licensed speech-language pathologist are available” and “provide the board with the applicant’s credentials,” but provide no criteria for what justifications or credentials would be acceptable to the Board. The Board says that it will review applications on a “case-by-case basis,” which does not provide a standard that is reasonably clear, but rather is subject to the Board’s unfettered discretion.

²⁵⁰ SONAR at 25.

²⁵¹ Ex. 12 (Office of the Legislative Auditor Evaluation Report on Minnesota Teacher Licensure to the Legislature, Summary, dated March 2016).

287. Because subpart 1b provides no reasonably clear criteria, but rather gives the Board “case-by-case” discretion to approve applicants, the Administrative Law Judge finds that this subpart is impermissibly vague and thus defective.

3. Subpart 2 and 2a: Requirements for Tier 3 and 4 Licenses

288. Subpart 2 requires a Tier 3 license under part 8710.0313 to be issued to a speech-language pathologist applicant who (1) has completed a master’s degree in speech language pathology in certain accredited programs; (2) holds a valid certificate of clinical competence from the relevant professional association; or (3) holds a speech-language pathology license granted by the Minnesota Department of Health.

289. Subpart 2a requires a Tier 4 license under part 8710.0314 to be issued to a speech-language pathologist applicant who (1) meets all of the Tier 3 requirements under subpart 2; (2) has at least three years of experience as a speech-language pathologist in Minnesota schools; and (3) was not placed or otherwise kept in an improvement process aligned to the district’s teacher development and evaluation plan by the applicant’s most recent summative evaluation.

290. The Board states that these rules “are needed because the board does not approve programs in Speech Language Pathology. Instead, the board looks to other accrediting bodies to determine who is qualified to earn a school speech language pathology license.”²⁵²

291. Although comments were submitted on the issue of whether speech-language pathologist licenses should be issued only at Tier 3 or 4, no comments were submitted examining the specific criteria for a speech-language pathologist to obtain a Tier 3 or 4 license.

292. MNSHA comments that “it is our recommendation that bachelor level SLPs, who have been grandfathered into 5-year license renewal periods, be changed to Tier 4 licensure.”²⁵³ The Board writes that the proposed rules “maintain[] the grandfather clause for individuals who are renewing and were licensed prior to July 1, 1994,” and states that there are no Tier 2 renewals,²⁵⁴ indicating that grandfathered speech-language pathologists would be placed at Tiers 3 or 4, depending on their level of experience and improvement-process status.

²⁵² Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁵³ MNSHA (Comment rec’d June 7, 2018).

²⁵⁴ SONAR at 35.

293. The statutory language addressing Tier 3 licensure requirements in Minn. Stat. § 122A.183 only gives statutory guidance and criteria for teachers providing direct instruction.²⁵⁵

294. The statutory language addressing Tier 4 licensure requirements in Minn. Stat. 122A.184 also provides statutory guidance and criteria only for teachers providing direct instruction.²⁵⁶

295. Because the Legislature defined related-service professionals as teachers, and provided no mechanism whereby a teacher can be licensed without falling into one of the tiers, the Legislature empowered the Board to promulgate standards for tiering the related-service professions.

296. The Administrative Law Judge concludes that the Board's standards for placing speech-language pathologists into Tiers 3 and 4 are needed to align those licensees with the tier system and reasonable as a set of criteria for doing so.

4. Subpart 4: License Renewal

297. This subpart requires speech-language pathologist licenses to be renewed according to the Board's rules set forth in Minn. R. 8710.7200.

298. This subpart allows speech-language pathologists to use a certificate of clinical competence from the relevant professional association in lieu of clock hours required under part 8710.7200, subpart 2, and provides a mechanism for prorating required clock hours if the credential expires during the licensee's renewal period. "Clock hour" means an hour of actual instruction, or planned group or individual professional development activity as approved by the local continuing education/relicensure committee.²⁵⁷

²⁵⁵ Those criteria are: (1) the candidate meets the educational or professional requirements in paragraphs (b) and (c), where those paragraphs discuss educational requirements to "teach a class" and "credentials in a relevant content area to teach a class or course" in career and technical education; (2) the candidate has obtained a passing score on required licensure exams under section 122A.185, exams that the related-service professions are exempted from having to pass; and (3) completing certain teacher preparation course requirements that are not relevant to the related-service professions, which do not provide direct instruction. Minn. Stat. § 122A.183, subd. 1.

²⁵⁶ Those criteria are: (1) the candidate meets all requirements for a Tier 3 license under Minn. Stat. § 122A.183 and has completed a teacher preparation program, both of which do not pertain to related-service professionals; (2) the candidate has at least three years of teaching experience in Minnesota, which does pertain to related-service professionals and is reflected in the proposed Tier 4 rule for speech-language pathologists; (3) the candidate has obtained a passing score on all related licensure exams under 122A.185, which does not pertain to related service professionals, who are exempt from those tests by rule; and (4) the candidate's most recent summative teacher evaluation did not result in placing or otherwise keeping the teacher in an improvement process, which is reflected in the proposed Tier 4 rule speech-language pathologists. Minn. Stat. § 122A.184, subd. 1.

²⁵⁷ Minn. R. 8710.7200 (2017).

299. This subpart requires individuals licensed prior to July 1, 1994, who do not hold a master's degree and are applying for license renewal, to earn at least 24 quarter hours or 16 semester hours of post-baccalaureate college credit in speech-language pathology or related special education instruction and services to comply with the renewal requirements.

300. The Board comments:

For Tier 3 and Tier 4 speech language pathologists, they may use their Certificate of Clinical Competence, as they do in current practice for clock hours. The current draft also maintains the grandfather clause for individuals who are renewing and were licensed prior to July 1, 1994. There are not Tier 2 renewals as districts must get a waiver granted to get a Tier 2 [license].²⁵⁸

301. The Board further comments that “[t]his rule is reasonable because it is consistent with current practice and is overseen by the American Speech Language Hearing Association. It is needed to streamline renewal as much as possible to keep these individuals working in the schools.”²⁵⁹

302. Education Minnesota comments that, with regard to renewal and clock hours, it “support[s] the exception for certain related-services positions.”²⁶⁰

303. Discussion of the broader renewal framework is set forth in the relevant section below.

304. With certain specific exceptions not relevant to related-service professionals,²⁶¹ clock-hour requirements are not required by statute but are required by rule.

305. The Administrative Law Judge concludes that the licensure renewal rules as applied to speech-language pathologists are needed and reasonable.

M. Rule 8710.6100: School Nurse

1. Subpart 1a: Exceptions

306. This subpart states that a school nurse is not eligible to hold a Tier 1 or Tier 2 license issued under earlier parts of these rules.

²⁵⁸ SONAR at 35.

²⁵⁹ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁶⁰ Education Minnesota (Letter of D. Specht, June 6, 2018).

²⁶¹ See Minn. Stat. § 122A.187.

307. Minn. Stat. § 148.283 prohibits the unauthorized practice of nursing “by any person who has not been licensed to practice advanced practice, professional, or practical nursing” by the Board of Nursing.

308. The Board comments that it “cannot grant a Tier 1 or 2 license to a . . . school nurse without being in conflict with” that statute.²⁶²

309. The Administrative Law Judge concludes that Minnesota’s nursing statutes prohibit the Board from adopting its own criteria for licensing school nurses, and that the education level and professional standards of the nursing practice as licensed through the Board of Nursing do not align to any tier below Tier 3. Thus, this subpart is needed and reasonable to conform to Minnesota’s nursing laws.

2. Subparts 2 and 2a: Requirements for Tier 3 and 4 Licenses

310. Subpart 2 requires a Tier 3 license under proposed rule 8710.0313 to be issued to a school nurse applicant who (1) holds a baccalaureate degree in nursing from a regionally accredited college or university; (2) is currently registered in Minnesota to practice as a licensed registered nurse under the Board of Nursing; and (3) is currently registered in Minnesota as a public health nurse under the Board of Nursing.

311. Subpart 2a requires a Tier 4 license under proposed rule 8710.0314 to be issued to a school nurse applicant who (1) meets all of the Tier 3 requirements under subpart 2; (2) has at least three years of experience as a nurse in Minnesota schools; and (3) was not placed or otherwise kept in an improvement process aligned to the district’s teacher development and evaluation plan by the applicant’s most recent summative evaluation.

312. The Board explains that it “does not approve programs in nursing,” but rather “looks to other accrediting bodies to determine who is qualified to earn a school nurse license. In the case of nursing, the other accrediting body is the Minnesota Board of Nursing.”²⁶³

313. Although comments were submitted on the issue of whether school nurse licenses should be issued only at Tier 3 or 4, no comments were submitted examining the specific criteria for a school nurse to obtain a Tier 3 or 4 license.

²⁶² SONAR at 25.

²⁶³ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

314. The statutory language addressing Tier 3 licensure requirements, Minn. Stat. § 122A.183, only gives statutory guidance and criteria for teachers providing direct instruction.²⁶⁴

315. The statutory language addressing Tier 4 licensure requirements, Minn. Stat. 122A.184, only gives statutory guidance and criteria for teachers providing direct instruction.²⁶⁵

316. Because the Legislature defined related-service professionals as teachers, and provided no mechanism whereby a teacher can be licensed without falling into one of the tiers, the Legislature empowered the Board to promulgate standards for tiering the related-service professions.

317. The Administrative Law Judge concludes that the Board's standards for placing school nurses into Tiers 3 and 4 are needed to align those licensees with the tier system and reasonable as a set of criteria for doing so.

3. Subpart 4: License Renewal

318. This subpart requires school nurses licensed under this part to have their licenses renewed according to the Board's rules governing professional licensure, and requires evidence of current Minnesota Board of Nursing licensure as well.

319. The Board comments that the renewal process for school nurses under the proposed rules has not changed from the renewal process under the rules currently in force.²⁶⁶

320. Discussion of the broader renewal framework is set forth in the relevant section below.

²⁶⁴ Those criteria are: (1) the candidate meets the educational or professional requirements in paragraphs (b) and (c), where those paragraphs discuss educational requirements to "teach a class" and "credentials in a relevant content area to teach a class or course" in career and technical education; (2) the candidate has obtained a passing score on required licensure exams under section 122A.185, exams that the related-service professions are exempted from having to pass; and (3) completing certain teacher preparation course requirements that are not relevant to the related-service professions, which do not provide direct instruction. Minn. Stat. § 122A.183, subd. 1.

²⁶⁵ Those criteria are: (1) the candidate meets all requirements for a Tier 3 license under Minn. Stat. § 122A.183 and has completed a teacher preparation program, both of which do not pertain to related-service professionals; (2) the candidate has at least three years of teaching experience in Minnesota, which does pertain to related-service professionals and is reflected in the proposed Tier 4 rule for speech-language pathologists; (3) the candidate has obtained a passing score on all related licensure exams under 122A.185, which does not pertain to related service professionals, who are exempt from those tests by rule; and (4) the candidate's most recent summative teacher evaluation did not result in placing or otherwise keeping the teacher in an improvement process, which is reflected in the proposed Tier 4 rule speech-language pathologists. Minn. Stat. § 122A.184, subd. 1.

²⁶⁶ SONAR at 35.

321. Minn. Stat. § 148.283 prohibits the unauthorized practice of nursing “by any person who has not been licensed to practice advanced practice, professional, or practical nursing” by the Board of Nursing.

322. The Administrative Law Judge concludes that the licensure renewal rules as applied to school nurses are needed and reasonable to conform to the requirements of chapters 122A and 148.

4. Subpart 5: Maintaining Board of Nursing Registration

323. This subpart clarifies that, in order to retain licensure as a school nurse, current registration as a registered nurse must be maintained at all times, and lapse in registration or licensure is grounds for revocation of licensure as a school nurse.

324. This subpart also clarifies that those without baccalaureate degrees who are currently validly licensed as school nurses may continue to renew their licenses by meeting the requirements under subpart 4, but if they allow their license to lapse, they must meet the Tier 3 or 4 licensure requirements to receive a current school nurse license.

325. The Board comments that “[t]hese rules are necessary to ensure compliance to Minn. Stat. [§] 148E.283. In addition, the board does not have its own standards for this licensure area.”²⁶⁷

326. No other comments were submitted pertaining to this subpart.

327. The Administrative Law Judge concludes that this subpart is needed and reasonable to conform to the requirements of chapter 148.

N. Rule 8710.6200: School Psychologist

1. Subpart 1b: Requirements for Tier 2 License

328. This proposed subpart governs the requirements for issuance of a Tier 2 license to a school psychologist applicant.

329. To obtain a Tier 2 license, the applicant must (1) provide evidence that he or she has completed a school psychology program not accredited by the National Association of School Psychologists and does not hold a National School Psychologist Certification; or (2) hold a master’s degree or equivalent in a school psychology program and provide verification of completion of at least two years of preparation required for licensure as a school psychologist, and be enrolled in a school psychology program, and the program where the applicant is enrolled must verify that the applicant has completed at least two years, affirm that the institution will assist in designing the learning experience, and provide supervision during the learning experience.

²⁶⁷ Rule by Rule Analysis from A. Liuzzi at PELSB (June 20, 2018) (eComments).

330. The Board explains:

There are two pathways for school psychologists to get Tier 2 licenses that are in line with current practices. Current practice allows school psychologists to be licensed while they complete their internship year, so they can get paid for that experience. The requirements for Subpart 1b(A)(2) align with that current practice. In addition, there are many school psychologists who have decades of experience working as school psychologists who graduated from a school psychology program not accredited by the National Association of School Psychologists and who do not hold a National School Psychologist Certification. Under current practice, those individuals get a limited license, and there is widespread recognition that these individuals play a valuable role in today's schools. The requirements for Subpart 1b(A)(1) align with that limited license.²⁶⁸

331. In its rule-by-rule analysis, the Board writes that the rule governing psychologists who graduated from unaccredited programs:

is needed to recognize a group of very experienced school psychologists who completed a school psychology program that was not approved by the National Association of School Psychologists (NASP). For some individuals, they completed their program before NASP existed. It would be unreasonable to expect individuals who may be near the end of their careers to go back and complete a NASP-approved program or get their National School Psychologist Certification.²⁶⁹

332. In its rule-by-rule analysis, the Board writes that the rule governing psychologists currently enrolled in education programs “is needed to maintain consistency with current practice and maintain the current supply of school psychologists.”²⁷⁰

333. Commenters were broadly in support of the provision allowing graduates of unaccredited programs to obtain Tier 2 licenses. One commenter wrote that he graduated from a program prior to 1988, when NASP began certifying programs, and requested a provision that would enable psychologists such as himself to be licensed under Tier 2.²⁷¹

334. Commenters also supported the provision allowing interns to be licensed at Tier 2 to be paid for their work. One commenter, who is affiliated with a graduate program in school psychology, voiced support for a provision allowing licensure and payment of

²⁶⁸ SONAR at 25-26.

²⁶⁹ Rule by Rule Analysis by A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁷⁰ *Id.*

²⁷¹ Comment of Charles Graham (June 7, 2018) (eComments); see also Response Comment of Scott Woitaszewski (June 8, 2018) (eComments) (program director at UW-River Falls who agrees with Graham's comment).

psychology interns.²⁷² Another commenter also voiced support for licensing these interns, noting their “excellent service to our member districts and more importantly to the students within those districts.”²⁷³

335. Education Minnesota comments:

We believe that temporarily allowing speech-language pathologists, school psychologists, and school counselors to hold Tier 2 licenses helps meet the needs of districts in hiring individuals who are very close to completing master’s programs or certification and who are working under supervision by a licensed professional and accredited institution. Allowing a Tier 2 license in the limited circumstances provided in these rules also avoids the need to water down the requirements for obtaining a Tier 3 or 4 license in these fields.²⁷⁴

336. Minn. Stat. § 148.9075 states:

Nothing in sections 148.88 to 148.98 shall be construed to prevent a person who holds a license or certificate issued by the Professional Educator Licensing and Standards Board in accordance with chapters 122A and 129 from practicing school psychology within the scope of employment if authorized by a board of education or by a private school that meets the standards prescribed by the Professional Educator Licensing and Standards Board, or from practicing as a school psychologist within the scope of employment in a program for children with disabilities.

337. The Administrative Law Judge concludes that the proposed rule sets forth clear criteria for Tier 2 school psychologist licensees; that the proposed rule aligns with current practice and is supported by stakeholders; and that the proposed rule is permitted under Minnesota law. The proposed rule setting forth Tier 2 license standards for school psychologists is needed and reasonable for all of the above reasons.

338. The proposed rule states that, to hire a Tier 2 applicant as a school psychologist, the hiring district must (1) request a Tier 2 license from the board; (2) affirm that the applicant will participate in certain aligned evaluation models; and (3) if the applicant is hired as a current enrollee in a school psychology program, the district must assign a Tier 3 or 4 licensee as a school psychologist to supervise the applicant in a manner aligned to supervision standards identified by NASP, affirm that the position is designed to serve as a learning experience for the applicant, and affirm that the applicant will not replace a Tier 3 or 4 licensed school psychologist.

²⁷² Comment of Scott Woitaszewski (June 8, 2018) (eComments).

²⁷³ Ex. 8. Southwest West Central Service Cooperative (Letter of Dr. M. Palmer, June 8, 2018).

²⁷⁴ Ex. 8. Education Minnesota (Letter of D. Specht, June 6, 2018).

339. The Board's rule-by-rule analysis states:

Given that the hiring district has a unique responsibility when hiring a Tier 2 school psychologist under item A, subitem (2), it is important that the district affirms that the position is designed to be a learning opportunity with supervision. Rule remains consistent with other related service areas without direct statutory conflict to provide flexibility within lower tiers.²⁷⁵

340. The original language of the proposed rule required "direct, day-to-day supervision" of certain Tier 2-licensed school psychologists. One commenter who is a faculty member in a graduate program noted that this requirement was "unnecessarily restrictive" because "ongoing supervision needs of interns are most appropriately met through their receiving at least 2 hours of face-to-face supervision each week."²⁷⁶ SWWC also asked that the "daily supervision" requirement be removed, writing that it will "create another burden and obstacle for districts in obtaining qualified School Psychologists, who under current rules are already difficult to employ."²⁷⁷ On June 29, 2018, the Board changed its proposed rule to require "supervision . . . aligned to supervision standards identified by [NASP]."²⁷⁸

341. The Administrative Law Judge concludes that this rule is needed and reasonable to align the hiring and supervising process of Tier 2 school psychologists to reasonable procedure and professional practice. The Board's modifications do not make the rule substantially different from the rule as originally proposed.

2. Subpart 1c: Tier 2 License Duration and Renewal

342. A Tier 2 licensee whose license was issued pursuant to the part covering those who have completed a school psychology program not accredited by NASP and does not hold a National School Psychologist Certification may hold their license for up to two years, with the expiration date on June 30 of the expiration year, and have their license renewed up to three times. Upon each renewal, the district must show that the applicant participated in certain aligned mentorship and evaluation programs.²⁷⁹

343. A Tier 2 licensee whose license was issued pursuant to the part covering those currently enrolled in a master's program may hold their license for up to two years, with the expiration date on June 30 of the expiration year, and have their license renewed up to one time if the applicant must complete the equivalent of one school year of internship experience during the following school year.²⁸⁰

²⁷⁵ Rule by Rule Analysis by A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁷⁶ Comment of Dan Hyson (June 8, 2018) (eComments).

²⁷⁷ Ex. 8. Southwest West Central Service Cooperative (Letter of Dr. M. Palmer, June 8, 2018).

²⁷⁸ Board's Attachment to Rebuttal Comment (July 2, 2018) (eComments).

²⁷⁹ Proposed Minn. R. 8710.6200, subp. 1c.A.

²⁸⁰ Proposed Minn. R. 8710.6200, subp. 1c.B.

344. The Board explains:

For school psychologists and school counselors who do not require supervision as Tier 2 teachers, there is the renewal requirement that they participate in mentorship and evaluation, in line with other Tier 2 licenses.

For school psychologists and school counselors who need supervision, these licenses may only be renewed one time. Since school counselors do not need to be as far along in the program when they complete this clinical experience, there is the requirement that these applicants make meaningful progress toward licensure. Both school counselors and school psychologists who need supervision may only renew the license once as it would not be reasonable for candidates to take longer than that to complete their program.²⁸¹

345. In its rule-by-rule analysis, the Board writes that a “Tier 2 license under item A, subitem (2) does not need more than one renewal because individuals should be able to complete the learning experience in 1 or 2 years. It would only be in rare circumstances that an individual would need that license renewed one time, and this could occur under a discretionary variance to the board.”²⁸²

346. Minn. Stat. § 122A.182, subd. 3 states that the Board “must issue an initial Tier 2 license for a term of two years,” and that “[a] Tier 2 license may be renewed three times.”

347. Minn. Stat. § 122A.182, subd. 3, does not provide direct authority for the Board to limit the license renewal of certain Tier 2 licensees to a single renewal. The Administrative Law Judge has previously concluded that the Legislature’s statutory tiering requirements are silent as to the related-service professions, and that the Board has the authority to align those professions with the tiers. Although the Board stated the professional reasons for this limitation, it must still justify its statutory authority for permitting only a single renewal to these licensees.

348. Minn. Stat. § 122A.182, subd. 3, requires the Board to “issue rules setting forth the conditions for additional renewals after the initial license has been renewed three times.” The Board has not issued any rules governing what would happen in this situation.

349. The Board’s only mention of additional renewals pertains to a potential second renewal of a Tier 2 license for a paid intern in psychology, which states that such renewals would occur “under a discretionary variance to the board.”²⁸³ The Board has not issued any rules governing the criteria on or limits to its discretion in such circumstances.

²⁸¹ SONAR at 36.

²⁸² Rule by Rule Analysis by A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁸³ *Id.*

350. The Administrative Law Judge concludes that this proposed subpart is defective to the extent: it does not demonstrate statutory authority for limiting certain Tier 2 licensees to a single renewal; it does not create rules governing the renewal, after three prior renewals, of certain Tier 2 licenses; and it does not create rules governing the renewal, after one prior renewal, of the remaining Tier 2 licenses. The Administrative Law Judge concludes that this proposed subpart is otherwise needed and reasonable.

3. Subparts 2 and 2a: Requirements for Tier 3 and 4 Licenses

351. Subpart 2 requires that a Tier 3 license under part 8710.0313 must be issued to a school psychologist applicant who has completed a preparation program in school psychology accredited by the NASP or holds the Nationally Certified School Psychologists credential from NASP.

352. Subpart 2a requires a Tier 4 license to issue under part 8710.0314 to an applicant who: (1) meets all the requirements for a Tier 3 license under subpart 2; (2) has at least three years of experience work as a school psychologist in Minnesota; and (3) was not placed or otherwise kept in an improvement process aligned to the district's teacher development and evaluation plan by the applicant's most recent summative evaluation.

353. The Board explains that it "does not approve programs in psychology. The board looks to other accrediting bodies to determine who is qualified to earn a school psychology license. In the case of psychology, the other accrediting body is the National Association of School Psychologists."²⁸⁴

354. Although comments were submitted on the issue of whether school psychologist licenses should be issued only at Tier 3 or 4, no comments were submitted examining the specific criteria for a school nurse to obtain a Tier 3 or 4 license.

355. The statutory language addressing Tier 3 licensure requirements, Minn. Stat. § 122A.183, only gives statutory guidance and criteria for teachers providing direct instruction.²⁸⁵

²⁸⁴ *Id.*

²⁸⁵ Those criteria are: (1) the candidate meets the educational or professional requirements in paragraphs (b) and (c), where those paragraphs discuss educational requirements to "teach a class" and "credentials in a relevant content area to teach a class or course" in career and technical education; (2) the candidate has obtained a passing score on required licensure exams under section 122A.185, exams that the related-service professions are exempted from having to pass; and (3) completing certain teacher preparation course requirements that are not relevant to the related-service professions, which do not provide direct instruction. Minn. Stat. § 122A.183, subd. 1.

356. The statutory language addressing Tier 4 licensure requirements, Minn. Stat. § 122A.184, only gives statutory guidance and criteria for teachers providing direct instruction.²⁸⁶

357. Because the Legislature defined related-service professionals as teachers, and provided no mechanism whereby a teacher can be licensed without falling into one of the tiers, the Legislature empowered the Board to promulgate standards for tiering the related-service professions.

358. The Administrative Law Judge concludes that the Board's standards for placing school psychologists into Tiers 3 and 4 are needed to align those licensees with the tier system and reasonable as a set of criteria for doing so.

4. Subpart 4: Tier 3 and 4 License Renewal

359. This subpart requires school psychologists licensed under this part to have their licenses renewed according to the Board's rules governing professional licensure.

360. This subpart allows school psychologists to use a credential from the relevant professional association in lieu of clock hours required under part 8710.7200, subpart 2, and provides a mechanism for prorating required clock hours if the credential expires during the licensee's renewal period.

361. The Board explains:

This rule maintains consistency with current practice of using the Nationally Certified School Psychologist credential in lieu of clock hours. These hours are overseen by the National Association of School Psychologists, so the board considers them to be valid for renewal purposes. It is also needed to streamline the process of renewal for these highly qualified individuals.²⁸⁷

362. The Board further explains that "[t]he Tier 3 and 4 renewal exceptions for related service are in line with current practice as the renewal requirements are not all applicable to their work or may have been done in another way (ex. NCSP credential for school psychologists)."²⁸⁸

²⁸⁶ Those criteria are: (1) the candidate meets all requirements for a Tier 3 license under Minn. Stat. § 122A.183 and has completed a teacher preparation program, both of which do not pertain to related-service professionals; (2) the candidate has at least three years of teaching experience in Minnesota, which does pertain to related-service professionals and is reflected in the proposed Tier 4 rule for speech-language pathologists; (3) the candidate has obtained a passing score on all related licensure exams under 122A.185, which does not pertain to related service professionals, who are exempt from those tests by rule; and (4) the candidate's most recent summative teacher evaluation did not result in placing or otherwise keeping the teacher in an improvement process, which is reflected in the proposed Tier 4 rule speech-language pathologists. Minn. Stat. § 122A.184, subd. 1.

²⁸⁷ Rule by Rule Analysis by A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁸⁸ SONAR at 36.

363. Education Minnesota comments that, with regards to renewal and clock hours, it “support[s] the exception for certain related services positions.”²⁸⁹

364. Discussion of the broader renewal framework is set forth in the relevant section below.

365. With certain specific exceptions not relevant to related-service professionals,²⁹⁰ clock-hour requirements are not required by statute, but are required by rule.

366. The Administrative Law Judge concludes that the licensure renewal rules as applied to school psychologists are needed and reasonable.

O. 8710.6300: School Social Worker

1. Subpart 1a: Exceptions

367. This subpart states that a school social worker is not eligible to hold a Tier 1 or 2 license issued under earlier parts of these rules.

368. Minn. Stat. § 144E.275 prohibits, with certain exceptions not relevant to this proceeding, the unauthorized practice of social work by anyone not licensed through the Board of Social Work.

369. The Board comments that granting a Tier 1 or 2 license to a school social worker “would be in conflict with” that statute.

370. A representative of the Minnesota Board of Social Work commented at the public hearing that the Board of Social Work supports limiting social work licenses to Tiers 3 and 4. The Board of Social Work commented that allowing licenses to issue at Tiers 1 and 2 would be in conflict of Minnesota’s social work statutes and create regulatory inconsistency.²⁹¹

371. A representative of the Minnesota School Social Workers Association (MSSWA) commented at the public hearing that MSSWA supports limiting social work licenses to Tiers 3 and 4.²⁹²

372. The Administrative Law Judge concludes that Minnesota’s social work statutes prohibit the Board from adopting its own criteria for licensing school social workers, and that the education level and professional standards of the social work practice as licensed through the Board of Social Work do not align to any tier below Tier 3. Thus, this subpart is needed and reasonable to conform to Minnesota’s social work laws.

²⁸⁹ Ex. 8. Education Minnesota (Letter of D. Specht, June 6, 2018).

²⁹⁰ See Minn. Stat. § 122A.187.

²⁹¹ Pub. Hrg. Trans. at 47-51 (Comment of Megan Gallagher on behalf of the Minnesota Board of Social Work).

²⁹² Pub. Hrg. Trans. at 28-29 (Comment of Cathy Dalnes on behalf of MSSWA).

2. Subparts 2 and 2a: Requirements for Tier 3 and 4 Licenses

373. Subpart 2 requires a Tier 3 license to be issued to an applicant who (1) holds a baccalaureate or master's degree, and (2) is currently licensed in Minnesota to practice as a social worker under the Board of Social Work.

374. The Board comments that this subpart "is needed because the board does not approve programs in social work. The board looks to other accrediting bodies to determine who is qualified to earn a school social work license. In the case of social work, the other accrediting body is the Minnesota Board of Social Work."²⁹³

375. MSSWA commented that the Board should not strike language from this subpart requiring the candidate to have a "baccalaureate or master's degree *in social work from a program accredited by the Council on Social Work Education.*" (The italicized language is the language struck from the rule.) MSSWA stated that the language was necessary because, "per our board statute, a person cannot use the title of school social worker if they have not earned their degree from an accredited college or university," and thus, MSSWA "need[s] that language to be congruent between the Board of Social Work and [rule 8710.6300]."²⁹⁴

376. The Board of Social Work commented that it "would not object" to the striking of the phrase "in social work from a program accredited by the Council on Social Work Education" because the rule still requires that the person be licensed through the Board of Social Work, and because several Board of Social Work licensees have been grandfathered in despite not holding social work degrees from institutions accredited by the Council on Social Work Education. The Board of Social work commented that a "possible unintended consequence" of keeping that language would be that "there may be some currently licensed social workers who then may not qualify for that school social work license."²⁹⁵

377. The Administrative Law Judge concludes that striking the accreditation clause is needed and reasonable. As the Board and the Board of Social Work commented, the licensing of social workers takes place through the Board of Social Work, which imposes accreditation requirements on its licensees; leaving in the struck language may have the unintended consequence of disqualifying otherwise qualified licensees who have been grandfathered in by the Board of Social Work.

378. Subpart 2a requires a Tier 4 license to be issued to an applicant who (1) meets all the requirements for a Tier 3 license; (2) has at least three years of experience working as a social worker in Minnesota; and (3) was not placed or otherwise kept in an improvement process aligned to the district's teacher development and evaluation plan by the applicant's most recent summative evaluation.

²⁹³ Rule by Rule Analysis by A. Liuzzi at PELSB (June 20, 2018) (eComments).

²⁹⁴ Pub. Hrg. Tr. at 26-28 (Comment of C. Dalnes).

²⁹⁵ Pub. Hrg. Tr. at 47-48 (Comment of M. Gallagher).

379. No comments were submitted examining the specific criteria for a school social worker to obtain a Tier 4 license.

380. The statutory language addressing Tier 3 licensure requirements, Minn. Stat. § 122A.183, only gives statutory guidance and criteria for teachers providing direct instruction.²⁹⁶

381. The statutory language addressing Tier 4 licensure requirements, Minn. Stat. 122A.184, only gives statutory guidance and criteria for teachers providing direct instruction.²⁹⁷

382. Because the Legislature defined related-service professionals as teachers, and provided no mechanism whereby a teacher can be licensed without falling into one of the tiers, the Legislature empowered the Board to promulgate standards for tiering the related-service professions.

383. The Administrative Law Judge concludes that the Board's standards for placing school social workers into Tiers 3 and 4 are needed to align those licensees with the tier system and reasonable as a set of criteria for doing so.

3. Subpart 4: License Renewal

384. This subpart requires school social workers licensed under this part to have their licenses renewed according to the rules of PELSB governing professional licensure, and further requires evidence of current Board of Social Work licensure.

385. The Board comments that the renewal process for school social workers under the proposed rules has not changed from the renewal process under the rules currently in force.²⁹⁸

²⁹⁶ Those criteria are: (1) the candidate meets the educational or professional requirements in paragraphs (b) and (c), where those paragraphs discuss educational requirements to “teach a class” and “credentials in a relevant content area to teach a class or course” in career and technical education; (2) the candidate has obtained a passing score on required licensure exams under section 122A.185, exams that the related-service professions are exempted from having to pass; and (3) completing certain teacher preparation course requirements that are not relevant to the related-service professions, which do not provide direct instruction. Minn. Stat. § 122A.183, subd. 1.

²⁹⁷ Those criteria are: (1) the candidate meets all requirements for a Tier 3 license under Minn. Stat. § 122A.183 and has completed a teacher preparation program, both of which do not pertain to related-service professionals; (2) the candidate has at least three years of teaching experience in Minnesota, which does pertain to related-service professionals and is reflected in the proposed Tier 4 rule for speech-language pathologists; (3) the candidate has obtained a passing score on all related licensure exams under 122A.185, which does not pertain to related service professionals, who are exempt from those tests by rule; and (4) the candidate's most recent summative teacher evaluation did not result in placing or otherwise keeping the teacher in an improvement process, which is reflected in the proposed Tier 4 rule speech-language pathologists. Minn. Stat. § 122A.184, subd. 1.

²⁹⁸ SONAR at 35.

386. The Board further comments that the requirement of evidence of current Board of Social work licensure “is necessary to ensure compliance to Minn. Stat. § 148E.275.”²⁹⁹

387. Discussion of the broader renewal framework is set forth in the relevant section below.

388. Minn. Stat. § 144E.275 prohibits, with certain exceptions not relevant to this proceeding, the unauthorized practice of social work by anyone not licensed through the Board of Social Work.

389. No comments directly pertaining to the renewal of school social worker licenses were received.

390. The Administrative Law Judge concludes that the licensure renewal rules as applied to school social workers are needed and reasonable to conform to the requirements of chapters 122A and 144E.

P. Rule 8710.6400: School Counselor

1. Subpart 1b: Requirements for Tier 2 License

391. This subpart states the requirements for issuance of a Tier 2 license to a school counselor applicant.

392. To obtain a Tier 2 license, the applicant must (1) hold a master’s degree in counseling; or (2) hold a baccalaureate degree and be enrolled in an accredited school counselor program with no less than 24 semester credit hours in school-counseling-specific coursework or content, and must verify to the board in writing a plan to study full- or part-time enrollment to achieve licensure within three years.

393. For Tier 2 applicants currently in an accredited school counseling program, the applicants’ school counseling program must (1) verify completion of at least 24 semester credit hours in relevant coursework or content; (2) affirm that the individual is prepared for a learning experience of this nature; (3) affirm that the institution will assist in designing the learning experience; and (4) provide supervision during the learning experience.

²⁹⁹ Rule by Rule Analysis by A. Liuzzi at PELSB (June 20, 2018) (eComments).

394. The Board comments:

There are . . . two pathways for school counselors to get a Tier 2 license. In current practice, individuals with a master's degree in counseling, but not school counseling, may be granted a limited license, so under tiered licensure, these individuals would be eligible for a Tier 2 license. While school counselors do not currently use the "intern license" often, school counselor stakeholders felt that it was important to offer this option as a learning experience for those candidates.³⁰⁰

395. The Board comments in its rule-by-rule analysis that the proposed rule:

allows for school counselors to have a paid internship experience while they are completing their programs. Stakeholders agreed on the credit hour requirements by concluding that once this threshold has been met, candidates had completed foundational work and had an understanding of their ethical requirements within the field.³⁰¹

396. At the public hearing, the Board commented that school counseling was the only related-service profession for which the Board oversees preparation programs.³⁰²

397. Education Minnesota comments that:

some stakeholders including districts and program providers raised concerns in written comments and in meetings that not allowing Tier 2 licenses for speech-language pathologists, school psychologists, and school counselors would be a change in current practice for some of these fields. They noted that if a Tier 3 license requires completion of a master's degree program and/or certification by an outside entity, this would preclude interns who are very close to meeting these requirements and working under the supervision of an accredited institution.³⁰³

398. Education Minnesota further comments that:

We believe that temporarily allowing speech-language pathologists, school psychologists, and school counselors to hold Tier 2 licenses helps meet the needs of districts in hiring individuals who are very close to completing master's programs or certification and who are working under supervision by a licensed professional and accredited institution. Allowing a Tier 2 license in the limited circumstances provided in these rules also avoids the need to water down the requirements for obtaining a Tier 3 or 4 license in

³⁰⁰ SONAR at 26.

³⁰¹ Rule by Rule Analysis by A. Liuzzi at PELSB (June 20, 2018) (eComments).

³⁰² Pub. Hrg. Tr. at 17 (Test of A. Liuzzi).

³⁰³ Comments of Education Minnesota, (June 6, 2018) (eComments).

these fields. Education Minnesota agrees that the related service rules are both within the Board's authority and necessary to clarify how these professionals fit within the Tiered Licensure Law.³⁰⁴

399. The Minnesota School Counselors Association (MSCA) comments that:

School counselors and related student service professionals must have an advanced degree (or have nearly completed their degree) to be effective, safe, and properly trained in practicing their professions. Minnesota students today struggle with immense challenges—depression, suicidal behaviors, conflict resolution, uncertain and/or unstable home and family situations—and the MSCA firmly believes that professional school counselors and other student service professionals must be adequately and appropriately trained to meet the increasingly diverse needs of our students and uphold the highest standards of our profession. Under no circumstance does the MSCA support or endorse the use of nondegreed or unlicensed professionals, nor do we support granting lower tiered licensure permission (below Tier 3 and then only with approved supervision) to practice school counseling in the State of Minnesota.³⁰⁵

400. MSCA also submitted several proposed rules for school counselor license tiering to the Board, which the Board attached as its Exhibit 8.³⁰⁶

401. There are no conflicting statutory licensing provisions governing school counselors.³⁰⁷

402. Although MSCA does not appear to support Tier 2 school counselor licenses for those who hold master's degrees in counseling but not school counseling, the proposed rule aligns with the current "limited license" practice and is permissible under Minnesota law.

403. The Administrative Law Judge concludes that the proposed rule sets forth clear criteria for Tier 2 school counselor licensees; that the proposed rule aligns with current practice and is supported by stakeholders; and that the proposed rule is permitted under Minnesota law. The proposed rule setting forth Tier 2 license standards for school counselors is needed and reasonable for all of the above reasons.

404. To hire a Tier 2 applicant, the hiring district must (1) request a Tier 2 license from the Board; (2) affirm that the applicant will participate in certain aligned evaluation

³⁰⁴ Comments of Education Minnesota (June 6, 2018) (eComments).

³⁰⁵ Minnesota School Counselors Association (Comment of Walter B. Roberts Jr. and Murray Smart, June 6, 2018).

³⁰⁶ Ex. 8.

³⁰⁷ See Minn. Stat. § 148B.38, subd. 1 ("Nothing in sections 148B.29 to 148B.39 shall be construed to prevent qualified members of other licensed or certified professions or occupations, such as . . . school counselors who are employed by an accredited educational institution while performing those duties for which they are employed . . . from doing work of a marriage and family therapy nature.").

models; and (3) if the applicant is hired as a current enrollee in a school counselor program, the district must assign a Tier 3 or 4 licensee as a school psychologist to supervise the applicant day to day, affirm that the position is designed to serve as a learning experience for the applicant, and affirm that the applicant will not replace a Tier 3 or 4 licensed school psychologist.

405. The Administrative Law Judge concludes that this rule is, in all but one term, needed and reasonable to align the hiring and supervising process of Tier 2 school counselors to reasonable procedure and professional practice. The term “day-to-day supervision,” however, is impermissibly vague. In its everyday use, the term “day-to-day” can mean either “ordinary and regular” or “happening every day.”³⁰⁸ This ambiguity has led commenters on the school psychologist rule to question whether daily supervision aligns with professional practice, but it is unclear on the face of the rules whether the Board is actually requiring daily supervision, as opposed to regular supervision. In response to comments on the school psychologist subpart mentioning “day-to-day supervision,” the Board rectified the ambiguity by submitting a revision that aligned supervision standards to those of professional practice. Although no commenters mentioned the term “day-to-day supervision” in the context of school counselors, the Administrative Law Judge concludes that it is ambiguous for the same reason, and that the Board must clarify this term and should consider whether requiring daily supervision aligns with professional practice and the needs of the districts.

2. Subpart 1c: Tier 2 License Duration and Renewal

406. A Tier 2 licensee whose license was issued pursuant to the part covering those who have completed a master’s degree may hold their license for up to two years, with the expiration date on June 30 of the expiration year, and have their license renewed up to three times. Upon each renewal, the district must show that the applicant participated in certain aligned mentorship and evaluation programs.

407. A Tier 2 licensee whose license was issued pursuant to the part covering those currently enrolled in a school counselor program may hold their license for up to two years, with the expiration date on June 30 of the expiration year, and have their license renewed up to one time. Renewal is subject to the applicant’s school program certifying that the applicant is making “meaningful progress,” as defined by the program, toward completion in the program.

408. The Board states that, “[f]or . . . school counselors who do not require supervision as Tier 2 teachers, there is the renewal requirement that they participate in mentorship and evaluation, in line with other Tier 2 licenses.”³⁰⁹

³⁰⁸ See “Day-to-Day,” Cambridge Dictionary, *available at* <https://dictionary.cambridge.org/us/dictionary/english/day-to-day>, last accessed August 15, 2018.

³⁰⁹ SONAR at 36.

409. The Board also states that:

For . . . school counselors who need supervision, these licenses may only be renewed one time. Since school counselors do not need to be as far along in the program when they complete this clinical experience, there is the requirement that these applicants make meaningful progress toward licensure. [School counselors] who need supervision may only renew the license once as it would not be reasonable for candidates to take longer than that to complete their program.³¹⁰

410. Finally, the Board explains:

Stakeholders worked closely on this section and decided that the provider's definition of "meaningful progress" is the most appropriate measure considering different teacher preparation provider types. The rule ensures flexibility within providers, including their ability to work with candidates. The applicant still has the ability to provide additional information if the provider denies meaningful progress.³¹¹

411. Minn. Stat. § 122A.182, subd. 3, states that the Board "must issue an initial Tier 2 license for a term of two years," and that "[a] Tier 2 license may be renewed three times."

412. Minn. Stat. § 122A.182, subd. 3 does not provide direct authority for the Board to limit the license renewal of certain Tier 2 licensees to a single renewal. The Administrative Law Judge has previously concluded that the Legislature's statutory tiering requirements are silent as to the related-service professions, and that the Board has the authority to align those professions with the tiers. Although the Board stated the professional reasons for this limitation, it must still justify its statutory authority for permitting only a single renewal to these licensees.

413. Minn. Stat. § 122A.182, subd. 3 requires the Board to "issue rules setting forth the conditions for additional renewals after the initial license has been renewed three times." The Board has not issued any rules governing what would happen in this situation.

414. The Administrative Law Judge concludes that this proposed subpart is defective to the extent it does not demonstrate statutory authority to limit certain Tier 2 licensees to a single renewal; and to the extent it does not create rules governing the renewal, after three prior renewals, of certain Tier 2 licenses. The Administrative Law Judge concludes that this proposed subpart is otherwise needed and reasonable.

³¹⁰ *Id.*

³¹¹ SONAR at 27.

3. Subparts 2 and 2a: Requirements for Tier 3 License

415. A Tier 3 license must be issued to a school counselor applicant who (1) holds a master's degree or equivalent in school counseling from a regional accredited school and (2) verifies having completed a preparation program approved by the state where the program resides or the relevant accrediting body.

416. A Tier 4 license must be issued to a school counselor applicant who (1) meets all the requirements for a Tier 3 license; (2) has at least three years of experience working as a school counselor in Minnesota; and (3) was not placed or otherwise kept in an improvement process aligned to the district's teacher development and evaluation plan by the applicant's most recent summative evaluation.

417. Aside from MSCA's comment advocating that a master's degree be required for Tier 3 licensure, no comments were submitted on the specific criteria for Tier 3 or 4 licenses.

418. Because the Legislature defined related-service professionals as teachers, and provided no mechanism whereby a teacher can be licensed without falling into one of the tiers, the Legislature empowered the Board to promulgate standards for tiering the related-service professions.

419. The Administrative Law Judge concludes that the Board's standards for placing school counselors into Tiers 3 and 4 are needed to align those licensees with the tier system and reasonable as a set of criteria for doing so.

4. Subpart 5: Tier 3 and 4 Renewal

420. This subpart requires school counselors licensed under this part to have their licenses renewed according to the Board's rules governing professional licensure.

421. Discussion of the broader renewal framework is set forth in the relevant section above.

422. No comments on the counselor-specific criteria for renewal were received.

423. The Administrative Law Judge concludes that the licensure renewal rules as applied to school counselor are needed and reasonable.

CONCLUSIONS OF LAW

1. The Board gave proper notice of the hearing in this matter and has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law and rule.

2. Modifications to the proposed rules suggested by the Board after publication of the proposed rules in the *State Register* are not substantially different from the

proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, .15, subd. 3 (2018).

2. The Board has demonstrated their statutory authority to adopt the proposed rules and have fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, .15, subd. 3, .50 (i)-(ii) (2018).

3. The following proposed rules contain defects as discussed in the Findings of Fact:

- a. **Rule 8710.0310** (Definitions):
 - (1) Subpart 1G. “Good cause;”
 - (2) Subpart 1J. “Professional license from another state.”
- b. **Rule 8710.0311** (Tier 1 License):
 - (6) Subparts 2B, 4B, 5B, 6B (“acceptable” applicants);
 - (7) Subparts 2C(1), 4D(2), 5C(1), 6D(1) (mentorship program);
 - (8) Subpart 6C(2) (good cause);
 - (9) Subparts 2D, 4E, 5D, 6C, 6E (emergency placements);
 - (10) Subpart 6 (additional renewals)
- c. **Rule 8710.0312** (Tier 2 License):
 - (1) Subpart 6B (good cause).
- d. **Rule 8710.0314** (Tier 4 License):
 - (1) Subpart 2B(1) (conventional, nonconventional, or alternative teacher preparation program).
- e. **Rule 8710.0320** (Out-of-Field Permission):
 - (5) Subpart 2A (“acceptable” applicants);
 - (6) Subpart 2C (emergency placements);
 - (7) Subpart 4C (“acceptable” applicants); and
 - (8) Subpart 5 (additional renewals).
- f. **Rule 8710.6000** (Speech-Language Pathologist):
 - (1) Subpart 1b (waiver for Tier 2 License).
- g. **Rule 8710.6200** (School Psychologist):
 - (1) Subpart 1c (Tier 2 license duration).
- h. **Rule 8710.6400** (School Counselor):
 - (3) Subpart 1bC(3) (day-to-day supervision);
 - (4) Subpart 1cB (renewal).

4. Except for the rules with defects, the Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4, .50 (iii).

5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

6. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based on this Report and an examination of the public comments, provided that the rule finally adopted is based on facts appearing in this rule hearing record.

Based on the Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

It is **RECOMMENDED** that the Board's proposed rules be adopted, with the exception of the rules identified in Conclusion 4 above.

Dated: August 6, 2018



BARBARA J. CASE
Administrative Law Judge

NOTICE

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

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