STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of the Proposed Adoption of Rules of the Department of Health Governing the Registration of Speech-Language Pathologists and Audiologists, Minn. Rules, Parts 4750.0010 to 4750.0700.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Howard L. Kaibel, Jr., on June 11, 1990, at 9:30 a.m. in Veteran's Conference Room D, Veteran's Service Building, 20 West Twelfth Street, St. Paul, Minnesota.

This report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 to hear public comment, to determine whether the Minnesota Department of Health (the "Department") has fulfilled all relevant substantive and procedural requirements of law or rule, to determine whether the Department has documented its statutory authority to adopt the proposed rules, to determine whether the proposed rules are needed and reasonable, and to determine whether or not the rules, if modified, are substantially different from those originally proposed.

Penny Troolin, Special Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Department staff at the hearing. The Department staff appearing in support of the proposed rules consisted of Jean Klosowski, Rule Development Specialist and Tom Hiendlmayr, Director of the Health Occupations Section.

Twenty persons attended the hearing. The hearing continued until all interested persons, groups, or associations had an opportunity to be heard.

The record remained open for the submission of written comments until July 2, 1990, twenty (20) calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1, three business days were allowed for the filing of responsive comments. On July 6, 1990, the rulemaking record closed for all purposes.

Hundreds of public pre-hearing and post-hearing comments were also received and made a part of the record. The Department submitted a written

comment responding to matters discussed at the hearing and a supplementary response during the three-day period.

The Commissioner 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 Commissioner of actions which will correct the defects and the Commissioner 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 Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, she must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner 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 Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then she 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 Commissioner files the rule with the Secretary of State, she 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 April 18, 1990, the Department 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 proposed Order for Hearing.
(c) the Statement of Need and Reasonableness; and
(d) the Notice of Hearing proposed to be issued.

2. On May 2, 1990, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

3. On May 7, 1990, the Notice of Hearing and a copy of the proposed rules were published at 14 State Register 2563.

4. On May 11, 1990, the Department 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) the names of Commission personnel who would represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf; and
(e) a copy of the pages of the State Register on which the notice was published;
(f) the Affidavits of delivering the notice to the chairs of the Minnesota House Appropriations Committee and the Minnesota Senate Finance Committees;
(g) the Notice of Solicitation, as published in the State Register, together with the materials received through that Notice.

The Department did not file the actual mailing list with its certification that the list was accurate and complete. The Department did not do so because the physical list is lengthy and bulky. No one has objected to this action by the Department. No one has claimed that the absence of that list from the hearing record results in prejudice. Under these circumstances, failure to file the list does not constitute a defect. These documents were timely filed by the Department pursuant to Minn. Rule 1400.0600.

5. All documents were available for inspection and copying at the Office of Administrative Hearings from the date of filing to July 6, 1990, the date the rulemaking record closed.

Nature of the Proposed Rules

6. The proposed rules require persons using the title of audiologist or speech language pathologist (or certain related words) to have certain qualifications and register with the Department. The bulk of the proposed rules are devoted to establishing the procedures and specific requirements for temporary registration, permanent registration, continuing education, reciprocity, renewal, fees, disciplinary action, and an advisory council. The registration system is intended to be mandatory to the extent that no one would be able to hold oneself out as engaging in the practice of audiology or speech language pathology without being registered. The actual practice of audiology or speech pathology is not limited to those individuals who have registered. Once registered, persons must either adhere to the continuing education and renewal requirements or not use the titles protected under the rule. The proposed rules include definitions, filing procedures, required course types, required course hours, rights of persons subject to discipline, and specific fees.

Statutory Authority

7. In its Statement of Need and Reasonableness ("SONAR"), the Department cites Minn. Stat. § 214.13, subd. 1 as authority for the adoption of the proposed rules. This statute requires the Commissioner to "establish procedures for the identification of human service occupations not now credentialed by the state . . . and promulgate by rule standards and procedures relating to the credentialing of persons practicing in the affected occupations . . . If the commissioner determines that credentialing of an occupation is appropriate, the commissioner is empowered only to register the occupation." Minn. Stat. § 214.13, subd. 1. The Department has adequately documented its statutory authority to enact the proposed rules, except as otherwise noted in subsequent findings.

Small Business Considerations in Rulemaking

8. Minn. Stat. § 14.115, subd. 2, requires state agencies proposing rules affecting small businesses to consider methods for reducing adverse impact on those businesses. In the SONAR, the Department asserted that the proposed rules will not affect small businesses. The Department maintains that these rules provide for the registration of people, not businesses. The Department also points out that the registration system is voluntary. In addition, the Department has considered the five suggested methods for reducing the impact of rules on small businesses contained in Minn. Stat. § 14.115, subd. 2. The Department has concluded that adopting any of those methods would not be feasible and would undermine the purpose of registering audiologists and speech language pathologists (SLP's).

The Department's distinction between registering individuals and businesses is not well founded. The registration proposed by these rules is of an occupation. Although a small business cannot practice either audiology or speech language pathology, such a business could function with only these professionals on staff, or as a sole proprietorship operated by a single professional. With regard to such businesses, the prohibition against holding oneself out as an audiologist or SLP could have a direct and severe impact. Similarly, the ability to avoid registration does not lessen the impact of the proposed rules on small businesses. Avoiding registration carries the cost of not using certain identifying terms. Not using those terms may place some businesses at a competitive disadvantage to other businesses in the same field. The fact that registration is voluntary does not relieve the Department of its responsibility to consider less restrictive alternatives. Minn. Stat. § 14.115, subd. 2, is applicable to the proposed rules.

However, no one has objected to the Department staff's conclusion, in the SONAR analysis, that rejected alternatives were infeasible. No one has suggested any way that small business impact could be lessened while ensuring the protection of consumers of audiologist and SLP services. Minn. Stat. § 14.115, subd. 2, has been duly complied with.

Impact on Agricultural Land

9. Minn. Stat. § 14.11, subd. 2, requires proposers of rules that may have a "direct and substantial adverse impact on agricultural land in this state" to comply with the requirements of Minn. Stat. §§ 17.80 through 17.84. The proposed rules have no impact on agricultural land and, therefore, these statutory provisions do not apply.

Analysis of Substantive Provisions

10. Because many provisions of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The portions of the proposed rules that received significant critical comment or otherwise need to be examined will be discussed below. Where a particular comment applied to several subparts of the proposed rules, the analysis will not be repeated. It is specifically found that the need for and reasonableness of the provisions that are not discussed in this Report have been demonstrated by an affirmative presentation of facts, and that such provisions are specifically authorized by statute.

Need for and Reasonableness of the Proposed Rules in General

11. The proposed rules establish a system of registration for persons using titles that include the terms "speech language" or "audiologist." In deciding upon registration as the appropriate regulatory method for these persons, the Commissioner applied Minn. Stat. § 214.001, subds. 2 and 3, and Minn. Stat. § 214.13. Under Minn. Stat. § 214.001, subd. 2, an occupation may only be regulated if it is required to protect the public from harm. Once a finding is made that an occupation must be regulated, the least restrictive level of regulation is required by Minn. Stat. § 214.001, subd. 3. The Commissioner has found that registration is the appropriate level of regulation for persons working in the fields of speech language pathology and audiology.

The process set forth by Chapter 214 is not part of the rulemaking proceeding. There is no authority established in that chapter for review of the Commissioner's decision to regulate. Presumably, any person adversely affected by the Commissioner's decision could appeal that decision as a final agency action. Such an action has no place in a rulemaking proceeding. The Commissioner's decision, that registration is appropriate for persons within the jurisdiction of the Department, must be accepted for the purposes of this proceeding.

The foregoing analysis only applies to the Commissioner's general decision to impose a system of registration on persons within the Department's jurisdiction. Each provision of the proposed rules must still be analyzed under the rulemaking process set out in Minn. Stat. Chapter 14 for need, reasonableness, statutory authority and compliance with all other laws or rules. This particularly includes proposed provisions including and excluding members of the potentially affected public.

Proposed Rule 4750.0010 -- Scope.

12. The scope as established in proposed rule part 4750.0010 has, through the rulemaking process, become the most critical portion of the proposed rules. Owing to the complexity of the issues surrounding this part, it will be discussed in Findings 13, 14, 15, and 16.

Need for the Registration of Licensed Educators.

13. Most SLP services in Minnesota are performed daily in the public school system by roughly 1,100 dedicated, competent, college educated medical

professionals who are not generally members of the Minnesota Speech-Language-Hearing Association (MSHA) or American Speech-Language-Hearing Association (ASHA) certified. There is no substantial or specific evidence that these health care providers are inadequately trained to carry out their ordinary, day-to-day occupational responsibilities. On the contrary, Department staff specifically concluded in their recommendations to the Commissioner, after reviewing the record in the Human Services Occupations Advisory Committee (HSOAC) deliberations:

> The actual and potential harm cited are low in numbers. The extent of harm caused by practitioners in the public schools who are trained at the bachelor degree level is not known.

Most of these school SLP's actually have master's degrees and all of them are constantly improving their educational qualifications (25 continuing education credits every five years). Only roughly 470 of the school SLP's in Minnesota still had only a baccalaureate degree in 1987, according to three year old MSHA data. The record shows these publicly employed caregivers to be conscientious, generally recognizing their limitations. They refer extraordinary cases to specialists with superior training and experience inside and outside of the public school system. The MSHA licensing application which initiated this rulemaking process recommended exempting school SLP's because "school personnel regularly refer children for hearing evaluation and for speech-language pathology service which cannot be rendered by regular personnel in the school." As a consequence, a fundamental question which must be carefully examined here is whether Department staff has documented by an affirmative presentation of facts the necessity of depriving these school SLP's, who render the bulk of the SLP services in the state, of their right to use their hard earned credentials.

To begin with, there is no evidence of substantial confusion amongst the general public over the expertise of school SLP's or that any member of the public has ever been misled about a school SLP's credentials. Unlike Hearing Aid Dispensers, who were described in a recent rulemaking report as needing registration because of a few "bad apples" (In the Matter of the Proposed Adoption of Rules of the Department of Health Governing the Registration of Hearing Instrument Dispensers, OAH No. 5-0900-4098-1, Report of the Administrative Law Judge, January 19, 1990), there is no evidence here that the public is being preyed upon by unscrupulous, unqualified school SLP's. The public does not ordinarily "shop around" for or employ school SLP's. Rather, these persons are all employed and supervised by knowledgeable school administrators.

Further, school SLP's are already licensed by the government and subject to its admission and continuing education requirements for consumer protection - unlike the 300 or so non-school SLP's in private practice. If a case can be make for gradually upgrading the qualifications of some school SLP's, the necessity for such rules must be demonstrated to the Board of Teaching, which has (under Minn. Stat. § 125.05, subd. 1) the jurisdiction to make such changes in a way that will be fair to all educators and students, and is capable of balancing the conflicting educational priorities at stake in such a process. Department staff specifically recognized this in recommendations to the Commissioner following the HSOAC deliberations, explicitly advising that any "remedial" measures should be left to the Board of Teaching. MSHA has also recognized this by urging exclusion of licensed educators in its application and by making its case for more rigorous qualifications (albeit unsuccessfully) to that Board. Other than MSHA's concerns over

qualifications, there is no allegation by anyone that the Board of Teaching has failed to assiduously execute its licensing duties.

The proposed rules have been challenged by SLP's who are licensed by the Board of Teaching and work in the public schools. These SLP's assert that the Department has not shown any need to include them in the registration system. The Department's response has been to assert that they are not necessarily included under the system because of the permissive nature of registration, as opposed to licensure. Licensure limits the scope of practice available to individuals not admitted, while registration only limits the use of titles for persons not enrolled. Registration does not prohibit anyone from engaging in an occupation. The staff is of course correct in asserting that no one is required to register under the proposed rules, on their face.

Implementing a permissive system does not end the analysis, however. As further discussed in a subsequent Finding, the persons objecting to the treatment of licensed educators are not under the jurisdiction of the Department. Rather, those persons are regulated by the Board of Teaching pursuant to Minn. Stat. § 125.05, subd. 1. The Department has identified the title used by the licensing section of the Minnesota Department of Education in the specialty most closely related to speech language pathology. The title used in that setting is "Special Education" with an endorsement in "Speech Correction."

While educators do not have a license title falling within the proposed rules, the Department has not eliminated the possibility that a school district in Minnesota may insist upon using a restricted title to describe a licensed educator or that these licensees may need to identify themselves by their legally acquired degrees and/or ASHA certifications in speech language pathology. Since the proposed rules do not explicitly exempt licensed educators from the prohibitions against using restricted titles, the licensed educator would then be required to comply with all aspects of these rules.

In its post-hearing comment, the Department proposed a change in the language of proposed rule 4750.0010 to respond to the comments of licensed educators. The change exempts "school personnel licensed by the Board of Teaching under Minnesota Rules, part 8700.5505 who use occupational titles other than those titles protected by part 4750.0030." This change, by its terms, does not resolve the problem posed in the prior paragraph. When examined closely, the purported exemption would be circular and redundant. Everyone using non-protected titles is already exempt. The change does not remove the question of whether a need exists to impose the proposed registration system on licensed educators.

The Commissioner specifically and unequivocally confined her findings regarding the potential harm which justifies imposing a regulatory system to those audiologists and SLP's outside the public schools. SONAR, Attachment A. With respect to licensed educators, the Commissioner found:

> With respect to public harm caused by speech language pathologists and audiologists, Health Department staff found the incidence of public harm from unregulated practice to be low, and therefore, the potential for public harm to be remote. The harm found resulted from services provided by speech correctionists in the public schools, allegedly because the speech correctionists were trained at the bachelor's degree, rather than

the master's degree level. However, the applicant group specifically excluded public school speech correctionists from its licensure request. Further, the group is already regulated by the Minnesota Board of Teaching, and is thus outside the scope of this review.

SONAR, Attachment A, at 3. The findings upon which the need for the proposed rules is based (under Chapter 214) explicitly exclude the group which is potentially affected by the proposed rules, as amended. The Commissioner's finding does not demonstrate that the proposed rule is needed to regulate licensed educators. The Department has not demonstrated that applying the registration system to licensed educators is needed by an affirmative presentation of facts. This constitutes a defect in the proposed rules under the Administrative Procedures Act (Minn. Stat. Chapter 14).

Reasonableness of Registering Licensed Educators.

14. Commentators also express colorable concern that the proposed rules are unreasonable because of the effect which will flow from their adoption. The entry requirement for licensed educators engaged in speech language pathology is the baccalaureate degree. That is the current most rigorous state-established requirement for SLP service delivery in Minnesota. The federal Education of the Handicapped Act of 1986 (EHA-B) requires each state to hire personnel who meet the "highest requirements" of any State approved licensing or registration which apply to the area in which special education services are provided. 20 U.S.C. 1413(a)(14). The proposed rules would establish a master's degree standard for the registration of persons engaged in the practice of speech language pathology. Failure to meet the "highest requirements" standard could result in the loss of federal funding for special education programs.

The Department argues that the "highest requirements" standard is met for the purposes of EHA-B. The Department bases this assertion on a letter solicited from the U.S. Department of Education. The Department characterizes the letter as indicating "Minnesota school districts will not be required to exclusively hire people with master's degrees or retrain personnel as a result of the proposed rules." Department's First Response to Public Comment, at 3.

Post-hearing comment received from MSHA suggests that EHA-B does require matching the "highest requirements," unless states try to define licensed educators who practice in the area of speech language pathology as something other than "speech-language pathologists." MSHA Post-Hearing Comment, Attachment 8, Governmental Affairs Review, at 24, American Speech-Language-Hearing Association, June, 1989. ASHA recommended that state associations "work . . . to ensure that their state does not try to re-define the profession as something other than 'speech-language pathology.'" Id. at 24.

The letter from the U.S. Department of Education, authored by Judy A. Schrag, Director of the Office of Special Education Programs, responds to the question from the Department: " . . . will any Federal statute or regulation require that the Minnesota Department of Education employ personnel to work with speech handicapped children who meet the highest minimum entry standard set by a Minnesota agency . . ." SONAR, Attachment C. Director Schrag responded: "[u]nder certain circumstances, it is permissable under the EHA-B for the State of Minnesota to use multiple occupational categories with different entry level requirements for personnel providing special education and related services to children with handicaps." Id.

Director Schrag also explained the effect of 34 C.F.R. § 300.153(a)(3) in that letter. That rule defines "profession or discipline" as:

> a specific occupational category that --
> (i) Provides special education and related services to handicapped children under this part;
> (ii) Has been established or designated by the State;
> (iii) Has a required scope of responsibility and degree of supervision.

34 C.F.R. § 300.153(a)(3). Director Schrag concluded:

> Thus, it is permissable under EHA-B for Minnesota to establish different entry level professional requirements standards for the professions or disciplines of "speech-language pathologist" and "speech correctionist" for personnel who provide speech services to children with handicaps, provided there is a difference in the required scope of responsibility or degree of supervision for individuals in these specific occupational categories.

SONAR, Attachment C (emphasis added). For the proposed rules to avoid triggering the "highest requirements" standard, a minimum of two factors must be present. First, two state-defined professional categories must exist, one for educators and the other for non-educators. Second, the scope of responsibility or the degree of supervision must differ between these two categories. If these two factors do not exist, the "highest requirements" standard of EHA-B will require the State of Minnesota to hire persons holding the master's degree in speech language pathology and submit a plan to bring existing educators up to that standard. 20 U.S.C. 1413(a)(14).

The Department has not attempted to show that raising the entry level requirements of licensed educators from the baccalaureate to the master's degree in the area of speech language pathology through these rules is reasonable. Rather, the Department has asserted that there will be no impact on the licensed educator's entry standards. The Department introduced a memorandum, jointly issued by Marsha Gronseth, Executive Director of the State Board of Education, Norena Hale, Manager of the Unique Learner Needs Section of the Minnesota Department of Education, and Kenneth Peatross, Executive Secretary of the Minnesota Board of Teaching, as a response to those concerned about the effect of EHA-B on funding for special education programs or the entry level requirements for licensed educators in the area of speech language pathology. The memorandum states, in pertinent part:

> For the purposes of EHA-B, the Minnesota State Plan recognizes the Board of Teaching license in special education: communication disorders as the standard for persons who provide speech services to learners with handicaps in the schools. We understand that the proposed rules will not require persons who practice as teachers of special education: communication disorders in school districts to be registered. It is further our understanding that the proposed rules do not prohibit the practice of speech-language pathology but do apply to those who use the proposed protected titles. With these understandings, the proposed rules do not conflict with rules administered by our agencies.

Department's First Response to Public Comment, Attachment B. The information

presented in the memorandum lacks two essential items. The first is whether the occupation held by persons with a special education: communication disorders license is distinct from the profession or discipline of speech language pathologists. The second is, if two professions or disciplines exist, is the scope of responsibility or degree of supervision different for the two. Without evidence on these points, the effect of EHA-B on the existing entry level requirements for licensed educators cannot be determined.

In rulemaking, the burden is upon the agency to show the need for and reasonableness of the proposed rules by an affirmative presentation of facts. Minn. Stat. § 14.14, subd. 2. The rulemaking record lacks the information needed to determine whether the ultimate effect of promulgating the proposed rules will be to raise the entry level standards of persons not under the jurisdiction of the Department. That result remains a strong likelihood, in spite of the Department's assertions. Raising the entry level for licensed educators in the area of speech language pathology will have an adverse impact on school districts and the licensees. Neither of these groups are within the jurisdiction of the Department. The Department has not shown that promulgating the proposed rules, as amended, is reasonable. This is a substantive defect under the Administrative Procedures Act.

Statutory Authority for Registration of Licensed Educators.

15. Licensed school SLP's are already credentialed by the state and were so credentialed at the time the Legislature adopted the statute giving the Commissioner jurisdiction to consider these rules. That statute is explicitly and unequivocally limited to "human service occupations not now credentialed by the state." Minn. Stat. § 214.13, subd. 1. Legislators could not possibly have expressed their intention more clearly. Jurisdiction over credentialing for this occupation had already been delegated to the Board of Teaching, which has established an exclusive licensing system, including qualifications, fees, continuing education requirements, and disciplinary procedures. It is inconceivable to interpret this statute as including a legislative intent to impose a separate duplicative credentialing system on these already credentialed professionals. Legislator's comments submitted into the rulemaking record objected vigorously to any such misinterpretation. Department staff has not, on this record, documented statutory authority to include licensed educators, even indirectly in the registration system. This lack of statutory authority constitutes a defect in the proposed rules.

Fiscal Note

16. Minn. Stat. § 14.11, subd. 1, requires agencies proposing rules that will require the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the two-year period immediately following adoption of the rules. The Department maintains that the proposed rules will not require any expenditure of funds by a local agency or school district, and therefore this statute is inapplicable. The Department's assertion is accurate only if the adoption of the proposed rules does not trigger the "highest requirements" standard of EHA-B. If the master's degree standard is to be applied throughout the educational system, increased costs can occur through any of three ways. First, federal special education funding could be reduced or eliminated for failure to follow the requirements of EHA-B. Second, higher salaries would be required to hire the better credentialed SLP's. Third, school districts may incur expenses to retrain present personnel licensed at

the baccalaureate level and/or to replace them during the retraining. Since there are roughly 1,100 licensed educators providing services in the area of speech language pathology, and several years would be required for, ASHA certification, retraining, and supervised internships, the cost could readily exceed $100,000 for more than two years. The Department has not shown that the "highest requirements" standard of EHA-B will be avoided. The Department has not estimated the cost which will result in that event. The Department has not published that estimate as required by Minn. Stat. § 14.11, subd. 1. This constitutes a procedural defect in the rules.

Correction of Defects.

17. The defects discussed at Findings 13, 14, 15, and 16 all arise from the potential impact the proposed rules could have on licensed educators and school districts through the operation of EHA-B. The defects can be cured by explicitly exempting these persons from the application of the proposed rules. An exemption in the proposed rules would create the required two professions, purely by the status of the individual as either a licensed educator or an SLP outside of the educational process. The potential adverse impact of EHA-B on licensed educators and school districts would be avoided. The absence of information in the record concerning the need for and reasonableness of including school SLP's would be irrelevant. The express exemption of licensed educators would clearly confine the jurisdiction of the rules to non-credentialed persons, eliminating the statutory authority defect. Since no raising of standards would be required, no financial effect could result. There would then be no requirement that the Department publish a fiscal note prior to the rule hearing.

Exempting school personnel is not without precedent. Of the 36 states which required licensure of SLP's in 1987, 30 exempted those individuals working in the educational system. As discussed above, an explicit exemption will not reduce the effectiveness of the rules, since the Department has no jurisdiction over licensed educators, so long as those persons are performing functions within the school system.

The Department has proposed a modification to the scope provision of the proposed rules purporting to be an "exemption." As discussed above, the language of that modification would only exempt those who do not use protected titles. Thus, the modification only exempts those to whom the rules never applied in the first place. To be effective in curing the defects of need, reasonableness, statutory authority, and the fiscal note, the exemption must clearly and explicitly exempt the class of persons not under the jurisdiction of the Department and subject to the provisions of EHA-B. The following language added to the "scope" provisions of proposed rule part 4750.0010 or to the "exemption" provisions of proposed rule part 4750.0070, subp. 2 will achieve that goal:

> These rules do not apply to school personnel licensed by the Board of Teaching under Minnesota Rules, part 8700.5505, so long as those school personnel confine their practice to employment with a school system.

The recommended exemption provides the explicit, unambiguous exemption required to avert adverse consequences from the "highest requirements"

standard of EHA-B and prohibits unregistered school personnel from using a protected title when acting outside their employment with a school. This will achieve the goal of protecting consumers of speech language pathology services while not intruding into the jurisdiction of the Board of Teaching.

In the alternative, perhaps the best way of correcting the defect would be for the Commissioner to reconsider the overall approach taken in the proposed rules, which reversed the recommendations of staff, MSHA, and the HSOAC. The evidence herein suggests the decision to register audiologists and SLP's may have been a "close call" worthy of further exploration.

The question of whether to exclude or include licensed educators in another credentialing system is inextricably interrelated with other basic aspects of that proposed regulatory system. MSHA members, for example, fear that the costs and fees for administration of the proposed "voluntary" system might discourage registration if a major portion of those costs could not be passed on to the already licensed educational SLP's. Likewise, the question of how tight to draw the protection around the professional titles is fundamentally intertwined with who is excluded (either legally or "voluntarily") and the amount of the fees. If educational SLP's are not exempted, they must be allowed to call themselves "speech therapists" or some similar title which could then be used by other non-school SLP's to avoid registration, which would increase the fees for those who did register, which would further encourage avoidance, and so on.

MSHA has consistently advocated an entirely different licensing approach which avoids the inequity of duplicate credentialing for licensed educators, while ensuring fair, tough consumer protection. It was embodied in a bill that they first drew up and lobbied for in the 1973 Legislative session, 17 years ago. The bill was authored by some of the state's most respected and influential lawmakers from both sides of the aisle (including A. Carlson, Moe, Forsythe, H. Sieben, and Norton). It exempted licensed educational SLP's and regulated all other speech and hearing practitioners of every sort. The regulated "speech pathologist" title, for example, was exhaustively inclusive:

> A person represents himself to be a speech pathologist when he holds himself out to the public by any title or description of services incorporating the words speech pathologist, speech pathology, speech therapy, speech correction, speech correctionist, speech therapist, speech clinic, speech clinician, language pathologist, language pathology, logopedics, logopedist, communicology, communicologist, ayshasiologist, voice therapy, voice therapist, voice pathology, voice pathologist, language therapist, or phoniatrist or any similar titles. (emphasis added).

"Audiologist" and the scope of the licensed "practices" were similarly unambiguously defined, to ensure that consumers would get only government regulated, qualified professional service. Because there would be no potential evasion of such an involuntary licensing system, its administrative fees would be equitably shared by all currently unlicensed practitioners and not imposed on anyone already licensed.

MSHA pushed for this same basic approach in redrafted legislation in 1984, included in its application which led to this proceeding. After extensive hearings and deliberations, the HSOAC adopted this MSHA licensing model in its

recommendations in 1987. The Commissioner subsequently rejected licensing, however, and staff has substituted this registration alternative. MSHA's construct, which would require legislative action, would not be subject to the defects of the proposed rule and might be enacted if it received the Commissioner's approval.

A third alternative approach which would cure the proposed rule's defects, perhaps goes without saying. The rules could simply be withdrawn. As the Commissioner concluded in her 1988 recommendations (page 9): "The existing level of professionalism within the professions of speech-language pathology and audiology is commendably high." The Minnesota healthcare response to communication disorders will doubtless continue to respond commendably and professionally to consumer needs without any further governmental intervention.

Proposed Rule 4750.0020 -- Definitions

18. Proposed Rule 4750.0020 contains twenty subparts defining the terms to be used in the proposed rules. Commentators objected to the definition of "contact hour" on the basis that denying credit for instructional sessions conducted during meals with a speaker was unreasonable. The Department agreed with those comments and proposed at the hearing to delete the words "with or" to allow credit for such instructional sessions. The definition of "contact hour" as contained in subpart 9 is needed and reasonable, as amended. The change was suggested by the public, discussed at the hearing, and does not constitute a substantial change.

These definitions, as modified, have been shown to be needed and reasonable to promote clear comprehension of the applicability of the rules. The modifications made to the language of the proposed rules following the hearing merely clarify the definitions in this rule part and do not constitute a substantial change.

Proposed Rule 4750.0030 -- Protected Titles and Restrictions on Use.

19. This part of the proposed rules establishes which words may not be used by persons other than those registered with the Department, or those outside the Department's jurisdiction. Subpart 1 contains the restriction against using protected titles. The initial language of subpart 1 has been changed to accommodate changes later in the same subpart. The changes merely conform the citation in this portion of the subpart to the actual text of the subpart, as modified. The change is needed and reasonable and does not constitute a substantial change.

The Department modified subpart 1(A) to prohibit the use of "the following terms or initials which represent the following terms" when those terms or initials "form an occupational title" and the person is not registered with the Department. The modifications are in response to comment made at the public hearing by Cheryl Mae Johnson, of ISD 709 (Duluth Public Schools) that suggested the application of the rule, as originally written, would prohibit the truthful listing of the actual degree received by persons educated in this area but not registered with the Department. The modification limits the scope of the restriction to "occupational titles," rather than a strict prohibition on the use of the terms as titles. As applied, the new language proposed by the Department will allow a person to use the words "speech," "language," or "pathology" in an occupational title. However, those words

cannot be used in combination with each other to form an occupational title, whether or not other words are added. The Department also modified subpart 1(A) to protect the initials "SLP" (for speech language pathologist) and "A" (for audiologist). The changes incorporate into subpart 1(A) the language formerly expressed by subpart 1(C), and, therefore, the Department has deleted subpart 1(C).

The changes proposed by the Department express the intent and operation of the title restrictions more clearly than in the original version of the proposed rule. The changes would not permit a person, otherwise under the jurisdiction of the Department, to use the actual wording of a degree awarded as part of an occupational title unless that person was registered with the Department. Cheryl Mae Johnson suggested that use of a title earned from a national organization (such as ASHA) should not be restricted by the proposed rules. This is a cost necessarily incurred if consumers are to be protected through a system of registration. ASHA suggested that "speech therapist" and "speech and language therapist" also be restricted titles. SONAR, Attachment D. The Department's limitation of restricted titles strikes an appropriate balance between limiting titles to protect consumers and allowing unregistered persons who practice in the areas of speech language pathology and audiology to call themselves something that would allow consumers to locate their services. Anything else would not be voluntary. Persons not under the jurisdiction of the Department, however, such as licensed educators, should be able to use the words contained in an awarded degree or recognized national certifications to form an occupational title, so long as those persons remain exempt as discussed in Finding 17.

The Department has shown that proposed rule part 4750.0030, subpart 1, as modified, is needed and reasonable to clearly inform regulated professionals and the public of the restrictions imposed by the proposed rules. The changes made in the subpart were fully discussed at the hearing and in post-hearing comments, are needed and reasonable, and do not constitute a substantial change.

20. Subpart 2 establishes an exemption for federal employees practicing in the areas regulated by these proposed rules. The Department has modified subpart 2 in post-hearing comments by deleting the entire provision. The Department bases this action on the perceived inconsistency between explicitly exempting federal employees and not explicitly exempting licensed educators. In both cases, the Department has no jurisdiction over the persons engaged in the practice of speech language pathology and audiology. As discussed in Findings 13, 14, 15, 16, and 17, above, failing to explicitly exempt licensed educators is a defect in the proposed rules. On the one hand, since federal employees are not subject to the provisions of EHA-B, there is no need or reasonableness problem with not explicitly exempting them from the requirements of the proposed rules. On the other hand, since the perceived inconsistency is no longer at issue in the proposed rules, it is respectfully suggested that the Commissioner retain the explicit exemption of federal employees. Keeping subpart 2 will ensure the correct application of the proposed rules by advising persons applying the rule that, in fact, an exemption is legally mandated. Should the Commissioner decide to accept the staff recommendation to remove subpart 2, its deletion will not constitute a substantial change.

Proposed Rule 4750.0050 -- Qualifications for Registration Before January 1, 1993.
Proposed Rule 4750.0060 -- Qualifications for Registration On or After January 1, 1993.

21. These two proposed rule parts establish the specific requirements to be met by registrants prior to January 1, 1993 and on or after that date. The Department has chosen that date to conform with anticipated changes in the Certificate of Clinical Competency (CCC) requirements of ASHA. Requiring registrants to meet the standards of the CCC was supported by the Arne D. Teigland, Ph.D., Chair of Speech/Language/Hearing Sciences at Moorhead State University; Charles E. Speaks, Ph.D., Chair of the Department of Communicative Disorders at the University of Minnesota (Twin Cities); Arnold E. Aronson, Ph.D., Head of the Section of Speech Pathology, Department of Neurology, Mayo Medical School; MSHA; Jerry LaVoi, Ph.D., Chair of the Department of Communication Disorders, St. Cloud State University; Ash M. Hawk, Ph.D. Head of the Department of Allied Clinical Health, University of Minnesota (Duluth); Robert S. Brooks, Ph.D., Chair of the Department of Communication Disorders, Mankato State University; and ASHA. SONAR, Attachments L through X. The evidence presented by the Department establishes that the CCC is generally the present uniform national minimum standard for persons practicing in the areas of speech language pathology and audiology outside of the schools. To protect consumers by requiring registration, some minimum standard is needed to ensure registrants are qualified. Incorporating the existing minimum standard is reasonable for carrying out the goals of the Department in establishing this system of registration.

All of the persons objecting to these proposed rule parts were concerned about the effect of these requirements on licensed educators. As discussing in Findings 13, 14, 15, 16, and 17, above, licensed educators must be explicitly exempted from the registration requirements, including the requirement that the individual meet the current CCC standards. This exemption renders the concerns of the objecting parties moot regarding these rule parts. The Department has shown that proposed rule parts 4750.0050 and 4750.0060 are needed and reasonable.

Proposed Rule 4750.0070 -- Registration by Equivalency.

22. Proposed rule part 4750.0070 was altered by the Department as a result of comments received at the rulemaking proceeding. The Department noted that the language of the proposed rule part could create the perception of unbridled discretion on the part of the Commissioner. To eliminate this perception, the Department has modified this part to establish the standards for granting registration to persons with equivalent experience and qualifications. The qualifications listed in the modified language are: 1) holding a current CCC; and, 2) meeting the requirements of proposed rule part 4750.0040. The changes only restate the conditions in the original language while eliminating the word "may." The modification is needed and reasonable to establish attainable standards for persons who are otherwise qualified for registration, but do not meet the exact standards for registration. The proposed rule part is needed and reasonable as modified. The restatement of the rule does not constitute a substantial change.

Proposed Rule 4750.0080 -- Registration by Reciprocity.

23. The Department has made a change similar to that in Finding 22, above, to proposed rule part 4750.0080. This change is made for the same reason, that is, to remove any perception of unfettered discretion. The analysis in the foregoing Finding also applies to this part of the rules. The modified rule part is needed and reasonable and does not constitute a substantial change.

Proposed Rule 4750.0090 -- Registration Following Lapse of Registered Status.

24. No critical comments were received concerning this proposed rule part. However, the Department modified subpart 2(A) at the hearing. The modification only states that an applicant for registration following a lapse of more than three years must "apply for registration renewal according to part 4750.0300," in addition to the other standards that must be met. The Department had inadvertently left out that language. The modification received no objections from the public. The proposed rule part is needed and reasonable, as modified. The modification only corrects an omission of a procedural requirement and does not constitute a substantial change.

Proposed Rule 4750.0200 -- Registration Procedures.

25. Subpart 1 of this proposed rule part lists the information to be provided by an applicant for registration. Sally Cleland objected to the variety and vintage of the information required, suggesting that a "current, up-to-date CCC" would be enough documentation to warrant registration. The Department's response pointed out that proposed rule 4750.0070, Registration by Equivalency, allows persons who otherwise meet the requirements of 4750.0040 to register with a current CCC. The documentation required by subpart 1 would not be required in that circumstance. The Department has shown that providing documentation that an applicant is qualified for registration is needed. Listing the documentation clearly advises applicants of what is required. The items listed are such that applicants should either have those documents or be able to obtain copies without undue hardship. In the event that copies are unobtainable, an alternative registration method (proposed rule 4750.0070) exists to accommodate undocumented applicants. The proposed rule is reasonable.

The Department altered subpart 2(C) of proposed rule 4750.0200 to clarify that an applicant has 30 days from the date of notification to appeal a Commissioner's denial of registration. The change eliminates a potential due process problem and is not a substantial change.

Proposed Rule 4750.0400 -- Continuing Education Requirements.

26. To maintain one's registration as an SLP or audiologist one must accumulate continuing education contact hours. Subpart 1 establishes the total contact hours required to maintain registration in either discipline and what is required to maintain registration in both disciplines. John Krumm, supervisor of the speech language program for the Robbinsdale School District, stated at the hearing that he would like to see some of the continuing education "language cleaned up so that . . . you can clearly distinguish between Provision A and Provision B [in subpart 10]. . . ." Hearing

Transcript, at 71. The Department responded to this comment by adding title sentences to items A and B. For item A, this sentence reads: "For registration renewal as either a speech language pathologist or audiologist." For item B, the modification reads: "For registration renewal as both a speech language pathologist and audiologist." This language does accomplish the goal of clearly indicating what item applies to the individual's registration need, at least in part. The Department has shown that the subpart, as modified, is needed and reasonable. The change was requested by public comment, and does not constitute a substantial change.

The language of the two items is not altered by the change, however. The first sentence of item A begins: "Except as provided in item B. . . ." This language is inherently confusing, since the reader must first become acquainted with item B to determine whether it applies to the reader's situation. A clearer ordering of the language used in both items would be to delete the initial phrase in item A and incorporate the titles added by the Department to the text of the rule. The proposed subpart would then read:

> Subpart 1. **Number of contact hours required.** An applicant for registration renewal must meet the requirements for continuing education according to this subpart.
>
> A. An applicant for registration renewal as either a speech language pathologist or audiologist must provide evidence to the commissioner of a minimum of 30 contact hours of continuing education offered by an approved continuing education sponsor within the two years immediately preceding registration renewal. A minimum of 20 contact hours of continuing education must be directly related to the registrant's area of registration. Ten contact hours of continuing education may be in areas generally related to the registrant's area of registration.
>
> B. An applicant for registration renewal as both a speech language pathologist and an audiologist must attest to and document completion of a minimum of 36 contact hours of continuing education offered by an approved continuing education sponsor within the two years immediately preceding registration renewal. A minimum of 15 contact hours must be received in the area of speech language pathology and a minimum of 15 contact hours must be received in the area of audiology. Six contact hours of continuing education may be in areas generally related to the registrant's areas of registration.

The recommended modification eliminates inherently confusing language and improves readability of items A and B. The recommended change would not constitute a substantial change.

The Department received comment from many licensed educators who indicated that, should they seek registration, they would find the continuing education requirements redundant with those continuing education requirements imposed by the Board of Teaching. In its First Response to Public Comment, the Department indicated that its proposed rule was not intended to impose any additional burden on licensed educators who sought licensure, except to ensure that the contact hours received for licensure were directly related to speech language pathology. For that reason, the Department rejected the suggestion

of Mr. Krumm that all Board of Teaching continuing education contact hours be accepted for registration purposes. Instead, the Department has relabelled item C to D, and added a new item C. This new language expands what is directly related to speech language pathology (regarding registration for continuing education) to include coursework and conferences. The new language also incorporates the remaining categories of Board of Teaching continuing education into continuing education generally related to speech language pathology. The modification is needed and reasonable to prevent continuing education requirements from overlapping when licensed educators seek to maintain their registration. The change was initiated at the hearing and finalized in the post-hearing comment. The change does not constitute a substantial change.

The Department proposes to change the language of subpart 3(D) to clarify the intent of the rule. Subpart 3(D) informs continuing education sponsors that compliance with proposed rule part 4750.0400 is required to maintain the status of continuing education sponsor. The change does not alter the effect of the item. Subpart 3, as modified, is needed and reasonable. The change is not a substantial change.

Subpart 5(A) sets 30 days after the continuing education activity has been selected as the time limit for requesting approval for credit. The Administrative Law Judge inquired of the Department staff why 30 days was appropriate rather than, say, 45 days. The Department now proposes to alter the item to 45 days. The inquiry was intended to provoke consideration of the need for and reasonableness of setting any kind of a time limit for requesting approval for credit, when applicants can document that the education was in fact duly acquired. The Department's SONAR does not set forth any reasons for choosing the 30 day time limit. No commentators objected to either the 30 or 45 day limit. The 45 day limit does not appear to be necessary, but because there was no objection it is not found to be a defect in the proposed rules. The change expands the time allotted for approval of continuing education activities. It does not constitute a substantial change. It would also not be a substantial change if the Commissioner deleted the time limit entirely, which is respectfully recommended.

The Department has also modified subpart 7 to permit the Commissioner to request verification of attendance at continuing education activities from either the sponsor or the attendee. The original proposed subpart only placed the responsibility solely on the individual attendee. The change is needed and reasonable to allow independent verification of claimed attendance and provide an additional source of documentation for individuals. The change was discussed at the hearing and does not constitute a substantial change.

The continuing education requirements, as originally proposed, made no allowance for persons who could not complete the continuing education requirements due to hardship or compelling reasons. The Department proposes adding subpart 8 to proposed rule 4750.0400 to add such a waiver provision. The new subpart provides relief from a potentially harsh result, and is needed and reasonable. The change was discussed at the hearing and is not a substantial change.

Proposed Rule 4750.0500 -- Fees.

27. Proposed Rule 4750.0500 sets fees to be paid by registrants. The Department is required by Minn. Stat. § 214.13 to use only funds obtained through fees to operate the registration system. The Department has presented the budgetary figures and anticipated number of registrants used to set the fee of $80.00. SONAR, at 118. No commentator objected to the figures used by the Department. The Department is also required to recover the direct costs of establishing the registration system over a five-year period. Minn. Stat. § 214.06, subd. 1. For that reason, the Department has established a surcharge of $21.00. Again, the Department has presented the figures used to calculate that amount (SONAR, at 120) and no commentator has objected to those figures. The Department has complied with Minn. Stat. § 16A.128 and has obtained the approval of the Commissioner of Finance, through his representative, Bruce Reddemann. (SONAR, Attachment B).

A number of comments criticized the fees set by the Department as excessive and unfair. Almost all of the criticism was received from licensed educators. Their concerns should be met by the requirement for exempting licensed educators discussed at Findings 13, 14, 15, 16, and 17. Some of the commentators suggested lessening the impact of the fee requirement by extending the renewal period from one year to five years. While this measure would reduce some of the expenses of the registration system, it would not generate enough income to cover the remaining expenses. None of the commentators provided a solution to that problem. So long as the Department is required to fund the system of registration solely through fees, the amounts required for the fee and surcharge are needed and reasonable. The Department has stated that it may modify the fees in later proceedings, if the numbers of registrants or estimate of costs is not correct.

Proposed Rule 4750.0600 -- Investigation Process and Grounds for Disciplinary Action.

28. Owing to the nature of the regulation imposed by these rules, disciplinary action cannot follow the usual course of sanctions available in licensure schemes. Registration only restricts the use of a title, not the practice of the discipline or profession. Several commentators expressed a belief that this is not adequate to protect the public. As discussed in Finding 11, above, the issue of what system of regulation is appropriate, if any, lies solely with the Commissioner. The Administrative Law Judge cannot review that decision, nor can the Department impose restrictions not available (such as prohibiting unregistered persons from practicing the profession) under the law delegating the decision to the Commissioner.

Proposed subpart 3 sets forth the grounds for disciplinary action. The Administrative Law Judge noted that items F and O of that subpart are substantially identical. The Department responded to this comment by combining the essential portions of the two items into item F and deleting item O. No other comments were received on this portion of the proposed rules. The Department has shown that the grounds for disciplinary action are needed and reasonable. The change in the proposed subpart is intended to simplify the rule and does not constitute a substantial change.

The Department has proposed altering subparts 4 and 6 to eliminate confusion over the difference between registration revocation and registration suspension. The Department had erroneously included a three year limit on revocations. That language is now deleted. The Department describes the difference between revocation and suspension as the difference between a having no right to the occupational title and having a continuing right which may be regained upon meeting the appropriate condition. To clarify this difference, the Department has included a reference to a form to be provided to persons seeking reinstatement after a suspension. This form is not a part of the initial registration process. The only way to register after a revocation is by making an application for a new registration. The changes made by the Department clarify proposed subparts 4 and 6. The subparts are needed and reasonable and the change is not a substantial change.

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

CONCLUSIONS

1. That the Minnesota Department of Health gave proper notice of the hearing in this matter.

2. That the Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule, except as noted in Finding 16.

3. That the Department has documented its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii), except as noted in Finding 15.

4. That the Department 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. 2, and 14.50 (iii), except as noted in Findings 13 and 14.

5. That the additions and amendments to the proposed rules which were suggested by the Department 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. Rules pts. 1400.1000, subp. 1, and 1400.1100.

6. That the Administrative Law Judge has suggested action to correct the defects cited in Conclusions 2, 3, and 4 as noted at Finding 17.

7. That due to Conclusions 2, 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 Department from further modification of the 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 consistent with the Findings and Conclusions made above.

Dated this 6TH day of August, 1990.

HOWARD L. KAIBEL
Administrative Law Judge