6-1300-5492-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE STATE BOARD OF EDUCATION

JUL 1 1991

In the Matter of the Proposed Adoption of Rules Regarding Special Education, Minn. Rule Pts. 3525.0200 to 3525.7500

PARTIAL REPORT OF ADMINISTRATIVE LAW JUDGE

On June 5, 1991, the State Board of Education filed a Request for Bifurcated Order and Request for Five-Day Comment Period with the Administrative Law Judge. The request asks that five proposed rules be separated from a large package of proposals, and that the five be handled in an expedited fashion in order to prevent a cutoff of federal funds. A public hearing on all of the proposed rules was held on June 12 and 13, 1991, in Little Canada, Minnesota. At the start of the public hearing on June 12, it was determined that there was no objection to the Board's request for bifurcation. Therefore, this Report deals only with a small number (five) of the total number of rules proposed for adoption in this proceeding. The remainder of the rules will be dealt with in a separate report to be issued in August.

This proceeding is held pursuant to Minn. Stat. §§ 14.131 to 14.20. Its purpose is to determine whether or not the Board has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of rules, whether the proposed rules have been demonstrated to be needed and reasonable, and whether any modifications to the rules proposed by the Board after initial publication are impermissible substantial changes.

The Board was represented by Special Assistant Attorney General Bernard E. Johnson, 1100 Bremer Tower, Seventh Place and Minnesota Streets, St. Paul, Minnesota 55101. The Board's Hearing Panel was made up of Wayne A. Erickson, Manager of the Unique Learner Needs Section, and Carolyn Elliott, a Supervisor in that Section.

Approximately 100 persons attended the hearing, 91 of whom signed the hearing register. The hearing continued until all interested persons had been given an opportunity to be heard concerning the adoption of the rules. There were only a handful of comments regarding the five rules to be discussed in this Report. The vast majority of the comments, both at the hearing and by mail, dealt with other portions of the rules proposed by the Board.

The record remained open until Thursday, June 20, for the submission of written comments on these five rules. Then, an additional three business days, until June 25, were allowed for the submission of responsive comments. At the close of business on June 25, the record on these five rules closed for all purposes.

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rule(s). The agency may then adopt the rules as final, or it

may modify or withdraw the proposed rules. If the Board makes changes in the rules other than those recommended in this report, it must submit the rules with the complete hearing record to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit it to the Revisor of Statutes for a review of the form of the rule. The agency must also give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.

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

FINDINGS OF FACT

Procedural Requirements

1. On April 16, 1991, the Board filed documents with the Chief Administrative Law Judge. All of the documents related to the entire package of rules, including the five discussed in this report. Unless otherwise stated, Findings 1-4 relate to the whole package. The filed documents included:

(a) A copy of all 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 May 6, 1991, a Notice of Hearing and a copy of the proposed rules were published at 15 State Register 2374. Ex. 1B.

3. On May 7, 1991, the Board mailed the Notice of Hearing to all persons and associations who had registered their names for the purpose of receiving such notice. Ex. 4.

4. On May 17, 1991, the Board 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. The Board mailed copies of the Notice and copies of the proposed rules to all superintendents of schools and a number of advocacy organizations. Ex. 1A.
(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 1896, on February 6, 1989, 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 comment and statements on the five rules remained open through June 20, 1991. The record closed for all purposes on June 25, 1991, at the end of the response period.

Historical Background: Federal/State Interactions

6. The Individuals with Disabilities Education Act [formerly known as the Education of the Handicapped Act], 20 U.S.C. §§ 1400 - 1427, provides federal funds to assist state and local agencies in educating handicapped children. The Act confers upon handicapped children an enforceable substantive right to a free appropriate public education that includes special education and related services designed to meet the child's unique needs. The statute conditions federal assistance upon a state's compliance with substantive and procedural goals of the Act. In order to qualify for federal funds, a state, through its educational agency, must develop a State Plan to be approved by the federal secretary of education. The State Plan must assure all disabled children within the State the right to a free appropriate public education. The plan must set forth in detail a description of the programs and procedures designed to assure that the funds paid to the State will be expended in accordance with the provisions of the Act. Andrews v. Ledbetter, 880 F.2d 1287 (11th Cir. 1989) and A.A. v. Cooperman, 526 A.2d 1103 (N.J. Sup. Ct. 1987).

The Act establishes a system of "procedural safeguards" which permit parents to participate in, disagree with, and contest decisions made by public schools concerning their child's education. As the United States Supreme Court has noted, "the importance Congress attached to these procedural safeguards cannot be gainsaid . . . . Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." Board of Education v. Rowley, 458 U.S. 176, 205-06, 102 S. Ct. 3034, 73 L. Ed.2d 690 (1982).

7. On July 3, 1990, the United States Department of Education informed the Minnesota Department of Education that it had completed its initial review of the State's fiscal year 1991-93 State Plan. The federal transmittal included a relatively lengthy list of technical and substantive matters where the federal agency identified either omissions or questions regarding the State Plan's compliance with federal law or rules. Among the matters listed were the five issues contained in these proposal rules. The letter indicates that the State must take action before the federal agency can complete its grant award process.

8. On October 10, 1990, the State Department provided a number of assurances to the federal agency. Among the assurances provided were several relating to these rules, wherein the State agency agreed to proceed through the rulemaking process to amend the existing rules to conform to the federal requirements.

9. On October 26, 1990, the federal department responded to the State agency, indicating that the 1991-93 State Plan had been conditionally

approved. This conditional approval was based, in part, upon the State's assurances that it would complete a number of statutory and regulatory changes as soon as possible, but no later than July 1, 1991. Along with the letter was the State's grant award for 1991.

10. On March 8, 1991, the federal department supplied the State agency with a draft of a compliance monitoring report. This report was based upon a series of inspections, public meetings and other activities by a team of federal inspectors during the fall of 1990. Among the items noted in the draft report were a number of inconsistencies between requirements of federal rules and the State rules or policies. Among the inconsistencies noted were some of the issues raised in these five rules. The draft report contains a statement indicating that eligibility for federal funding is dependent upon compliance with federal standards.

11. On May 6, 1991, the State department responded to the federal draft report, indicating that the agency had commenced the process to adopt several new rules, which process would be completed during the summer of 1991.

12. Normally, the federal disbursement for fiscal year 1992 would take place on or about July 1, 1991. It is expected that, on that date, the federal agency would disburse approximately $37,000,000 to the State. The State agency has indicated that they have been informed that these fiscal year 1992 funds will not be forthcoming until the rule changes are enacted. That is the motivation behind the Board's request that these five rules be bifurcated from the remainder of the set, and be handled in an expedited manner.

13. The five rules at issue in this proceeding are:

Part 3525.2750
Part 3525.3300
Part 3525.3500
Part 3525.4100
Part 3525.4200

One of the Board's proposed changes affects language in each of the first three rules so they will be discussed together.

Reassessment

14. Existing Rule 3525.2750 (page 41 of the Revisor's 04/08/91 printout) currently provides that an assessment must be conducted when certain educational standards are triggered, but that an assessment must be conducted at least every three years, and may be conducted if the parent, student or other agency requests. The Board has proposed to change both the educational standards (which changes drew no adverse comment) and make it mandatory for an assessment to be conducted whenever the parent requests.

15. This proposal for mandatory assessments drew criticisms from nine commentators, but praise from two. The criticisms essentially raise three issues: that the cost (roughly $2,000 per assessment) is too great to require assessments at the whim of the parent, that it was sometimes methodologically inappropriate to reassess too often, and that parents sometimes request

reassessments for educationally irrelevant purposes (such as custody disputes incident to divorce proceedings). The solutions proposed ranged from deleting the provision entirely to placing limits upon the parental request so that it is clear that the request must be made for educationally appropriate reasons. In response, the Board checked with the federal agency, which confirmed the Board's belief that the federal rule required a reassessment at the parents' request, or the school must give parents formal notice of their right to a hearing on the school's refusal.

16. Federal Rule 34 C.F.R. § 300.534 provides as follows:

> Each state and local educational agency shall ensure:
>
> * * *
>
> (b) that an evaluation of the child, based on procedures which meet the requirements under § 300.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

17. In its July 3, 1990 initial review of the State's draft plan, the federal office noted that the existing rule left the parent's request for an evaluation to the discretion of the school, and directed the Board to conform the State rule to the federal rule.

18. In the Board's Statement of Need and Reasonableness, it was explained that this change requires a district to conduct an assessment whenever a parent requests, but if the district determines an assessment is not necessary or is not appropriate, then it may go to a hearing. This resolves a question submitted by Marlene Peltier, who asked whether a district had to reassess, or whether a district could refuse.

19. Existing Rule 3525.3500 is related to the discussion above. It currently provides that the school district must prepare and serve a notice to the parents before the district performs an assessment or reassessment, or refuses to perform an assessment or reassessment. The notice must set forth the reasons for the assessment (or refusal), how the results may be used, a description of the areas to be assessed and procedures to be used, and other information regarding it. The Board initially proposed to add a provision requiring the notice to state that if the district refuses to perform a requested assessment, then it must initiate a hearing. However, in response to comments, the Board clarified its intent in a posthearing submission by amending the proposal to indicate that if a school refused to reassess, then the school must give parents a formal notice of their right to request a hearing on the refusal.

20. Existing Rule 3525.3800 sets forth when a hearing must be held. The Board had initially proposed to amend it to add a provision requiring a hearing to be held when the district refuses to conduct a reassessment requested by a parent. In response to comments, the Board now proposes to withdraw its initial language and leave the rule unchanged.

21. These two changes drew only a few comments. Minnesota Administrators in Special Education (MACE) urged that it was unreasonable to automatically

schedule a hearing every time a parent's requests were refused, stating that many times parental requests are for purposes of custody hearings, etc., and not necessarily based on the performance or needs of the student. MACE thought a hearing following a refusal only further burdened the educational system. Donna Ford Vierow urged that the rule be changed so that the parent could have the option of requesting a hearing. She agreed that something should be added to the notice, but that it ought to be up to the parent to decide whether or not the parent wanted a hearing or not. The Crow River Special Education Cooperative (which had earlier noted that it was not always appropriate to reassess using the same instrument until a certain period of time had passed) objected to the cost of due process hearings if its refusal to reassess was based upon an inappropriately brief time since the last assessment. Sonja Kerr, a private attorney, suggested that the rule be amended to add a timeframe in which the district must initiate the hearing process.

22. 34 C.F.R. § 300.504 requires the parents to be given written notice before the agency refuses to initiate or change the identification, evaluation, or educational placement of the child. 34 C.F.R. § 300.506 provides that a parent or a public educational agency may initiate a hearing on any of the matters described in 300.504. 20 U.S.C. § 14.15(b)(2) provides, in pertinent part, as follows:

> Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall <u>have an opportunity</u> for an impartial due process hearing . . .

Among the items triggering a hearing is a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child." 1415(b)(1)(E).

23. The Administrative Law Judge concludes that the Board's posthearing proposal to add language to part 3525.2750, to reword the new language for 3525.3500 F. and to delete its proposed amendment in 3525.3800, have all been demonstrated to be needed, reasonable, and the changes are not substantial changes.

<u>Subpoenas</u>

24. Existing Rule 3525.3300 relates to the contents of notices. The agency is proposing to require that the notice contain a statement of a parent's right to compel the attendance of any person at a hearing if that person may have evidence relating to a proposed action.

25. This is related to a change proposed for existing Rule 3525.4100 (which would allow the hearing officer to subpoena any person or paper considered necessary for an adequate review of the appropriateness of a proposed action) and a change proposed for Rule 3525.4200 which would give all parties the right to compel the attendance of any person who might have evidence relating to the proposed action. Since all three of these deal with the same issue, they will be discussed together.

26. 20 U.S.C. § 1415 deals with procedural safeguards, and requires any state or local unit receiving federal funds to meet certain procedural

standards. Whenever a complaint has been received, the parents or guardians must be given an opportunity for an impartial due process hearing. One of the rights afforded to all parties by federal law in connection with such hearings is the "right to compel the attendance of witnesses". 20 U.S.C. § 1415(d)(2). Pursuant to that statutory directive, the federal agency has adopted 34 C.F.R. § 300.508, which requires that any party to a hearing must be afforded the "right to compel the attendance of witnesses". Minn. Rule pt. 3525.4200 presently provides that parties may request the attendance of witnesses. The rule goes on to provide that if the hearing officer determines that there are remaining factual disputes, a hearing may be continued for up to ten days to obtain the attendance of witnesses. In the Board's current proposal, the right to "request" the attendance of witnesses would be changed to the right to "compel" their attendance.

27. The only adverse comment received in connection with this proposed change came from the Minnesota Education Association, which urged that school districts be required to pay for time of professional staff who are compelled to attend hearings. In response, the Board noted that hearings are conducted during school hours, and teacher contracts provide that the school must pay for a substitute when a teacher attends a hearing.

28. There is no State statute which clearly empowers special education hearing officers to issue subpoenas to compel the attendance of witnesses. Instead, that power must be inferred from the federal statute and the federal rule. A close reading of the federal statute indicates that it is affording to any party the absolute right to compel the attendance of witnesses. Pursuant to the supremacy clause (United States Constitution, Article VI), a participating State could not deny, limit or restrict this power even if it wanted to. The only question is how far a participating state must go to accommodate it. One obvious method is to allow hearing officers to issue subpoenas. That is what the Board is proposing. The alternatives would be to require parties to seek relief in the federal district court, or to obtain state district court subpoenas pursuant to Rule 45.05 of the Rules of Civil Procedure. See Beck, Bakken & Muck, Minnesota Administrative Procedure, at page 126. Requiring the use of either alternative would be contrary to the spirit of the federal statute and rules, which are clearly designed to minimize the difficulties for parents in these special education due process hearings. It is concluded that the federal statute and rule are enough authority to support the Board's proposal and therefore the proposed rule may be adopted as written. To avoid any possible disputes over the validity of the subpoenas, the Board may want to seek explicit legislative authority in the next session. At the same time, the Board could ask the legislature to specify an enforcement mechanism for the subpoenas, as there is currently no mechanism specified in either federal or state statute or rule.

Exclusion of Evidence

29. Existing Rule 3525.4200 contains a provision providing that at least five days before the hearing, the parents must be provided with a brief resume of additional material allegations which were not contained in the original Notice of Hearing. The rule goes on to provide that if material allegations or information is not disclosed, but is attempted to be raised at the hearing, then the hearing officer must determine if it may be considered or not. The rule also requires a list of witnesses from any party, upon request from

another party. The Board is proposing to amend this rule by adding the following requirement:

> Any party to the hearing may prohibit the introduction of any evidence that has not been disclosed to that party at least five days before the hearing.

In other words, a rule which previously only required districts to inform parents of additional material allegations, and then directed the hearing officer to determine whether or not to admit them even if they were not disclosed, is now proposed to be amended so that any party can block the introduction of any evidence which was not disclosed. There is no requirement that the challenged evidence be the subject of a discovery demand.

30. The federal agency's July 3, 1990 review of the Minnesota State Plan noted that a plan only required a list of witnesses if the parents filed a written request, and that the hearing officer was given discretion to determine whether "new" material allegations could be introduced. The federal agency opined that both were inconsistent with 34 C.F.R. § 300.508(a)(3). In an October 10, 1990 response, the State agency assured the federal government that it had amended the plan, and would amend the rule to provide that either party would have the right to prohibit the admission of "late" evidence. The issue was also raised in the federal compliance review.

31. 34 C.F.R. § 300.508(a)(3) provides the following:

> Any party to a hearing has the right to . . . prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing . . . .

This federal rule does not contain any requirements for a discovery demand or other prehearing Order. It allows the exclusion of any undisclosed evidence from the hearing.

32. There were no adverse comments on this proposal. The due process hearings that would involve this rule are not "contested cases" within the meaning of Minn. Stat. § 14.02, and thus the rules of the Office of Administrative Hearings are not automatically applicable to them. Therefore, the preemption feature of the Office of Administrative Hearing's rules (see Minn. Stat. § 14.51 (1990)) does not apply.

33. The Administrative Law Judge finds that the agency has justified its proposal as both needed and reasonable.

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

CONCLUSIONS

1. That the Board gave proper notice of the hearing in this matter.

2. That the Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, and all other procedural requirements of law or rule.

3. That the Board 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).

4. That the Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. That the additions and amendments to the proposed rules which were suggested by the Board 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, Minn. Rule 1400.1000, subp. 1 and 1400.1100.

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

7. That a finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board 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 28th day of June, 1991.

Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded, Transcript in Process.

MEMORANDUM

The practical implementation of the last rule discussed above, relating to the exclusion of any undisclosed evidence, deserves further attention from the Board. The Board ought to consider how parties can be meaningfully informed of their obligation to disclose. This is particularly a concern for unrepresented parties, such as parents. They need meaningful notice that they run the risk of having their evidence excluded unless they disclose it in advance. Unfortunately, there is no other rule that affirmatively requires

advance disclosure, nor is there any rule that requires that parties be explicitly warned of the risk of nondisclosure. This new rule could have a serious impact upon a party's ability to present its side of the story. While the rule cannot be said to be unreasonable on its face, it could have a severe impact upon the overall fairness of the hearing process unless persons are given fair warning of it. The Board is urged to take appropriate steps to assure that parties are given meaningful notice of this requirement.

A.W.K.