STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF EDUCATION

In the Matter of the
Proposed Rules Governing
Special Education,
3525.0200 to 3525.7500.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Howard L. Kaibel, Jr., on March 15, 1989 at 9:00 A.M., in St. Paul, Minnesota. This Report is part of a rule hearing proceeding held pursuant to Minn. Stat. §§ 14.131 -- 14.20, to determine whether the Agency has fulfilled all relevant substantive and procedural requirements of law, whether the proposed rules are needed and reasonable, and whether or not the rules, if modified, are substantially different from those originally proposed.

Dr. Norena A. Hale, manager of the Unique Learner Needs Section and Ann Bettenburg, a Specialist in policy and rule development for that section, made up the Agency panel. Several witnesses testified on behalf of the proposed rules as submitted in the latest Department staff draft, including: directors and coordinators of special education from school districts throughout the state and parent advocates. The hearing continued until all interested groups and persons had an opportunity to testify concerning the adoption of the proposed rule, through the following day, March 16.

The Minnesota Board of Education must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of Education of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board of Education elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board of Education makes changes in

the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board of Education files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

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

FINDINGS OF FACT

Procedural Requirements.

1. On January 30, 1989, the Board staff filed the following documents with the Chief Administrative Law Judge:

(a) A copy of the proposed rules certified by the Revisor of Statutes.
(b) The Order for Hearing.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.
(e) The Statement of Need and Reasonableness.
(f) A Statement of Additional Notice.

2. On February 13, 1989, a Notice of Hearing and a copy of the proposed rules were published at 13 State Register 1960.

3. On February 9, 1989, the Board staff mailed the Notice of Hearing to all persons and associations who had registered their names with the Department of Education for the purpose of receiving such notice.

4. On February 17, 1989, the Board staff filed the following documents with the Administrative Law Judge:

(a) The Notice of Hearing as mailed.
(b) The Agency's certification that its mailing list was accurate and complete.
(c) The Affidavit of Mailing the Notice to all persons on the Agency's list.
(d) An Affidavit of Additional Notice.
(e) The names of Board personnel who will represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) A copy of the State Register containing the proposed rules.
(g) All materials received following a Notice of Intent to Solicit Outside Opinion published at 13 State Register 1108, October 31, 1988, and a copy of the Notice.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

5. The period for submission of written comments and statements remained open through April 5, 1989. The record closed on April 10, 1989, at the end of the third business day following the close of the comment period.

Statutory Authority.

6. Statutory authority to promulgate the proposed rules is found at Minn. Stat. §§ 120.03, 120.17 and 126.071.

7. An outstanding feature of this record is its volume, both in terms of its length and of the depth of sincere legitimate concern of the participants: parents for their children; school administrators for their fiscal responsibilities; program directors for effective and efficient delivery of these crucial services; representatives of handicapped populations seeking to improve conditions for upcoming generations with similar handicaps; and legal advocates concerning wording that will doubtless impact future litigation in this area. Though there were numerous outstate meetings by staff prior to issuance of the notice of hearing, the rule hearings in St. Paul involved more than a hundred participants and lasted two full days. The record includes more than 20 tapes of outstate meetings and a box of letters and written comments from people throughout the state.

8. A second outstanding feature of this record is the degree to which the staff has endeavored to respond thoughtfully to these inevitably conflicting legitimate concerns. They have published and noticed and held outstate meetings on drafts and redrafts after consultation with broadly representative advisory committees. At the outset of the rules hearing, they proposed extensive technical amendments which resolved nearly all of the most significant concerns of the public, very constructively.

9. There are literally hundreds of specific suggested revisions in this record to the proposed language. This Report's length would rival War and Peace if it tried to catalog all of them. All of those concerns have been carefully considered in the course of preparing this Report. Nearly all of the significant concerns have been dealt with by the Department staff in their final draft and technical amendments, doubtless to the mutual dissatisfaction of many of the participants. This Report is consequently limited to a few of the most vigorously contested issues. The proposed revisions in the final proposed draft are specifically found to be needed, reasonable and legally authorized, except for the particular revisions hereinafter discussed.

10. The cited need for these proposed amendments to the rules are threefold:

1. Direction from the 1985, 1986, 1987 and 1988 Legislature;
2. The need for more clarity of standards and expectations of school districts and parents; and
3. Compliance with the Federal Act (Education of All Handicapped Act of 1975 as Amended, Commonly Referred to as P.L. 94-142.) and regulations (C.F.R., Title 34, Chap. III). (Statement of Need and Reasonableness).

Any rule designed to meet the first of these needs (if reasonable and legally authorized) is axiomatic. The second of these alleged needs, clarifying federal and state statutes, regulations, court decisions, et cetera, is

doubtless helpful so long as such a restatement of the law does not change or add to it. The third need cited, compliance with the Federal Act, has always been a given. As long as the state wants to receive an estimated $25 million for special education purposes, it will have to conform the programs to federal regulations, guidelines, audits, et cetera. One comment indicates that the federal share of the cost for this program was originally slated to be 40% when the program was adopted in 1975. It indicates that the federal share since then has dropped to around 10%. The Board should be aware of the option of requesting that the Legislature appropriate more funds and simply eliminate federal participation altogether. This would eliminate complying with federal requirements and forms. It might be that a totally Minnesota special education program could be made more cost effective.

Fiscal Impact Statement.

11. The Department staff did not prepare a fiscal note pursuant to Minn. Stat. § 14.11, subd. 1. Such impact statements are required whenever a state agency adopts a rule which would require the expenditure of public money by local governmental subdivisions (such as school districts) in excess of $100,000 in either of "the two years following adoption of the rule". The purpose of that statute is to ensure that attention will be paid to the effects of state rulemaking on local property taxes.

12. The fiscal impact is particularly important here because any cost increases occasioned by these rules will almost certainly have to be levied by local school boards as property tax increases. As previously noted, federal participation in educating special children is declining and at best will remain at current levels. As noted on the record, projected state expenditures for education are in the neighborhood of a 2% increase versus a projected 6% increase in inflation. It follows that any cost increase occasioned by these rule revisions will have to paid for in local property tax levies. The vigorously alleged possibilities, that such cost increases are likely, have accordingly been very carefully scrutinized.

13. Except for one section, the proposed rule amendments will not increase the costs of local government beyond $100,000 per year. Without belaboring, representative reasoning with regard to a few of the school district concerns is in order.

The proposed revisions do not force school districts to start financing day care. The districts have always had the responsibility to provide "the least restrictive alternative" including services "from a public or private agency" as long as it "is available or can be made available and can be more appropriately provided" than "more restrictive" alternatives such as segregated classroom settings. (former rule 3525.0800). The proposed revisions do not change this requirement or put school districts into the day care subsidy business. They do clarify that provision of services may take place in ordinary private day care agency settings if such settings are available and more appropriate, et cetera. The clarification does not impose any new requirements or costs.

Similarly, the "program or pupil support assistant" revisions are intended to expand the role of personnel performing in this capacity to include performance of instructional services. Comments at regional meetings indicate that these aides commonly assist in instruction already. The revision is not

intended to decrease the role of higher-paid certified teachers or to increase the cost of their assistants. As Department staff indicated on August 29, 1988 at the Rochester regional meeting, the intention here is only "to open the door a little wider" for reimbursement for this kind of assistance. It is not intended to require increased expenditures of local government dollars.

Another example is the concern regarding new language relating to teaching early childhood special education in center-based classrooms. The rule (.2335, subd. 2) specifies an alternative way of delivering early childhood services where up to 8 children will be in the same room, requiring at least one support assistant for safety reasons. This is only one alternative way of delivering the early childhood services mandated by the statute. It is the least favored alternative under the rule which is relatively more restrictive, but it is probably often significantly less expensive than the favored (and less restrictive) preferred home settings. The statute requires expenditures for early childhood programming. The rules simply outline alternative ways of delivering them. The rule provides flexibility in meeting a statutory mandate. Whether each district will meet this mandate in center-based or home-settings is a matter of hundreds of individual E.P. determinations in the future. A fiscal impact note on such projections would be pure conjecture. However, it is specifically found that the rule as proposed gives maximum flexibility to districts in delivering early childhood services and does not increase local costs.

Similarly, many districts were concerned by the "administrator or administrative designee" provisions of .0200, subp. 1.A. requiring participation in all I.E.P. meetings. The Department staff has clarified in its revisions and re-revisions and technical amendments that such designations include all superintendents, principals, assistant principals, supervising counselors and changed "be in attendance" to "participate" which allows phone consultation regarding decisions. Even small rural districts should have no difficulty complying with this provision without increasing costs.

14. However, the transportation costs involved in .2310 -- "Length of School Day" -- would definitely exceed $100,000 per year, according to unrefuted estimates of several school officials. The title for this proposed repeal and reenactment is a misnomer. The proposed revision of the rule does not require equal amounts of time in school for special education and regular education students. Instead, it would require "the same starting and ending times" for all students at each school site. This is a major new requirement for expenditure of public monies by school districts who have to make special transportation arrangements for special children who have special transportation requirements.

Present state practice allows local transportation officials up to one-half hour of variance in this transportation planning for delivery of students to the same sites. The "starting and ending time" rule proposed here is a new requirement which several districts identified as mandating expenditures exceeding the threshold of $100,000 -- requiring the fiscal note.

There is a narrow "escape valve" written into the latest draft allowing deviations if the I.E.P. team and the parent and the Commissioner all agree to different starting and ending times. School districts are justifiably concerned with the realistic potential utility of this "escape valve".

Department staff quipped at one of the outstate meetings that administrators should not send all of these "individual" requests for deviations to the Commissioner on the same day.

This is an indication that obviously the state is likely to exercise its discretion under the rule sparingly. However, this rule not only would vest virtually unbridled discretion in a state official, but would extend the same kind of discretion to parents and the I.E.P. team. This is the kind of unbridled discretion which causes transportation planners and school board fiscal analysts to tear out their hair. It is specifically found herein to have the potential to cause local expenditures of more than $100,000 per year.

This is not a judgment that the rule is unreasonable or unnecessary. It is simply a finding that the record fairly construed shows a likelihood that there would be a fiscal impact in excess of $100,000.

The defect can be corrected in several ways: (1) the revision and repeal could simply be withdrawn; (2) a legally sufficient fiscal note could be prepared permitting the proposed promulgation; or (3) action could be deferred until after the next legislative session to permit appropriation of sufficient transportation funds in the larger districts and/or cooperatives where there is indubitably a difficult and expensive proposed change.

Discussion of Public Comments.

15. Much, if not most of the criticism of these proposed rule revisions related to the so-called "braille rule" (.2850) relating to assessments "for pupils who are blind". Many advocates for the visually handicapped appear to be misled by the title. They properly insist that blind students must be taught braille to be literate and pursue their education (if the particular individual has the mental and tactile capacity to benefit from such training).

Although it is not found in this Report to be a legal defect, use of the term "blind" is confusing to the public. Changing "blind" in the title (and perhaps in ¶ A) to "visually handicapped" is an alternative called to the Board's consideration as a means of more precisely stating the parameters of the intended requirements. The intended definition of the handicapped student population here (as specifically provided in section A by statutory reference to Minn. Stat. § 290.06, subd. 3f.(4)(c) -- which was a tax assistance definition which has subsequently been repealed) caused the Department staff to propose a "technical amendment" incorporating the language of the repealed statute. It includes many learners who would not benefit from more intensive instruction in braille. Many are sighted enough to read very well, though their sight is legally deficient under the statutory definition. Others can't see well enough to read, but also have other disabilities (such as mental and/or tactile handicaps) which would make mandatory braille instruction unreasonable or in some cases, educationally counter-productive. The rule as proposed necessarily and reasonably requires individualized judgments by a qualified multi-disciplinary team, setting forth specific legally-reviewable criteria to prevent arbitrary or capricious denial of braille teaching.

The most recent statistical evidence in the record indicates that the visually impaired learners under the statutory definition was 910 students at

the last count in Minnesota. Roughly half of those students are "readers" and the prognosis for nearly all of the other visually-impaired learners is that their condition will not degenerate.

In addition, many of the learners who are "legally blind" and are not "readers" have other disabilities such as deafness and severe mental retardation. Braille would simply not benefit many of these learners. The rule as proposed by Department staff provides the needed flexibility to local I.E.P. teams to do their job (i.e., make individual judgments in establishing an educational program) while ensuring that the intent of the Braille Literacy Bill (Minn. Stat. § 126.071) is carried out.

The definition of blindness which Department staff incorporated in the original proposed rule was the statutory definition which allowed a tax exemption under the state revenue code. That section of the state tax law has since been repealed (in order to simplify tax forms by conforming to a federal process and definition). Instead, Department staff has proposed the same language that was originally intended to be incorporated by reference. That technical change is certainly not substantial and the need for or reasonableness of its substance was never directly challenged. However, it is important to understand that every person classified as blind for tax purposes is not incapable of functioning in many other ordinary circumstances, particularly literacy. Many of them have reliable prognoses of non-degeneration. Experienced professionals agree that the definition of "blindness" is "a real problem". Some legally "blind" people have been sighted enough to obtain driver's licenses.

This is a very sensitive and difficult area. When should the state force visually handicapped children, capable of reading print, to learn both print and braille on the chance that some day their vision will deteriorate? The proposed rule properly leaves this decision to the parents and the I.E.P. team, setting forth criteria that are legally reviewable. It is needed, reasonable and legally authorized as written.

16. A major reason for revising the rules is to "flesh-out" new statutory provisions providing pre-school special education services mandated by the Minnesota Legislature. Minnesota was one of the first states in the country to provide for and finance such early services. The specific alternatives provided in the proposed rules and the other extensive new requirements are generally specifically found to be needed, reasonable and statutorily authorized, except as hereinafter noted.

17. There is a problem with proposed part .2335 -- "Early Childhood Eligibility and Alternatives" -- subpart 2 - "Program Alternatives". It would originally have required an hour per week of assistance to such preschoolers. In response to school district objections, this was changed in technical amendments to "an average of" one hour per week, a change which is clearly in accord with the statutory intent. However, the school district still has the final decisionmaking authority over whether to prescribe home-based or other early childhood alternatives.

There is still a serious problem here of a potential that a school district could opt for home-based early childhood teams, intruding into homes against parental wishes. It is certainly unlikely that most school districts would fail to respect the wishes of parents of children under five, but the

rule as written creates the potential for a conflict. Parents were concerned and the history of litigation in this area certainly indicates that it is important to minimize the potential for conflict between school districts and parents wherever possible.

Department staff has not met its burden in this area of demonstrating by an affirmative presentation of facts that this portion of the rule is needed and reasonable. In addition, there has not been a showing that it is legally authorized.

Specifically, the defect here is the potential that the rule might be interpreted as requiring school services of an average of one hour per week from infancy to school age for a needy preschool child in a home-based setting (the "preferred setting" for the "very young") when parents objected to the extent and frequency of such state intervention into their home life. Perhaps there is evidence of past parental overprotection or malfeasance that has seriously harmed preschool children in need of special services, but it has not been presented here. Similarly, perhaps in some smaller districts it is so much more cost-effective to render home-based services that the state is justified in mandating such intrusions and there is legal precedent for such in-home intervention, but that has not been shown on this record.

The Governor's Planning Council on Developmental Disabilities stressed that both the Minnesota statute and P.L. 99-457 emphasize the importance of the family -- particularly that importance in early childhood years.

The Board should be aware that there is considerable concern expressed in testimony and written comments for the need to increase the role of parents in the education of their special children. For example, Carol Raabe, a state official who understands the relationship between law and rules and also has extensive experience as the parent of a special child, stressed "parental involvement must be included in these rules to a much greater degree."

This defect could be cured in many ways, including the following specific suggestions and/or combinations of them.

(1) The Board could temporarily withdraw the one hour minimum standard altogether and compile survey or other factual data showing the need for and reasonableness of forced intrusions into the homes of preschool children. This could be presented in a subsequent rulemaking proceeding along with whatever factual data is available on why child neglect laws cannot be used where aberrant parents arbitrarily refuse to allow services for truly needy special children.

(2) The Board could also create an escape valve similar to .2310 for situations where parents of home-based preschool children object to the one hour per week intensity of government services. Perhaps it should consider adding a requirement that if someone else objects to the exercise of this parent perogative, an alternative must be approved by the I.E.P. team and/or the Commissioner.

(3) Perhaps the simplest cure is suggested by the Minnesota Occupational Therapy Association which recommends adding "unless the parents request or the team recommends an alternative" to part .2335, subp.

5, B. (line 34 on page 27 of the hearing draft). In addition to curing the defect, this suggestion would retain the minimum standard for services in the event a district became recalcitrant, while adding flexibility for early childhood development.

18. The most frequently (and perhaps most fervently) expressed concern was overwhelming disagreement with the proposal to lower the age of kindergarten services. In a rare display of unity, the only thing everyone agreed upon in express written comments and testimony from every corner of the state was that this would be a mistake. Parent concerns were mirrored in comments from sincerely concerned program administrators, teachers and legal advocates. Even school district officials, who would presumably benefit from decreased costs -- which was their main concern -- expressly agreed that it would be a mistake to eliminate these services.

One key to successful integration of special education students into the mainstream according to studies in the record is assignment to the most "appropriate" grade level. The appropriate time to enter any child into kindergarten or first grade can vary from "pushing" them to "holding them back" up to three years under the law. Each child differs individually and entrance into the "mainstream" grade level has always been left to the parent. This applies equally to special and non-special education elementary entrants.

The handicaps of special education children vary in intensity from slight to severe. In one of the studies, for example, one-third of the special education students integrated into the mainstream were only "mildly handicapped". Delaying entry, plus special assistance, without labeling, appears on this record to be a recognized, cost-effective way of assisting special children with mild handicaps.

Department staff specifically stated on the record at the hearing that the proposed revision here in existing policy was not required by either state or federal law or regulations. It is therefore legally required that they document the need for this revision by some other "affirmative presentation of facts".

The practical impact of the proposed revision for parents with special children will be labeling of, or discrimination against, special children. Parents would still be able to receive early childhood services under "categorical" programs that provide assistance to specific types of severely handicapped pupils such as the mentally retarded. Everyone seems to agree that such diagnoses or labeling at this age, especially in borderline cases, is at best "somewhat uncertain".

The discrimination against parents of special children results from the pressure to either label them or enter them early. As Bette Clement, a Hastings Public School Physical Therapist (as well as many other commentators) pointed out in prehearing written comments, it is counterproductive to allow some parents of non-handicapped children to delay first grade until age seven, while forcing handicapped children to attend earlier and be among the youngest in the class. The attorneys at Legal Advocacy for Persons With Developmental Disabilities noted:

The net result is to force children with disabilities to be

placed in school-age alternatives earlier than children without disabilities in order to obtain noncategorical assistance.

Parents of preschool children understand the relative capabilities of their special children, individually, better than an I.E.P. team or anyone else. The position statement of the National Association of Early Childhood Specialists in State Departments of Education included with the comments of the South Central Minnesota Educational Cooperative Service Unit, entitled Unacceptable Trends in Kindergarten Entry and Placement stresses the role of parents:

> Parents have a unique perspective about their child's development and learning history. For this reason, their knowledge about the behavior and attainments of their children is invaluable to teachers.

This document also stresses "Flexible" peer grouping and "multi-age" classes. These concepts are recognized in Minnesota state law which allows parents to start their children's schooling (and their normal subsequent progression) anywhere from age five to age seven.

The defect here is one of failure to document need for or reasonableness of the proposal, plus inadequate demonstration of statutory authority for the proposed change in present practices. It is complicated by a legislated transition from ordinary special education to preschool "early childhood" special education, which the rules must address. There are several ways of curing the defect.

(1) Department staff fully understands the concerns here of parents and educators. They are probably in the best position to recommend adoption of language which would accommodate these concerns.

(2) Donna Wright of the Hopkins Public School System suggests adding wording (to page 21 of the hearing draft, lines 29 and 30) which would provide an exception for one additional year if it is recommended by the I.E.P. team. This would limit parental discretion in this area very significantly, substituting (generally sympathetic) professional discretion at the local level. This would cure the defect, but the State Board must make the ultimate value judgment of parental versus governmental (I.E.P.) decisions on the best time for attempted entry of special children into the mainstream.

(3) The Legal Advocacy for Persons with Developmental Disabilities lawyers also urged language in written comments (October 6, 1988, page 4) which would cure the defect. This language would not significantly increase the role of I.E.P. professionals.

19. Numerous past administrative proceedings involving the Board of Teaching suggest that the State Board of Education's attention should be called to the licensing provisions in .1550 -- Contracted Services, which provide that people rendering service to special children must "hold appropriate licenses issued by the Board of Teaching or the State Board of Education". The Department staff clarified in prehearing meetings that the choice of words was deliberately done to avoid any misimpression that the

provision was meant to hamper mainstreaming by requiring special education licenses for every teacher instructing special education students. However, there is still a problem here with "non-licensed" persons offering or providing services on behalf of the school district which could cause a problem in the future. There have been cases where local school districts have attempted to utilize personnel which they felt were competent when the Board of Teaching Staff disagreed (teachers lack x-thousand hours of rateable experience, etc.).

It is clear here that many people contracted with by local school boards to deal with local students, especially in the birth-to-kindergarten age range, will not be licensed by either the Board of Teaching or the Board of Education. For example, some I.E.P. plans could provide that mainstream services would be best provided by day care personnel in center-based settings by teachers licensed by the Department of Human Services who do not wish to undergo the additional licensing difficulties involved in special education, just to help a school district "mainstream" an early childhood needy student. Day care educators did not express such reservations, but it is likely that they were unaware of such potential future obligations. A parent comment does warn that occupational therapists are not licensed or regulated in Minnesota, at least by the Boards of Education or Teaching. The Mahtomedi Director of Educational Services notes that in his district psychological assessments are often done by licensed psychologists and/or psychiatrists in hospital settings where the doctors are not licensed by the Board of Teaching or Education.

Department staff indicates that the Board of Teaching already has a special license for early childhood education which would prevent local districts from using unlicensed persons. They are only attempting to add the word "appropriate" to add some "flexibility". They indicated at the August 1988 outstate meeting on the rules in Rochester, for example, that people providing services "wouldn't necessarily need a special education license and may only need an early childhood license." The potential problem occurs here when the Board of Teaching conducts a sporadic "audit" and determines that x, y and z professionals rendering some kind of professional education services do not possess requisite licenses, according to their computers. In such a proceeding, the Board of Teaching would assert that the special education rules "unequivocally" required a license for special education services of one sort or another for the services rendered. Regardless of the qualifications of the psychiatrist, day care provider, et cetera, the Administrative Law Judge would be forced to uphold the full force and effect of the rule prohibiting practice without the requisite Board of Teaching license, regardless of the qualifications of the professional providing the services.

This is specifically not found to be a defect under the Administrative Procedure Act. However, it is a major concern which is appropriately called to the attention of the Board of Education, which is already probably aware of it in contested case proceedings involving license cases.

There is no defect involved, but the Board may wish to consider these solutions to the potential problem.

(1) At a minimum, legally, it would help with future technical construction of the language to add or substitute for "licensed by the Board of Education and Teaching", the words "licensed by the state agency regulating the occupation involved".

(2) Perhaps the State Board of Education should consider eliminating the duplicative licensing requirement in these rules altogether, leaving "special education" and "early childhood special education" licenses entirely to rules of the Board of Teaching which the Board of Education oversees. The Teaching Board could not then cite these rules as a reason for taking someone's job away.

(3) The Board of Education should certainly direct its staff, here or elsewhere, to review this escalating licensing problem. Perhaps, legislation increasing oversight of the Board of Teaching should be recommended in the next session.

20. Another problem that is deserving of state School Board notice, although it is not a statutory defect in the rules that needs to be cured, is paper work. Anyone reviewing the hundreds of comments from participants and hours of tapes from outstate meetings would agree that too many resources intended for special children are being diverted to administrative forms and procedures. Teachers are regularly leaving this field throughout the state due to disillusionment with filling out forms and attending meetings, rather than serving students. This is a serious problem. However, these problems do not rise to the level of being a statutory defect under the Administrative Procedures Act with regard to these rules. On the other hand, that is a close judgment at least with regard to part .2600, subp. 3 -- Assessment Summary Report. This new paper work requirement was supported by many in the field but was also criticized by many, including the St. Paul Director of Special Education as a costly, time-consuming, additional documentary requirement. There is no doubt that it is this kind of thing which causes devoted professionals to desert special education because of their frustration with the ratio of paper work to student service.

There is a concern here worthy of state Board attention. Experienced administrators expressed doubts (for example, at the St. Cloud meeting on September 6, 1988), that all members of an I.E.P. team would even be willing to eventually sign off on such a summary integration of assessments provided by other professionals who are outside their own area of expertise. This is particularly likely where team members disagree with one another's judgments that would have to be integrated into such a summary. If the "team's" signature (page 33, line 27 of the hearing draft) were changed to "pupil I.E.P. manager's" signature, there would be some potentially significant reduction in the time that professionals would need to devote to this documentation. Although the final decision is of course up to the Chief Administrative Law Judge, such a revision would not appear to be a substantial change.

Another place where the Board could make some difference with regard to this paper work problem is .3600 B.(4) which would require amendment of the I.E.P. every time "the amount of time a pupil spends with nonhandicapped peers is changed". The paper work involved in informing the parents under such circumstances is already expensive and time-consuming. Formally revising the I.E.P. every time there is such a schedule change, especially with older students, would involve considerable additional paper work. Department staff tentatively agreed to examine this problem at the September 1, 1988 meeting in Brainerd. It explained that the language involved is only a result of a "complaint decision" where the particular -- perhaps peculiar -- facts were

not discussed on this record, except to note that there was virtually a full day decrease in services and that the parents were not informed of this "significant change" in hours of service.

Parents are doubtless entitled to notices of "significant" changes in mainstreaming. Once parental notification is given, formal revision of the I.E.P. could easily await the next regularly scheduled periodic revision.

Indeed, the Board should consider striking "and revision of the I.E.P." altogether from part .3600 (B) as a means of indicating to the public generally that it considers elimination of unnecessary paper work to be a major priority. The notices to parents will provide a "paper trail" and the I.E.P. will be revised "periodically" as required to reflect that "trail" so that educators would have a few more hours to deal with handicapped children. This is not a legal judgment, only a suggestion for the Board's consideration.

21. This Report has dealt with all of the most significant issues involved in the record, although it has not discussed many more. There is a statutory limit on how many days an Administrative Law Judge may spend examining a rulemaking record, of 30 days. There is a provision for an extension, which has been granted in this case of one week by the Chief Administrative Law Judge with the acquiescence of the secretary to the State Board of Education. The limitation and its limited extensions are the law. In simple, relatively uncontested cases, this 30-day limit makes a good deal of sense. In difficult, contested cases like this one, many hearing participants are inevitably of the opinion that their concerns were not adequately addressed in the Report of the Administrative Law Judge. Omission of mention of any such concerns does not mean that they should be slighted by the Board or by the staff in future rulemaking proceedings.

Many of the concerns throughout the record relate to changes in rules that are basically not being substantively changed. For example, revisions to .2470 relating to discipline, requiring an I.E.P. team meeting prior to suspension, was objected to as onerous, particularly in rural districts. However, this is not a change in the existing rule and Department staff was not consequently called upon to document the need for or reasonableness of the requirement. It is a problem that has some considerable potential for litigation which could be discussed at greater length, but for time limitations.

To cite one more example, before ending this tome, the Governor's Planning Council on Developmental Disabilities urges that part .2600, subp. 2 A. be amended to add "other individualized assessment procedures . . .". Perhaps, this additional language is implied in existing language which is specifically found to be needed and reasonable. However, the addition is commended to Department staff attention and would not be a substantial change. This and many other issues in this record would be worthy of more extensive discussion, however, the 30-day cutoff plus extensions has been legally established and must be complied with.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Department of Education staff gave proper notice of the hearing in this matter.

2. That the Department of Education staff has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule.

3. That the Department Staff has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i)(ii), except as noted at Findings 14, 17 and 18.

4. That the Department Staff has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings 17 and 18.

5. That the amendments and additions to the proposed rules which were suggested by the Department Staff after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rule 1400.1000, Subp. 1 and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4 as noted at Findings 14, 17 and 18.

7. That due to Conclusions 3 and 4 , this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. That any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Minnesota Board of Education from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

RECOMMENDATION

It is hereby recommended that the proposed rules be adopted except where specifically otherwise noted above.

Dated: May 25th, 1989.

HOWARD L. KAISER, JR.
Administrative Law Judge