69-1300-9101-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA BOARD OF EDUCATION

In the Matter of Proposed
Rules 3525.0200-3525.4400
Governing Special Education
and 3500.1000, a Rule Governing
Experimental Programs.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on November 29 and 30, 1994, at 9:00 a.m. in the Sheraton Midway Hotel, Interstate 94 and Hamline Avenue, 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 Education (Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the Department after initial publication are impermissible, substantial changes.

Bernard Johnson, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department at the hearing. Thomas Lombard, Supervisor of the Office of Compliance and Monitoring of the Minnesota Department of Education and Russell Smith, Superintendent of Schools for Cloquet, Minnesota, and a member of the Task Force on the Education of Children With Disabilities appeared on behalf of the MDE and the Task Force for Special Education. Wayne Erickson, Director of the Office of Special Education, Minnesota Department of Education, appeared on behalf of the Minnesota State Board of Education (Board).

Fifty-six persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules. The Administrative Law Judge received 36 written comments on the proposed rules during the posthearing public comment period, ending on December 19, 1994, as established at the hearing. The Minnesota Department of Education submitted a letter and attached memorandum to the Administrative Law Judge on December 27, 1994, during the five business day response submission period authorized by Minn.Stat. § 14.15, subd.1. (Posthearing Response). The Board responded to comments made during the hearing on the proposed rules. The record of this proceeding closed on December 27, 1994, except for receipt of the U.S.

Department of Education monitoring report. That report was received on January 13, 1995, and the record was closed.

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

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

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

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

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

FINDINGS OF FACT

Procedural Requirements

1. On September 13, 1994, the Board filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules;
(b) the Notice of Hearing proposed to be issued; and
(c) the Statement of Need and Reasonableness (SONAR).

2. On September 21, 1994, the Board filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes;
(b) the Order for Hearing;
(c) the Notice of Hearing proposed to be issued; and
(d) an estimate of the number of persons who would attend the hearing and how long the hearing is expected to last.

3. On October 13, 1994, 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 and the persons who appear on the list, filed on October 7, 1994, of additional persons to receive the Notice of Hearing.

4. On October 24, 1994, the Notice of Hearing and the proposed rules were published at 19 State Register 857.

5. On November 2, 1994, the Board filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed;
(b) a copy of the State Register pages containing the Notice of Hearing and its proposed rules;
(c) the names of agency personnel and witnesses called by the Board to testify at the hearing;
(d) the Board's certification that its mailing list was accurate and complete as of October 4, 1994;
(e) the Affidavit of Mailing the Notice to all persons on the Board's mailing list; and,
(f) the Affidavit of Additional Mailing.

6. No Notice of Solicitation of Outside Materials was published for these rules.

Task Force on Education for Children With Disabilities

7. The 1993 session of the Minnesota State Legislature established a 15 member task force "to review the state's special education rules established to recommend to the legislature changes that can be made to simplify the rules while ensuring that the rules meet applicable federal requirements and support the state's interest in education outcomes. See Laws of Minnesota 1993, Ch. 224, Art. 3, Sec. 35. The Task Force was made up of two parents of children with disabilities, three representatives of advocacy organizations for children with disabilities, one student with a disability, two special education teachers, one general education teacher, three school administrators, two special education directors, and one representative of higher education. Exhibit 33.

8. The Legislature directed the Task Force to make recommendations to:

- reduce paperwork and other administrative burdens on classroom teachers to increase the amount of time they spend educating students;
- improve access to effective education for children with disabilities by increased coordination of special and general education services, including staff development programs;
- assure that education for children with disabilities is outcome-based while maintaining due process protection for students and their families;
- eliminate duplication in the regulatory scheme; and
- state the outcomes of the state's special education rules.

Laws of Minnesota 1993, Ch. 224, Art. 3, Sec. 35.

9. The task force met for a total of 140 hours across 18 days during which time it gathered information regarding future projections, identified issues with the current special education rules, developed its vision of the future, and considered a variety of options as it worked to fulfill its charge. The task force convened panels of parents, teachers, and administrators and put out a call for written input regarding what should added, deleted, or changed in the special education rules to meet the legislative charge. That input provided the foundation for the recommendations contained in its report. SONAR, at 2.

10. The Task Force's report was submitted to the education committees of the Legislature on February 1, 1994. Subsequently, the Legislature adopted Laws of Minnesota 1994, Ch. 647, Art. 3, Sec. 23, quoted below. That session law directs the Board to engage in this rulemaking. The Administrative Law Judge concludes that the Board has general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking

11. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. In its Notice of Hearing, the Board asserted that the proposed rules will not impact small businesses. This statement was not challenged during the rulemaking process. The Board has met its statutory requirement to address small business considerations.

Fiscal Notice.

12. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of $100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. The proposed rules govern the expenditure of state and federal money administered by the districts. The fiscal note requirement arises when the rules would increase costs to "local public bodies." Costs incurred by the State are not costs to local public bodies. There is no evidence that the proposed modifications would shift any costs to the districts. The proposed rules will not require increased expenditures by local governmental units or school

districts in excess of $100,000 in either of the two years immediately following adoption, and thus no notice is statutorily required.

Impact on Agricultural Land.

13. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory notice requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in the state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

14. The Notice of Hearing contained an error in its statement of statutory authority for the Board to adopt the proposed rules. The correct statutory authority is found in Minnesota Statutes § 120.17 subd. 3, as stated in the SONAR. The SONAR misstates Laws of Minnesota 1994, Ch. 647, Art. 3, Sec. 23, which articulates the outcomes expected of the Board by the state legislature. SONAR, p.10-11. Apparently the SONAR was quoting from some proposed legislation. The statute actually adopted reads as follows:

> *Subd. 3(b) The state's regulatory scheme should support schools by assuring that all state special education rules adopted by the state board of education result in one or more of the following outcomes:*
>
> *(1) increased time available to teachers for educating students through direct and indirect instruction;*
>
> *(2) consistent and uniform access to effective education programs for students with disabilities throughout the state;*
>
> *(3) reduced inequalities, conflict, and court actions related to the delivery of special education instruction and services for students with disabilities;*
>
> *(4) clear expectations for service providers and for students with disabilities;*
>
> *(5) increased accountability for all individuals and agencies that provide instruction and other services to students with disabilities;*
>
> *(6) greater focus for the state and local resources dedicated to educating students with disabilities; and*
>
> *(7) clearer standards for evaluating the effectiveness of education and support services for students with disabilities.*

Laws of Minnesota 1994, Ch. 647, Art. 3, Sec. 23.

These misstatements, while unnecessarily increasing the difficulty of the public to participate, are sufficiently close in meaning and tone to the statute's language, that they constitute harmless error.

15. Portions of the SONAR addressing the definitions section of the proposed rule (3525.0200) were mislabeled. In a letter dated November 21, 1994, to the Commissioner of Eduation, Arc Minnesota requested that:

The Department of Education and the State Board of Education renotice, republish and reschedule its public hearing on proposed rules 3525.0200-3525.4400 governing special education. The published SONAR often refers to rule sections without titles, and refers to federal law as authority without citing the specific law. The SONAR also refers to sections of the rule which were not published or improperly referenced.

The Board acknowledged but rejected the request to renotice the hearing in a letter to Robert Brick of Arc Minnesota.

16. During the hearing, Barbara Case, an attorney with the Minnesota Disability Law Center (MDLC), expressed a desire for the proceeding record remain open until a Federal Monitoring Report was received. This is a report on how well each state is implementing the due process and other provisions of its special education laws. The MDE disagreed with the need to hold the record open until the Monitoring Report was received, noting that the federal report never gives directives for changing rules, which is the purpose of this hearing. After the normal close of the record and before this Report was prepared, the Department advised the Administrative Law Judge that the monitoring report had been received. The Judge asked the Department to submit the report and it was made part of the record. The monitoring report contains nothing that directly impacts the amendments proposed in this proceeding.

Task Force Recommendation for Creation of "Best Practices" Manual

17. The Task Force considered issues surrounding the elimination of "best practice" rules in furtherance of its charge to "assure that education for children with disabilities is outcome-based". It proposed that the Commissioner publish a user friendly "manual" for teachers and parents that contained two parts:

- All of the state and federal laws and rules covering special education in one place; and
- All of the "best practice" language removed from the current rule package. Exhibit 34.

18. The Legislature agreed with the Task Force idea of creating a Best Practices Manual, and enacted Laws of Minnesota 1994, Ch. 647, Art. 3, Sec. 28, which provides as follows:

(a) The commissioner of education shall develop a manual pertaining to the delivery of special education instruction and services for use by parents, school district administrators, teachers, and related service staff, and other direct service providers. The commissioner shall update the manual as necessary to ensure that the information contained in the manual is current. The manual shall contain at least the following:
(1) a concise listing of all federal and state laws, rules, and regulations that apply to special education;
(2) the rights and procedural safeguards available to students with disabilities and their parents or guardian; and

(3) best practice recommendations for school districts for policies and procedures to meet the needs of students with disabilities.

19. In response to the Legislature's action, the Board has proposed to amend the rules by removing some existing provisions from the rules and moving them into the manual. Several commentators objected to the removal of various rules sections for placement in the proposed manual. The main arguments were as follows:

- the manual would not have the effect of law, as the current rules do, effectively removing much of the legal muscle now possessed by parents
- without the force of law, districts would implement the manual inconsistently, a violation of the legislative directive for statewide consistency in special education procedures
- rules are more clear than a manual would be
- lack of clarity would result in conflicts between parents and districts, in contravention of the stated legislative objective
- the Board has a poor record of implementing procedure manuals, as demonstrated with the existing "Companion Manual for Minnesota Rule 3525.2925 - The Use of Behavior Interventions with Pupils"

20. In its Posthearing Response, the Board responded to claims that removal of the "best practice" or "how to" language from the rules would prove detrimental to the concept of providing high quality programs, and the suggestion that transferring language to a manual without the force of law would be an ineffective procedure that would provide the opportunity for schools to settle for less effective services. The Board stated:

> The manual as proposed by the Task Force and directed by the legislature will contain: (1) All of the state and federal laws and rules covering special education; and (2) All of the "best practice language removed from the rule" It is true that a manual will not have the force of law. However, significant legislative activity is directed at the transformation of the public education to a results oriented system ... The existence of "how to" rules is antithetical to such a system and in special education has contributed to a stifling, duplicative morass of paperwork and procedural requirements that decrease teacher contact time with students. The objection to the removal seems to be based on two premises: (1) That the state knows and has evidence to demonstrate that there is only one "best" way to meet a standard and achieve an outcome. (2) That schools will not provide the "best" services they can unless instructed by some higher authority on how to complete that task. The State Board and the Department reject both premises and propose to remove language as contained in the rules as submitted.

21. Relocation of language from the rules to a best practices manual removes the legal force of such language and must be justified by a demonstration of facts showing the need for and reasonableness of the relocation. While there is nothing to prohibit the publication of a manual as required by statute, the statute does not require that the rules be amended to delete

everything that would go into the manual. Both the rules and the manual can coexist. While it may generally be "antithetical" to a results oriented system, "how to" language which currently defines due process rights of persons involved with special education cannot be removed without proper justification -- and something more than merely the need for an outcome-based system. The Legislature acknowledged the necessity of a proper balance on this issue when it demanded that "the task force shall make recommendations to ... (3) assure that education for children with disabilities is outcome-based while maintaining due process protection for students and their families." Laws of Minnesota 1993, Ch. 224, Art.3, Sec.35.

22. The deletion of current rules cannot be justified simply by the fact that the deleted language will appear in a manual whose creation is dictated by the Legislature. In each case where language relocation is proposed, the Board must establish the reasonableness of the relocation consonant with the outcomes established by the Legislature.

Scope of this Report

23. The Legislature has authorized and directed the Board to adopt special education rules. However, before those rules can take effect, the Legislature has required that they be adopted pursuant to the rulemaking process in Minn. Stat. Ch. 14. The scope of the Administrative Law Judge's review is limited to determining if the Board has: (i) documented its statutory authority to take the proposed action; (ii) fulfilled all relevant, substantive and procedural requirements of law or rule; and (iii) demonstrated the need for and reasonableness of its proposed action with an affirmative presentation of facts.

Reasonableness of the Proposed Rules

24. In order for the Board to meet its burden of demonstrating reasonableness, the Board must demonstrate that the proposed rule is rationally related to the end sought to be achieved. Blocher Outdoor Advertising Co. v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). This demonstration may be either by adjudicative facts or legislative facts. Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn.1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how that evidence connects rationally with the agency's choice of action to be taken." Id. at 244. The Board must show that a reasoned determination has been made, as opposed to an arbitrary one. Id. at 246. It is not the job of the Administrative Law Judge to declare a rule to be unreasonable simply because a more reasonable alternative was proposed, or a better job of drafting might have been done. An agency is entitled to choose among possible alternative standards so long as its choice is one that a rational person could have made, and the choice does not conflict with the statute. Federal Sec. Adm'r v. Quaker Oats Co., 318 U.S. 218, 233 (1943). This Report will not attempt to select the "best rule" from among the various options proposed by the Board and the commentators. Instead, it will only determine whether the Board's rule is a reasonable one.

Portions of the Special Education Rule Package Not Addressed in this Proceeding

25. One of the commentators expressed confusion about whether a section of the current special education rule package that was not addressed in the SONAR or the text of the Board's Proposed Rule would remain intact. Exhibit 81. For the sake of clarity, all sections of the current rule package not addressed in the Board's presentation of proposed changes to the special education rules remain unchanged and in effect. Any changes to rules in the future will have to be adopted under the rulemaking procedures of Minn. Stat. Ch. 14.

UNCONTESTED PROPOSED RULE PROVISIONS

26. The Board proposes changes to Rule 3500.1000, EXPERIMENTAL AND FLEXIBLE SCHOOL YEAR PROGRAMS. This is a nonspecial education rule that provides the State Board of Education with the authority to grant experimental status to schools under certain conditions. Separate General Education and Special Education Rules now exist to describe "experimental programs." The Task Force recommended additions to the General Education rule, and subsequent repeal of the Special Education rule. The SONAR claims that the proposed changes are reasonable because they result in one inclusive rule to clarify and simplify the process through which all experimental educational programs will be approved, and, at the same time, update this rule for the specificity required for special education.

27. The Board makes a convincing argument that the proposed changes are reasonable, and, as noted, properly established its statutory authority to modify special education rules in the state. While this authority clearly encompasses the Board's power to repeal a current section of the special education rules, it does not itself sanction a relocation of the special education rule to a nonspecial education rule. Nowhere in the SONAR or its presentation did the Board document its authority to alter general education rules. The existence of such authority is not seriously questioned, and no commentators commented on the lack of such authority. The Board's statutory authority for promulgating nonspecial education rules is contained in Minn. Stat. § 121.11, sudb. 7b. While the Board's authority is limited to specifically authorized rulemaking, moving an existing rule is implied in the grant of authority in Laws of Minnesota 1994, Ch. 647, Art. 3, Sec. 23.

28. The Board proposes to repeal rule 3525.1200, ANNUAL APPLICATION FOR PROGRAMS AND BUDGET. The Board's justification for this deletion is found in the SONAR, which states that "it is reasonable to repeal this rule based on the assumption that districts want the state and federal funds that are disbursed and a mandate that they make application is unnecessary." SONAR, at 15.

29. There is more at issue in this rule than just the requirement that districts submit applications. For instance, subpart 1, while first explaining that the district shall submit an annual application -- which the SONAR addresses -- goes on to state that "the commissioner shall approve, disapprove, or modify each application and notify each applying district of the action and the estimated level of education aid to be paid when the first aid payment is made." There is a similar notification contemplated in subpart 2 of the rule, applicable to summer school

terms, which requires the commission to "approve, disapprove, or modify each application and notify the district of the action and the estimated level of special education aid within 45 days." And subpart 4 of the rule seems not to involve an annual application process at all. Rather, it states that "districts shall assure that they are in compliance with state and federal statutes and rules relating to the education of pupils."

30. The Board's desire to remove language in this rule that demands from districts what they would surely provide even without the rule is reasonable. The SONAR could have provided better justification of the deletion of the application process. Deleting the requirement that districts comply with state and federal statutes and rules regarding education adds nothing to the rule that does not already exist. No commentators objected to the deleting. Some school districts were involved in the rulemaking process. There is sufficient justification, absent objections, remove language from the rule that pertains to obligations of the Commissioner to respond to applications, and to remove language of the rule having no direct bearing on the submission of applications. Deletion of the rule has been shown to be needed and reasonable.

31. The Task Force recommended that subparts G, H, I, and J for rule 3525.1310, STATE AID FOR SPECIAL EDUCATION PERSONNEL, be maintained. The Legislature has removed these categories of personnel from eligibility for state-aid funding. The Board properly concluded that this legislative involvement makes the repeal of these sections needed and reasonable.

32. Rule 3525.1510, PERSONNEL VARIANCES, describes the two conditions necessary for the Commissioner of Education to grant a variance from Minn.Stat. § 125.04, which requires that teachers be licensed for their positions. According to the current rule, the first condition is that districts document their unsuccessful attempts to employ an appropriately licensed person. The Board's proposal removes the documentation requirement from this first condition. The Board claims that this change is "reasonable because it eliminates the need for unnecessary documentation ..." SONAR, at 17. Districts must still show that efforts were made to hire an appropriately licensed person. While Districts may choose to maintain documentation of their efforts to ensure a variance is granted, such documentation is not necessary. The rule deletion is needed and reasonable.

33. In rule 3525.3150, REQUIREMENTS FOR A HIGH SCHOOL DIPLOMA, the Board proposes two minor changes: the first removing an "age 14" requirement for an IEP team to review a student's graduation requirements, the second changing the language used to describe the span of time within which a pupil shall receive a high school diploma identical to that granted to all regular education students upon graduation or termination of special education services -- from "at" the age of 21, to "through" the age of 21.

34. The proposed changes are within the Board's rulemaking authority. The Board justifies removing the "age 14" criteria to rely solely on arrival at the ninth grade to trigger the IEP team's responsibility for considering graduation requirements. In testimony at the public hearing, the Board spokesperson stated that this proposal "*reduces* the age at which consideration must be given to the requirements for graduation." The shift will likely have a result opposite to

the desired effect. If the goal is to have graduation considerations made earlier than is sometimes now the case, this might be better achieved by maintaining the age 14 language. The proposed change is not unreasonable, but the Board should consider the result of the rule change in determining if it wants to adopt this language. Either result is needed and reasonable. Retaining the "age 14" language would not constitute a substantial change.

CONTESTED RULE PROPOSALS

Proposed Rule 3525.0200 DEFINITIONS FOR SPECIAL EDUCATION

35.. Dr. Richard S. Amado of InterBehavioral Technologies noted that several of the proposed definitions for the rule did not use "industry specific language," which could prove useful to people wanting to compare the rules to other materials on the subject. According to the commentator, creating new definitions to replace precise technical terms which are standard in the profession creates confusion and makes the rule disjointed with accepted standards of professional practice. The commentator suggested that standard industry definitions could be found in basic introductory texts addressing behavior analysis. Exhibit 82. During the public hearing the Board acknowledged that some of definitions in both the current rule package and proposed rule package do not use industry specific language, but did not suggest changes to any of the proposed definitions. Dr. Amado's point regarding the use of recognized terminology in the rules is a good one, and should be considered by the Board when it revisits the subject in subsequent rulemakings. The terminology proposed by the Board is not unreasonable, and the definitions proposed by the Board are reasonably clear and accurate. The Board has discretion to use non-technical language in its proposed definitions.

Proposed Rule 3525.0200, Subp. 1a

36. The definition appearing in this subpart defines the terms "administrator" and "administrative designee." The proposed rule strikes the final sentence of the definition appearing in the current rule, which required administrators and administrative designees to be identified and participate at each IEP meeting. The Board's presentation in the SONAR and elsewhere states that it is reasonable to drop the last sentence of the subpart because it "goes beyond the definition of a term [and] places an unrealistic demand on staff participation at IEP meetings." The Board further noted that "proposed modifications to [rule part] 3525.2900, subp.1A address this requirement for administrative participation." Exhibit 34.

37. Sharon Huotari and others contended during the public hearing and in subsequent written comments that removal of the IEP attendance requirement is improper. Several commentators claimed that "districts all too frequently override team decisions in violation of federal law. Assuring that an administrative designee is present prevents this problem." Exhibit 58, et al. Another common theme of commentators was that without the requirement of an administrator or administrative designee at an IEP meeting, time would be wasted rescheduling meetings where someone with authority can approve a procedure that involves district resources. Exhibit 61, et al.

38. In its Posthearing Response, the Board rejected suggestions to retain the final sentence of the current definition, stating that the proposed language in 3525.2900 subp.1.A(5) is "consistent with federal rule 34 CFR Section 300.344 that requires the attendance of a qualified supervisor (administrator) of special education." Posthearing Response, at 3.

39. The proposed IEP rule, part 3525.2900, subp. 1A(5) states that "a representative of the school district other than the pupil's teacher, who is qualified to provide or supervise the provision of special education services" must be present. It is not clear that this person is the administrative designee defined at proposed rule 3525.0200 subp.1(a). The language introducing subpart 1A(5) requires that the designated IEP team be responsible for "authorizing expenditures to implement the IEP." (subp.1A). Thus the requirement that a person with authority to commit district resources be part of the IEP team remains. Moreover, it is appropriate that the requirement appear in an operational rule, rather than a definition. The rule does not appear to create a difference in the attendance requirement of team members such as to meaningfully diminish parties' rights. The rule change is consistent with federal law, is needed and is reasonable.

Proposed Rule 3525.0200, Subp. 1b

40. This rule section defines the term "aids," and is necessary and reasonable, according to the Board, "because this term is used by the general public for multiple purposes. The concept of educational 'aids' applies to a specified range of resources needed by a pupil as required by the policy in 3525.0400." SONAR, at 13. Charles E. Long, on behalf of the Minnesota School Boards Association objected that the proposed rule defines aids as those items enabling a pupil "to achieve satisfactorily in the regular classroom," though federal law requires a lesser standard of "reasonably calculated to provide educational benefit." Exhibit 88. The Board's proposed rule is needed and reasonable. The language used is no more or less imprecise than the asserted federal standard. While the definition is more stringent than the federal requirement, it is not unreasonable.

Proposed Rule 3525.0200, Subp. 1f

41. This subpart defines the term "community-based," a term moved here from current rule 3525.2325 in an effort to ensure that the concept was not considered solely an early childhood issue. (From MDE testimony at hearing). According to the SONAR, "it is reasonable to define the term "community-based" in order to clarify the meaning of optional settings for early childhood programs as described in 3525.2335 Subp.2.b.3." SONAR, at 14. Two issues were raised by commentators: (1) the need for further definition of this term because schools have used a more strict interpretation of this term than is apparent from the language of the definition (Exhibit 52); and (2) the definition is not consistent with terminology used in professional literature on the subject. Exhibit 82. The proposed definition is reasonable. The Board's authority to adopt an otherwise reasonable rule is not diminished by individual school district noncompliance with the 'apparent language' of the rule. The issue of the use in these rules of nontechnical language is addressed above, in Finding 35.

Proposed Rule 3525.0200, Subp. 2c

42. This subpart defines the term "emergency." Collen Wieck, Ph.D., Executive Director of the Governor's Planning Council on Developmental Disabilities (GPCDD) accurately noted that the SONAR provided no justification for this rule. Exhibit 55. The Board noted in its Comment that the lack of mention in the SONAR should not bar the proposed definition, because the language used here is identical to that contained in current rule 3525.2925, subp.10. The definitional text is merely moved to the definitions section of the rule. Arc Minnesota and Barbara Case of the Minnesota Disability Law Center (MDLC) noted that a portion of the current language in 3525.2925, subp.10, which protected parental notification rights was not included in this definition, and not noted in the SONAR. They asked that the proposed rule change therefore be denied as unreasonable. Exhibits 57 and 85. The Board noted in its Posthearing Response that the portion of 3525.2925, subp.10 that was not definitional was moved verbatim to proposed rule 3525.2900, subp.5C. While the Board could have taken more care to explain the proposed changes in the SONAR, simply relocating the rule as part of a reorganization is reasonable, absent a conflict with newly proposed language. The Board is within its authority to make the proposed change. The rule is needed and reasonable, as proposed.

Proposed Rule 3525.0200, Subp. 6a

43. This rule defines the term "individual education plan or IEP." The proposal deletes parts A-G of the rule, which delineate what must be described in an IEP and read as follows:

> *A. the pupil's current level of performance;*
> *B. the pupil's needs determined in a team process;*
> *C. an identification of appropriate goals and objectives;*
> *D. a description of special education services designed to help the pupil accomplish the goals and objectives;*
> *E. a description of the environment in which the services will be provided;*
> *F. a schedule for periodic review; and*
> *G. criteria for evaluating the pupil's performance.*

The Board justifies this deletion on the grounds that parts A-G "are redundant with proposed changes in 3525.2900," (SONAR, at 2) and remove the non-definitional portions of the current IEP definitional section (according to Board testimony at the public hearing). GPCDD and Gloria Massey objected to the deletion of parts A-G on the grounds that it removed the requirement that a periodic review be conducted (part F). Exhibits 55 and 63. In its Posthearing Response, the Board correctly noted that the requirement for periodic IEP reviews remained intact, as part of rule 3525.3000.

44. Another commentator objected to the proposal on the grounds that the Board's SONAR incorrectly asserts that the items are redundant. The Board rejected the commentator's suggestions for changes on the grounds that they "would simply be repetitious to the IEP rule

3525.2900 and is unnecessary to defining the IEP." Posthearing Response, at 4. The commentator is correct in noting the absence of specific references deleted from this definitional subpart in proposed rule 3525.2900. According to subpart 3 of proposed 3525.2900, Content of Individual Education Program Plan, the following items are required:

> *A. for the areas identified in part 3525.2550, subpart 1. item A, where there are presenting problems, a statement of the pupil's present levels of educational performance;*
>
> *B. a statement of annual goals, including short-term instructional objectives;*
>
> *C. a statement of the specific special education and related services to be provided to the pupil and the extent that the pupil will be able to participate in regular educational programs;*
>
> *D. the projected dates for initiation of each service and the anticipated duration of services;*
>
> *E. alterations of the pupil's school day, when needed, which must be based on student needs and not administrative convenience;*
>
> *F. a transition plan, as required by subpart 4;*
>
> *G. conditional intervention procedures to be used; and*
>
> *H. appropriate evaluation procedures and schedules for determining, on at least an annual basis, whether the short-term instructional objectives are being achieved.*

While some of the language is different, the essential information required by proposed Rule 3525.2900 is the same. The three items which are not in proposed rule, a statement of the pupils' needs determined in a team process; a description of the environment in which services will be provided; and a schedule for periodic review, are covered by proposed rule 3525.2900, subpart 3, items C and H. The Board's statement that the language is merely relocated is sufficient to justify the deletion of the indicated language.

Proposed Rule 3525.0200, Subp. 9b

45. The Board proposes to delete this subpart, which defines the term "program support assistant or pupil support assistant." At the hearing the Board justified this deletion by claiming that the subpart was unnecessary, given insertion of the definition at subpart 10a. MDLC noted that the alleged replacement section for this repealed rule, part 3525.0200, subp.10a, contains only a portion of the current rule. The proposed rule removes the current requirement that the pupil's need for, and the specific responsibilities of, the pupil support assistant be described in writing on the IEP (current part 9bB). The commentator claims that "this documentation requirement provides clarity, direction, and protection to all parties." Exhibit 85. The Administrative Law Judge finds that this is more than just a paperwork requirement, it provides substantive rights to students. Deleting the definition is not reasonable unless the requirement that the IEP describe the need for the responsibilities of any such assistant is inserted elsewhere in the rule. A good place would be in part 3525.2900. If the addition to the IEP is not made, the defect can be cured by retaining subpart 9b.

Current Rule 3525.0200, Subp. 18b

46. The Board proposes to repeal the current rule, which defines the term "related service." The Board claims that it is reasonable to delete this definition because it is both outdated and redundant with the most recent federal rules defining related services. The federal rules apply with or without this citation. SONAR, at 13. Three commentators objected to the repeal of the definition for related services. The main objection centered on the notion that the Board's promise to create a manual to cross-reference state and federal requirements was inadequate justification for deleting what is required by federal law and what has been submitted to the federal agency in the State Plan. MDLC further argued that the Board's action should fail because proposed manual is not subject to public comment and yet is taking the place of, or at least augmenting, properly promulgated rules. Exhibit 85.

47. The Board responded to the commentators' objections in its Posthearing Response. The Board indicated that the definition of "related service" is recommended for repeal based on the fact that the Minnesota definition is completely reliant on the federal definition and is periodically changed in federal law and rule. Further, the Board stated:

> To address the problem, the Task Force recommended the development of a manual that contains all of the state and federal laws and rules related to special education, including related services. Development of the manual is under way as directed by the legislature and therefore the Board rejects this recommendation because it is more timely and cost-efficient to update a manual than to proceed through the rule-making process because a federal law or rule is changed.

Posthearing Response, at 5.

48. As noted in Findings 17-22, above, the claim that the manual is mandated by the Legislature is insufficient by itself to justify proposed changes that affect due process rights of parties. Here, however, only the degree of clarity of a definition is at stake. The Board acts reasonably here -- and fully within its discretion -- to delete the definition of "related service" on dual grounds that the term is defined in federal law and the term will become part of the promised best practices manual. Therefore, the deletion may be made as proposed.

Proposed Rule 3525.0400, LEAST RESTRICTIVE ENVIRONMENT

49. The Board stated that this rule must be maintained to meet the federal requirement for a state policy to provide special education services in the least restrictive environment. It asserted that the recommended changes are reasonable because they remove obsolete language (SONAR, at 14) and clarify that supplementary aids and supports are required in all placements. The Board's proposed change in the title of the rule -- replacing the word "alternative" with "environment" -- is necessary to make the language of the rule match federal language appearing at 34 CFR § 300.550-.556. (Public Hearing testimony of MDE).

50. MSBA suggested that the rule be revised further. While acknowledging that the Task Force had succeeded in moving the rule towards compliance with the federal standards, the

commentator stated that federal law does not require that disabled pupils "shall attend regular classes" in order to be in the least restrictive environment, as stated in the first sentence of Minn. R. 3525.0400. Exhibit 88. The commentator's remarks do not address the need for or reasonableness of a rule change proposed by the Board. The language which the commentator finds objectionable is already in the existing rule.

51. Carolyn Anderson, a Parent Network Specialist for the Minnesota Foundation for Better Hearing and Speech (MFBHS) and MSBA commented on the opening line of the proposed rule, which describes the threshold at which children with disabilities are to be educated with children who do not have disabilities. The current rule describes this threshold as "to the extent that there are no detrimental effects." The proposed rule changes this language to read "to the maximum extent appropriate." MSBHS wants the current language to be retained in order to protect the rights of children with hearing loss, who "easily experience 'detrimental effects' when Least Restrictive Environment is applied by persons not familiar with hearing loss and its effects on communication and interpersonal relationships." Exhibit 30. MSBA is concerned that this change will remove educators' responsibilities to address whether including the disabled student in a regular education classroom will have any detrimental effects on the classroom. Exhibit 88.

52. The Board's proposed wording change is a reasonable method of achieving compliance with federal requirements. The proposed language encompasses both of the commentators' concerns. The schools' duty has not been meaningfully changed. Schools must consider the needs of both disabled students and students who are not disabled in making educational decisions. Therefore, the Board may adopt its proposed change.

Proposed Rule 3525.0700, PARENTAL INVOLVEMENT

53. The Board proposes to remove all but the first sentence of the current rule. The deleted language describes district responsibilities to document efforts to contact and involve parents in developing pupil IEPs, informing parents of their right to bring a person of their choosing to the IEP meeting, and informing parents about "alternatives and methods of instruction as described in Minnesota Statutes, section 120.17, subdivision 2." The Board acknowledges that the rule must be maintained in some form because there is a federal requirement for a state policy which provides for parent involvement. The Board claims that "the proposed change is reasonable because it only removes best practice language and simplifies the requirement. The best practice component will be included in the forthcoming MDE manual as previously described." SONAR, at 14. At the public hearing, the Board clarified its position by stating that the proposal maintains the policy of parental right to participate in all phases of IEP development but repeals the requirement that the district document efforts to contact parents. This is an example of "best practice" language that will be covered in the manual required by the Legislature.

54. MDLC and others objected to the Board's proposal to remove existing language from the rule. The primary arguments were that: (1) the deleted sections are part of federal law, not just "best practices"; and (2) the proposed rule significantly reduces protection for students and

their families in direct contradiction to the legislative mandate that these rules "maintain due process protection for students and their families." Minn. Laws 1994, Ch. 224, Art. 3, Sec. 35, subd. 3(3)). MDLC maintains that "Notice and documentation is synonymous with due process." Exhibit 85. The Board responded at the public hearing to the commentators' first contention, stating that the proposed rule results in no diminished requirement to comply with federal law; the rule merely removes a redundant reference to federal requirements. The proper explanation of what should be provided is in the proposed best practices manual.

55. The Board did not respond directly to the contention that the deleted references will adversely affect the due process rights of students with disabilities and their parents. The proposed rule does not remove the existing protections mentioned by the language of the current rule. In proposed rule 3525.2900, subpart 1A, the state continues to require districts to designate a team of persons responsible for determining the IEP "which, at a minimum, shall include: (1) one or both parents ... (7) or other individuals at the discretion of the parent or district." Further, the district is required to document which team members attend the IEP meetings (subpart 1B) and to schedule the IEP meeting at a time and place that is mutually acceptable to the school and parents (subpart 1D). What is proposed here for removal from the current rules is the requirement that districts document their efforts to contact and involve parents in IEP meetings, to inform parents of their rights to have anyone of their choosing accompany them to the meeting, and to inform parents of their alternatives and methods of instruction according to Minnesota statutes. The question is whether these specific deletions so diminish significant parent rights as to make the Board's proposal unreasonable. The removal of the requirement that districts document their efforts to contact parents regarding IEP meetings seems not to rise to a level sufficient to make the proposal unreasonable. The language of the current and proposed IEP Rule 3525.2900 provide adequate safeguards for inviting and including parents meaningfully in the IEP process without a requirement that the district complete various paperwork.

56. The removal of the rule requirements that districts inform parents of their right to have someone accompany them to the IEP meeting and their statutory alternatives and available methods of instruction is a closer question, since the cornerstone of due process is notice of rights so that they may be asserted. While inclusion of these standards in a manual will get many districts to voluntarily comply, the manual does not have the force and effect of law. See Findings 17-22, above. While there is sufficient language in the rule to ensure that districts comply with their duty to notify parents of pending IEP meetings even if the district does not document such attempts, there is no remaining requirement for parents to be informed what their IEP meeting rights are if the Board's proposed change is allowed. The rule changes remove substantive notice rights from parents and students, not burdensome documentation requirements from districts. For this reason, the portion of the rule which deletes the requirements that districts inform parents of their right to have anyone of their choosing attend the IEP meeting, and their alternatives and available methods of instruction, is unreasonable. To cure this defect, the identified language must be retained in the rule. This retention does not constitute a substantial change.

Proposed Rule 3525.0800, RESPONSIBILITY FOR ENSURING PROVISION OF INSTRUCTION AND SERVICES

57. This is a recommendation for rewording a policy statement that is required by federal rule. The Board maintains that "the recommended changes are reasonable because they update this policy to include: a) the option for using mediation as a conflict resolution process which the legislature made available to parents and districts since the original rule was adopted; and b) address the change in age required by the federal government and enacted by the Minnesota Legislature. SONAR, at 15.

58. GPCDD and others expressed dissatisfaction with the proposed change in terminology in the rule, from "administrative designee" to "representative." Their main concern was that a district "representative" is not necessarily an individual with authority to commit the responsible district's resources. Consequently, the implementation of a student's IEP could be delayed while authority to approve recommended expenditures was obtained from the district. Exhibit 55. This same concern was addressed as part of the discussion of Proposed Rule 3525.0200, subpart 1a, at Findings 36-39, above. For the reasons stated in that discussion, the proposed changes are needed and reasonable.

Proposed Rule 3525.1100, STATE AND DISTRICT RESPONSIBILITY FOR TOTAL SPECIAL EDUCATION SYSTEM (TSES)

59. In its SONAR, the Board noted that this rule must be maintained to meet the federal requirement for an annual application from each school district. The Board asserted that the recommended change for Subpart 2D is reasonable because it adds a requirement that parents be involved in district policy and decision making, and that this effort be described in the district's annual TSES plan. The Board further claimed that Subpart 2G is reasonable because it retains the requirement from 3525.2925 for a local policy on the use of conditional procedures with pupils, and is consolidated with other policy requirements. SONAR, at 15. At the public hearing, the Board explained that changes to Subpart 1 of the rule revised a citation to federal law and indicated state level responsibility for all parts of the federal rules rather than a specific part of the rules. The proposed changes to Subpart 1 of this rule were not challenged during the hearing process and are needed and reasonable.

60. Arc Minnesota objected to subpart G of the proposed rule, stating that "the proposed rule attempts to incorporate the existing rule 3525.2925 Subp. 4, District Policy, into this section. However, it fails to include existing rule item D - district procedures for complaints and appeals from parents. The SONAR ... fails to mention that this section was deleted. This [results in] ... procedural protections that are targeted for elimination without justification." Exhibit 57. In its Posthearing Response, Board rejected any suggestion that the proposed language be changed. It noted only that the clause questioned by the commentator "was recommended for repeal because local procedures for parent complaints and appeals are typically established across programs." Posthearing Response, at 6.

The Board's response to the commentator's objection is not completely clear, but appears to rely upon the individual district's policy toward any appeal as the basis for the procedure to be followed in special education appeals. This rationale is sufficient, absent compelling reasons, to

delete a requirement that a district prepare procedures unique to special education. Since no commentator has advanced any compelling reasons for such unique procedures, the deletion of current rule 3525.2925, subpart 4D, is needed and reasonable. The Board has shown proposed rule 3525.1100, subp.2G, to be needed and reasonable.

Current Rule 3525.1320

61. The Board proposes the repeal of this rule, entitled EXPERIMENTAL PROPOSAL, on the grounds that proposed Rule 3500.1000, EXEMPTIONS FOR EXPERIMENTAL AND FLEXIBLE SCHOOL YEAR PROGRAMS, includes the unique considerations necessary for special education. "Two separate experimental program rules are unnecessary." SONAR, at 16. Jacki McCormack, Director of Programs for Arc Ramsey County, correctly noted that the language contained in subpart 2F of current rule 3525.1320 -- not included anywhere in proposed rule 3500.1000 -- requires evidence that parents whose children would be involved in an experimental program be fully informed at the team meeting and be given the opportunity to approve or disapprove placement in the experimental program. Exhibit 81. The ability to choose not to participate in an experimental program is an important current right for parents with special education children. The Board provides no specific justification for omission of this right in the proposed rule 3500.1000. Without such justification, the proposed deletion of subpart 2F has not been shown to be needed or reasonable. To cure this defect, the rights of parents to be informed of and approve or disapprove of participation must be included in the rule as adopted. Such a rule provision currently exists and would not constitute a substantial change.

Proposed Rule 3525.2350, MULTIDISABILITY TEAM TEACHING MODELS

62. This rule covers situations where a district assigns more than one teacher licensed in different areas or one or more teachers and related services staff as a team to provide instruction and related services to pupils. The Board proposes two main changes to subpart 3, Team Member Responsibility: (1) removal of a requirement for weekly consultations, and (2) replacing a requirement that IEP documentation be kept to record the frequency and amount of time spent on specific consultation and indirect services with language that the IEP team will determine such frequency and duration. The Board also proposes the deletion of subpart 5, Case Loads. The Board asserts that the recommended change in subpart 3 is reasonable because local districts would not be not forced to provide weekly consultation and direct services as a minimum since there are cases where less frequency is appropriate. The Board also asserts that this change clarifies that frequency is chosen by the IEP team. The Board asserts that it is reasonable to delete Subpart 5 because this provision is essentially obsolete due to legislative action that removed caseload limits (SONAR, at 19) and is needed to provide added flexibility for districts to implement this rule (from Board testimony at the public hearing).

63. Arc Ramsey County and MDLC objected to the proposed changes to subpart 3 of the rule. They both asserted that the Board is proposing deletion of a necessary safeguard by removing the requirement that the frequency and amount of time for consultation and indirect services to be included in the pupil's IEP. Exhibit 81 and Exhibit 85. MDLC also objected to the proposed removal of the requirement for weekly consultation. Exhibit 85. The Board's

proposed changes to this rule are reasonable. It is reasonable for the Board to propose that while consultations are required, weekly consultations are not. And the proposed elimination of a documentation requirement does not materially diminish important -- and continued -- rights of parties to have the IEP team determine the timing and duration of consultation.

Proposed Rule 3525.2415, ASSISTANT DIRECTORS AND OTHER SUPERVISORY PERSONNEL

64. This rule describes personnel that a district may receive reimbursement for when the personnel have provided special education services. The Board justifies changes to the rule by stating that they simply include assistant directors as one of the types of supervisory personnel. According to the Board, it is reasonable to add assistant directors to this rule because of the repeal of 3525.2410, which contributes to the objective of simplifying the total rule package without reducing district flexibility or parent and student rights. SONAR, at 20. GPCDD identified an inconsistency that allowed for the payment of aids for staff development in this rule but not in 3525.1310, STATE AID FOR SPECIAL EDUCATION PERSONNEL. Exhibit 55. In its Comment, the Board agreed that the proposed language was in error. The Legislature explicitly directed the removal of authority to reimburse districts for the activities cited in the proposed rule. Whether or not the language in the rule is changed, the MDE would be unable to pay state aids for those activities. The Board attached a Memorandum to this letter, asking the Administrative Law Judge for a recommendation regarding how to correct this error.

65. The ALJ suggests that the Board delete the subpart to ensure that districts are not misled as to the lack of state aid funding for these positions. The deletion is needed and reasonable to conform to the legislative mandate and not a substantial change.

Proposed Rule 3525.2550, CONDUCT BEFORE ASSESSMENT

66. The subject of assessments is addressed primarily in two rules: 3525.2550 and 3525.2750. Rule 3525.2550 currently requires that certain assessments and interventions be done and documented before a student is referred for special education. Results of an assessment are summarized in an assessment summary report. Assessment data is used to develop the student's IEP. The Board provides a detailed explanation of the changes proposed for this rule. It argues that the proposed changes are reasonable because they retain the rights of parents and pupils while dropping "how-to" requirements and duplicative documentation. SONAR, at 20-21. In testimony at the public hearing, the Board staff acknowledged that the major change proposed for this rule is the elimination of the documentation requirement for referral reviews. This documentation is unnecessary, according to the Board, because of documentation accumulated during other stages of the process. The Board contended that the proposed modifications retain sufficient documentation to keep parents duly informed and provide documentation for needed compliance reviews.

67. MDLC and Joyce Lang, Executive Director of Learning Disabilities of Minnesota objected to the Board's proposal. They argued that the proposed change reduces protection for students and their families in contradiction of the Legislature's directive to the Task Force. The

commentators claimed that "it is reasonable to require that regular educators document their efforts at interventions including the strategies and outcomes of the interventions. The proposed rule removes the requirement for this documentation ... Failing to keep data on a child is equivalent to denying parents access to information." Exhibit 85 and Exhibit 89.

68. The Board's proposed elimination of certain pre-assessment documentation requirements is reasonable, given that rights of students and parents are protected throughout the assessment process. As noted in the SONAR, districts are still required, among other things, to: review the result of pre-referral interventions (3525.2550, subp.1B); review other screening and referral data (3525.2550, subp.1A); develop and assessment plan for areas of suspected problems (3525.2550, subp.2A); notify parents before performing the assessment (3525.2650); and prepare an assessment summary report (3525.2750, subp.3). The Board's proposal is consistent with its goals of reducing documentation while preserving rights. The rule is needed and reasonable as proposed.

Proposed Rule 3525.2750, EDUCATIONAL ASSESSMENT

69. The modification of the special education rule in part 3525.2750 includes mostly minor changes, such as editorial corrections for sequencing items, addition of rule citations, insertion of assessment-related provisions from other locations and updated provisions. SONAR, at 21. The SONAR discusses the reasonableness of several specific changes proposed for the rules. According to testimony by Board staff at the public hearing, the proposed changes uphold the importance of the assessment, without diminishing the parental role or necessary procedural safeguards. At the same time, the modifications retain sufficient documentation to keep parents duly informed and provide documentation for needed compliance reviews.

70. Current subpart 2B of rule 3525.2750 provides that an assessment shall "include a review of the person's functioning in current and anticipated environments. The environmental review must address classroom performance based on the specific instructional strategies used in the classroom, performance in other daily routine environments, and information reported by parents, classroom teachers, and others involved regularly with the person. Specific instructional strategies include curriculum and curriculum modifications, classroom grouping patterns, and supports such as adaptive devices, materials and equipment available, and staff members." MDLC, Learning Disabilities of Minnesota, and Virginia Richardson of the Parent Advocacy Coalition for Educational Rights (PACER) objected to the proposed deletion of this subpart 2B. Exhibits 53, 85 and 89. They claimed that it provides information that should be required before a student is removed from regular education.

71. In its Comment, the Board rejected the commentators' request that the language in current subpart 2B be retained. The Board stated that use of the assessment and IEP planning activities of M.S.126.237, ALTERNATE INSTRUCTION REQUIRED, and the language in subp.1 of this rule which requires assessment of the student's "present level of performance," is equivalent to an assessment of the student's performance in regular and special education settings. The statute noted reads:

126.237. Alternate instruction required

Before a pupil is referred for a special education assessment, the district must conduct and document at least two instructional strategies, alternatives, or interventions while the pupil is in the regular classroom. The pupil's teacher must provide the documentation. A special education assessment team may waive this requirement when they determine the pupil's need for the assessment is urgent. This section may not be used to deny a pupil's right to a special education assessment.

The Board asserts that the additional assessments called for in the rule have been 'difficult to operationalize' and that removing them will simplify the rule. While simplification cannot come at the expense of a student's right to an education, protections must be reasonable and not unduly burdensome. The Board is entitled to rely upon the experience of districts in conducting assessments and adjust the rules accordingly. Where districts have been unable to assess a student's anticipated performance in a new environment, requiring them to meet such a requirement is futile. Districts must assess students to ensure appropriate services are being offered. That obligation does not change with the deletion of subpart 2B of rule 3525.2750. Removing the requirement to assess students in anticipated environments eliminates a task that districts have been unable to perform. No statutory protections for students have been reduced or eliminated by this change. The changes to the rule are needed and reasonable.

72. Arc Ramsey County objected to the proposed removal of language in subpart 3 of the rule, claiming that:

> This documentation provides vital information to parents, assures parents that testing was done in a fair manner and that arbitrary assumptions are not being made in regard to the child based on disability or personal characteristics ... The assessment team summary report provides parents with information on how the child is doing in a comprehensive manner, with one document providing a total picture of the child. With the proposed changes, parents will be left to rely on a variety of reports from a variety of individuals that look at separate areas of the child's functioning.

Exhibit 81.

The Board's proposal would eliminate requirements to document the reason for referral, a summary of instruments and procedures, and a review of the person's functioning in current and anticipated environments. Retained in this subpart are requirements for documenting results and interpretation of the assessment, the person's present level of performance in the areas assessed, and the team's judgments regarding eligibility for services. In a fashion similar to that noted in the discussion of subpart 2B, the Board is within its allowed discretion to make the proposed changes. The documentation requirements which remain are sufficiently protective of parties' rights to make the changes reasonable for adoption by the Board.

Proposed Rule 3525.2900, DEVELOPMENT AND CONTENT OF INDIVIDUAL EDUCATION PROGRAM PLAN

73. At the core of special education, as it is provided to students, is the IEP. The IEP tailors the education services provided to the individual student's need. Proposed rule 3525.2900 sets out what goes into an IEP and how it should be developed. This rule generated many comments by members of the public. According to the testimony of Board staff at the hearing, the major requirements for IEPs are driven by federal law, though states are allowed to make their rules stricter, which Minnesota did some years ago. Dr. Lombard stated:

> If the proposed changes in 3525.2900 are upheld, the six basic components of a student's IEP would be identical to federal rules. In addition, two components unique to Minnesota will be added: (1) when needed, alterations of the student's school day (formerly submitted to Commissioner for approval); (2) when needed, a plan for the use of conditional procedures.

Exhibit 37.

74. In its SONAR, the Board noted that this rule is another example of extensive "how-to" language limiting the flexibility of local district staff and creating minimum requirements not needed in all cases. The Board recommends a rule package that sets standards for what must be done by districts and must be included in the IEP; however, merely promising or recommended practices for actually meeting these standards are more appropriately described in a separate manual that can be more frequently and easily updated than subsequent rule revisions. SONAR, at 22. The Board includes in its SONAR a subpart by subpart explanation of why proposed changes are reasonable.

75. One commentator at the public hearing noted that there is a mistake in subpart 5C of 3525.2900, where it says that "districts may use regulated procedures in emergencies," (emphasis added); the subpart should instead say conditional procedures. The language providing districts the authority to implement regulated procedures on an emergency basis until the IEP team meets would permit the use of procedures which are prohibited under Minnesota law, such as corporal punishment. The Board agreed during the hearing and in its Posthearing Response recommended a change should be made, from "regulated" procedures to "conditional" procedures. Subpart 5C, as modified, is needed and reasonable. The change is not a substantial change.

76. There were several comments at the public hearing and in post-hearing submissions regarding the proposed elimination of current subparts 3A-F, Content of Individual Educational Program Plan. Many commentators objected to the removal of the concept of required "sequencing" within the rule. These objections were based primarily on the grounds that removal of the sequencing aspect of the rule would reduce its clarity, invite noncompliance and inconsistency among districts, produce no measurable reduction in paperwork, and would be confusing when coupled with the "how to" language in the manual to be produced later.

77. The Board set out in its SONAR the reasons for adopting the changes to the IEP development and content rule. The changes are justified as follows:

- Subparts 3A-E have been rewritten to drop extensive "how to" language, leaving the basic requirements in tact for documenting present level of performance, instructional goals and objectives, etc. These changes substantially simplify the IEP rule, provide more flexibility for districts, and make this rule more consistent with federal requirements.
- [Proposed] Subpart 3F reduces paperwork by using the IEP process to replace a separate application to the Commissioner in 3525.2300. Also, the language clarifies that alterations of a pupil's school day must be based on his/her needs.
- [Proposed] Subpart 3G reduces paperwork by using the IEP process to incorporate the pupil's transition plan.
- [Proposed] Subpart 3H reduces paperwork by using the IEP process instead of a separate behavior intervention plan when conditional intervention procedures are under consideration for a pupil. This change, along with the repeal of 3525.2925, would also eliminate duplication of effort for a separate team and review committee currently, thus reducing the number of meetings and paperwork demands on parents and district staff without sacrificing procedural safeguards.

SONAR, at 23.

The language proposed for subparts 3A-E closely follows the federal IEP language. See 34 C.F.R § 300.346(a).

78. The sequencing portions of the rule were developed by the Board and implemented in 1991 to assure compliance with federal requirements, in response to the federal Department of Education's 1991 monitoring report and other documents. When these provisions were put in place in 1991, the Board stated that they were needed because "IEP related problems are central to many monitoring citations, formal complaints and due process hearings which have occurred in Minnesota. Implementation of the proposed rule will greatly reduce the frequency of these problems and the potential litigation which accompanies unresolved due process challenges." 1991 SONAR, at 22. In addition, the Board stated that "the sequence assures that assessment results identify an individual's current level of performance and the pupils' instructional needs, and that these instructional needs are then translated into appropriate goals and short-term instructional objectives that are measurable. There has been variability among Minnesota districts in the quality and adequacy of the documentation of this sequence of program planning, and this will assure comparability and minimum acceptable standards among districts. It is reasonable for a parent to expect comparability among districts because many pupils transfer among districts ..." 1991 SONAR, at 24.

79. The Board rejected the commentators' objections to sequencing. The Board asserted that:

> the sequencing of activities in the development of an IEP is driven by two facts:
>
> What does one need to know to carry out the next step toward the ultimate goal of a complete and agreed upon IEP, and
>
> What is the sequence of questions that must be answered on the IEP form.
>
> The fact that the word "sequence" is included or omitted from the rule has little impact on the IEP team's operating procedures. The Task Force did not recommend this change based on the belief that it would reduce paperwork. Rather the Task Force made this recommendation based on the following:
>
> - The word 'sequence" is a direction relating to "how" something must be done rather [than] what must be done or the expected performance level.
> - The sequence of a series of activities to achieve a desired end result logically follows a path based on completion of prerequisites to the next step.
> - The fact that virtually every school district uses the State's recommended IEP form has the result that staff must follow the prescribed sequence to complete the form.
> - If a district chooses to use a different form and sequence that results in an IEP that meets all content and procedural requirements, the district should have the flexibility to do so.

Posthearing Response, at 8-9.

80. The Board's stated goal of having IEP rules that are consistent with the language of federal laws yet simpler than the rules currently drafted is certainly achieved by the proposed changes, as is its goal to provide flexibility to districts. While the difficulties noted in 1991 are likely to recur, this does not render the proposed rule unreasonable. School districts are responsible for following the rules adopted and should follow the manual produced to avoid noncompliance. Future noncompliance can be addressed as needed. Flexibility cannot be achieved without incurring the risk of error. But this risk, rather than certainty, of increased noncompliance is consistent with the Legislature's mandate to change the special education rules and insufficient to support a finding of a defect. The Board has discretion to delete and replace current subparts 3A-F as proposed.

81. Proposed subpart 4, Transition Planning, states that "By grade nine or age 14, whichever comes first, the IEP plan shall address the pupil's needs for transition from secondary services to post-secondary education and training, employment, and community living." When questioned about this rule at the public hearing, the Board staff admitted that the "age 14" language is a mistake; only the "grade 9" threshold is desired, because it is at this point in school that districts typically have the tools in place to perform proper assessments. This is not always true when a student reaches "age 14" -- which may occur in grade 7. The Board did not confirm this language change in any writing subsequent to the public hearing. With the deletion of "age

14" from the rule, the subpart is needed and reasonable. However, without the deletion, the subpart is unreasonable. The change is not a substantial change.

82. Several commentators objected to the proposed language for subpart 5B of this rule. This proposal provides that "all behavioral interventions must be consistent with the district's discipline policy. Continued and repeated use of any element of a district's discipline policy must be reviewed in the development of the individual pupil's IEP." The Board justified subpart 5 as a whole, stating that it:

> moves provisions regarding the use of conditional procedures from 3525.2925 to consolidate IEP requirements in one location in the rule package. Subpart 5 retains the intention of the corresponding provisions in 3525.2925, but with much simpler, straightforward language that establishes the basic requirements. The reasonableness of transferring "how-to" language to a manual which describes promising or recommended practices has been previously cited.

SONAR, at 23-24.

83. PACER; Marilynn Kaplan, President of the Minnesota Chapter of the Tourette Syndrome Association, Inc.; and Jerry L. Holman stated that the proposed language for subpart 5B should be removed because it is in potential conflict with federal requirements (Section 504 of the Rehabilitation Act of 1973, and the IDEA) that protect a student from punishment for behavior that is related to their disability. Exhibits 53, 69, and 73. The Board disagrees with the commentators' interpretation of the behavioral intervention rule. The Board asserted that the rule only applies to behavior interventions outside of those specified in the IEP. By operation of other rules, unregulated behavior interventions (e.g., use of corrective feedback or sending the student to a counselor or principal) must be consistent with the district's discipline policy.

84. To render the rule consistent with the Board staff's explanation, the rule language "all behavioral interventions" must be modified to read "all behavioral interventions not covered in the IEP." This change renders the rule part reasonable, given the Board staff's explanation as to why the rule is necessary. The modification is not a substantial change.

Current Rule 3525.2925

85. The Board proposes to repeal current rule 3525.2925, USE OF BEHAVIORAL INTERVENTIONS WITH PUPILS. According to testimony presented at the public hearing by a member of the Task Force, this rule generated the most public comment for the Task Force, and the response was "overwhelmingly negative." Passed in 1992, this rule was never widely implemented despite the need for regulated interventions. The Task Force sought to maintain the useful provisions of this rule by clarifying confusing definitions and transferring procedural requirements into the IEP process. These changes eliminate the original rule's duplicate system for paperwork, team meetings, notices, etc., while retaining the major components. Exhibit 37.

86. The current rule was developed after several years of discussion and study by a cross section of individuals representing various disability fields. The rule was intended to stop documented abuse that was occurring to special education students in Minnesota's schools. It is designed to provide guidance on how school personnel can effectively deal with students who display challenging behaviors. Exhibit 57.

87. The Board asserts that deletion of this rule is reasonable because in its present form it is confusing and burdensome, though its basic tenets are needed. The Board stated:

> It is reasonable to repeal this rule because recommended revisions throughout the rule package will retain the basic requirements and greatly simplify them by (1) transferring the major parts of 3525.2925 to other rules; and (2) referring "how to" language, which is extensive in 3525.2925, to a manual which describes promising or recommended practices.

SONAR, at 24.

The Board maintains that by incorporating the planning and documentation of the IEP process for the use of behavioral interventions, it is no longer necessary to have a separate written plan and local review committee as currently mandated by 3525.2925. Local review committees are proposed for incorporation in the manual to be prepared by the Board. SONAR, at 24.

88. The plan to delete this rule results in the following changes to the special education rule package:

- Definitions are moved to 3525.0200
- Assessment requirements are moved to 3525.2750
- Written program requirements are moved to the IEP rule 3525.2900
- Requirements for a local policy are moved to 3525.1100
- A state policy statement regarding the use of positive interventions is moved to 3525.0850

89. MSBA expressed satisfaction with the proposal to incorporate certain behavioral intervention rule elements in the IEP rule. They noted that both documents are developed through team processes which usually involve the same team members. "Combining the two documents should result in fewer required meetings, while providing an efficient process for IEP and BIP development." Exhibit 88.

90. Several other commentators objected to the elimination of the current rule. The primary arguments advanced by these commentators are as follows (taken from Exhibit 57, et.al.):

- The rule is only two years old and should be kept in place longer before changes are made; the MDE did not provide the planned and essential staff development activities necessary for districts to implement the rule. Any confusion regarding the rule is related to a lack of commitment to follow through with training, rather than lack of clarity of the rule itself.
- There is no evidence that the current rule isn't working properly, or that it is "confusing and burdensome," as alleged in the SONAR.
- The current rule was designed to remain together; breaking it apart would damage the clarity and flexibility of the rule, even if none of the relocated language was changed.
- The proposed changes remove parents' rights to unilaterally stop the use of a conditional behavior intervention after it had been agreed upon and written into an IEP.
- The proposed repeal of the "informed consent" portion of the rule (subpart 9) places parents in an unfair position regarding their understanding of what behavior interventions the school was proposing to implement.

91. The Board responded to these objections in its Posthearing Response. The Board acknowledged that:

> the current rule is very new and that the MDE did not provide all of the staff development that was originally planned. However, it is also true that the Task Force heard significant testimony that the rule was unmanageable with or without staff development, and caused great frustration. (See TASK FORCE ON EDUCATION FOR CHILDREN WITH DISABILITIES FINAL REPORT, JANUARY 1993 p.11). The Task Force reacted to the testimony with the recommendations for change incorporated in this rule proposal.

Posthearing Response, at 9.

The Board rejected commentators' suggestions that the Behavior Intervention and IEP rules be kept separate. It noted that one of the specific recommendations given to the Task Force was that this rule should become a part of the IEP process.

> Since the IEP addresses all areas of need, it seems logical that the IEP process address behavioral needs in the same manner and with the same team as address all other areas of student need. Behavior is inextricably a part of all areas of learning and cannot be separated or ignored when planning for a student's academic, physical, vocational, communication, and transition needs.

Posthearing Response, at 9.

92. The Board acknowledged commentators' claims that the proposal removes the parent's right to unilaterally withdraw permission to implement a behavior intervention written into an approved IEP. The Board contends that:

> the entire concept behind the state and federal laws governing special education is to provide a balance between school and parent rights in the decision making process used to define an appropriate education for each student with a disability. Both have the right to suggest inclusion of a specific activity or placement in a student's IEP. Both have the right to request assessments. Both have the right to agree to or reject a proposal of the other. Both have the right to request mediation to resolve disputes. Both have the right to request an impartial due process hearing to resolve disputes. Both have the right to appeal decisions to state or federal court to resolve disputes. It is the Board's belief that the inclusion of this provision in the original rule was an error that will eventually be deemed to be in non-compliance with federal laws and rules by the Office of Special Education Programs in the U.S. Department of Education.

Posthearing Response, at 10.

93. In its Posthearing Response, the Board acknowledged that the explicit informed consent provisions of the Behavior Intervention Rule are recommended for repeal. This subpart requires parental consent specifically for behavior intervention plans. It also requires districts to notify parents of their rights. Furthermore, it gives parents the right to withdraw consent for a behavior intervention plan at any time, and upon doing so, requires the district to stop the procedure immediately. Without a separate informed consent provision, withdrawing consent becomes part of the IEP process. Thus, a parent having consented to the use of certain, sometimes fairly extreme procedures cannot terminate the use of such procedures by withdrawing consent. Rather, a due process hearing would be held and the use of those procedures would be assessed. According to the Board's Posthearing Response:

> the Board agrees with the Task Force's position that informed consent is the basis for both federal and state laws governing all parent involvement in their child's special education program. See Board rules 3525.3200, .3300, and .3600 which require explicit parent notice. See 34 CFR Sections 300.500-515 which specify due process procedures including consent issues. The Board believes that explicit informed consent provisions for behavior interventions is duplicative and unnecessary and therefore rejects the proposal to maintain a separate informed consent provision for behavioral interventions.

Posthearing Response, at 10.

94. The consent requirements in 34 C.F.R. §§ 300.500-515 only apply to a preplacement evaluation and the initial placement of a child in special education programs. States are expressly authorized to adopt additional consent requirements. 34 C.F.R. § 300.504(c). The only limitation on the consent is that the refusal to consent cannot interfere with the child receiving a free appropriate education. Id. The note explaining this regulation states:

> If a State adopts a consent requirement in addition to those described in paragraph (b) of this section and consent is refused, paragraph (d) of this section requires that the public agency must nevertheless provide the services and activities that are not in dispute. For example, if a State requires parental consent to the provision of all services in an IEP and

> the parent refuses to consent to physical therapy services included in the IEP, the agency is not relieved of its obligation to implement those portions of the IEP to which the parent consents.

34 C.F.R. § 300.504, Note 3.

95. The Board's contention that the consent provision for behavioral interventions is noncompliant with federal regulation is not supported by the language of the federal rule. There was no mention of the consent provision in the monitoring report just completed by the U.S. Department of Education. The federal regulations contemplate states granting greater consent rights to parents than are required by the federal rule. The Board is removing a very significant right from parents. The SONAR does not explain how inclusion of the behavior intervention plan in the IEP changes the parents' interest in controlling the use of behavioral procedures. The Board has not presented a sufficient justification to eliminate this important protection. The Board's proposal to delete this protection, being unjustified, is therefore unreasonable. To cure this defect, the language expressing the parent's right to withdraw consent to behavioral interventions apart from the discipline policy of the school must be retained.

96. The Board's proposal to delete current rule 3525.2925, subp.7, eliminates the procedural protection of an Independent Committee Review available to parents. According to the language of the current rule:

> before implementing a behavioral intervention plan as part of the pupil's IEP or in any review or amendment of the behavior intervention plan, the parent must be informed of the right to request an independent committee review. The independent committee would review the assessment summary report, the behavioral intervention plan, and all pertinent information and provide recommendations to the district and the parents from that review.

Minn. Rule 3525.2925, subp. 7.

97. The elimination of an additional committee review is not a fundamental due process protection. The IEP is subject to reveiw by professionals and a due process appeal. Including the suggestion in a "best practices" manual is adequate to ensure that districts are aware of the desireability of having independent review of behavioral interventions, particularly where aversive and deprivation procedures are being considered. The deletion of the independent reveiw committee provision is needed and reasonable.

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

CONCLUSIONS

1. The Minnesota Department of Education and the Board (Board) gave proper notice of this rulemaking hearing.

2. The Board has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. 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), except as noted at Findings 45, 56, 61, 84 and 95.

5. 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, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusion 4.

7. Due to Conclusions 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn.Stat. s 14.15, subd. 3.

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

9. 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 proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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