

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EDUCATION**

In the Matter of the Proposed
Amendment to Rules Governing
Special Education, Minnesota Rules
Chapter 3525, and the Repeal of
Minnesota Rules 3525.2435 and
3525.2710

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

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Administrative Law Judge Barbara L. Neilson conducted a public hearing concerning rules proposed by the Minnesota Department of Education governing special education on December 3, 2007, commencing at 10:00 a.m. at the Minnesota Department of Education, 1500 Highway 36 West, Roseville, Minnesota. The hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act. The Legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in their being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

The members of the Department's hearing panel were Kathryn Olson, Rule Coordinator; Amy Roberts, Director of Compliance and Assistance; Barbara Troolin, Director of Special Education Policy; Chas Anderson, Deputy Commissioner; Barbara Case, Due Process Supervisor; Vicki Weinberg, Specific Learning Disability Specialist; Sage Van Voohris, Rulemaking Coordinator; and Kerstin Forsythe, Rulemaking Coordinator, all of whom are employed by MDE. Approximately 150 members of the public attended the hearing in Roseville on December 3.

The Department and the Administrative Law Judge received written comments on the proposed rules prior to the hearing. At the hearing, the initial deadline for filing written comment was set at twenty calendar days (December 24, 2007), to allow interested persons and the MDE an opportunity to submit written comments. A five-day rebuttal period ending on January 2, 2008, was scheduled at the time of the hearing to allow interested persons and the Department the opportunity to file a written response to the comments received during the initial period. Because the Department filed only a two-page letter (addressing only the peace officer issue) during the twenty-day period¹ and did not file an extensive post-hearing submission discussing other issues involved in the proposed rules until relatively late in the reply period,² the Administrative Law Judge extended the rebuttal period to January 11, 2008. A large number of written comments were received during the rulemaking process. To aid the public in participating in this matter, comments were posted on the Office of Administrative Hearings' website as they were received. The hearing record closed for all purposes on January 11, 2008.³

NOTICE

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

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, he will advise the Department of actions that will correct the defects, and the Department may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the Department may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The Department may not adopt the rules until it has received and considered the advice of the Commission. However, the Department is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Department's submission.

¹ See Department's Dec. 18, 2007, Submission.

² See Department's Dec. 31, 2007, Submission.

³ Pursuant to Minn. Stat. § 14.15, subd. 2, and Minn. R. 1400.2240, subp. 1, the Chief Administrative Law Judge has granted an extension for the preparation of this Report.

If the Department elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If the Department makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

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

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

FINDINGS OF FACT

I. Background and Nature of the Proposed Rules

1. Minnesota provides special education services for eligible children from birth to age 21.⁴ The rules adopted by the Department of Education (MDE or the Department) governing the provision of early intervention services and special education services are set forth in Minnesota Rules Chapter 3525. The federal law that governs the provision of such services is the Individuals with Disabilities Education Act (IDEA).⁵

2. In 2006, the federal regulations of the U.S. Department of Education implementing the IDEA were amended.⁶ The federal amendments conflicted with some of Minnesota's existing rules. MDE has also been directed by state legislation to consolidate its behavioral intervention rules and to revise its care and treatment rule to conform with recent changes to the Minnesota statute. Therefore, MDE is proposing amendments to Minnesota Rules, Chapter 3525, to comply with federal law and to preserve federal special education funding.⁷

3. A public stakeholder group met several times between March 12, 2007, and May 1, 2007, to discuss the proposed rules and comments were

⁴ Minn. Stat. Chapter 125A.

⁵ 20 U.S.C. § 1400 et seq.

⁶ See 34 C.F.R. Part 300.

⁷ SONAR at 1.

received from interested members of the community. A second workgroup met several times during the spring of 2007 and developed an initial draft of changes to Minnesota Rule 3525.1341, relating to specific learning disabilities evaluation and identification. In addition to these workgroups, the Department presented the proposed rules to the Special Education Advisory Panel (SEAP), a federally-mandated advisory panel appointed by the Commissioner of Education. SEAP members discussed the rules at their 2007 meetings. Throughout the rule drafting process, updated provisional drafts of the proposed rules were posted to the Department's website, and comments were received from interested parties.⁸

4. In this rulemaking proceeding, the Department has proposed numerous amendments throughout Minnesota Statutes Chapter 3525. The rules to which the Department is proposing significant change include: 1) the behavioral intervention rules; 2) the specific learning disability evaluation and identification rule; 3) the care and treatment rule; and 4) the rules relating to evaluation, re-evaluation, and development of individualized education plans. The Department also seeks to add a new rule relating to criteria to be used at the time children are re-evaluated for continuing eligibility for special education and related services. In addition, the Department proposes to repeal Minnesota Rules parts 3525.2435 (effort to locate parent) and 3525.2710 (evaluations and reevaluations) as well as portions of existing rules 3525.0210, 3525.0800, 3525.2810, 3525.2900, and 3525.3900.

II. Compliance with Procedural Rulemaking Requirements

5. On April 23, 2007, the Department published in the State Register a Request for Comments regarding its intention to amend and appeal the rules governing the provision of special education services to children with disabilities. The notice indicated that MDE had prepared a provisional draft of the possible rule amendments and repealed rules. A copy of the provisional draft was made available on MDE's website.⁹

6. On October 3, 2007, MDE filed copies of the proposed Notice of Hearing, the proposed rules, and a draft Statement of Need and Reasonableness (SONAR) with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2080, subp. 5. On the same date, MDE also filed a proposed additional notice plan for its Notice of Hearing and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter dated October 5, 2007, the Administrative Law Judge approved the additional notice plan.

7. As required by Minn. Stat. § 14.131, the Department asked the Commissioner of Finance to evaluate the fiscal impact and benefit of the

⁸ SONAR at 1; see also Letter from Kim Riesgraf, Linda Bonney, Pam Taylor, and David Olson (Nov. 5, 2007).

⁹ 31 State Reg. 1443 (April 23, 2007); MDE Ex. 1.

proposed rules on local units of government. The Department of Finance provided comments in a memorandum dated October 9, 2007.¹⁰

8. On October 10, 2007, MDE 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.¹¹ The Notice identified the date and location for the hearing in this matter. The Notice also announced that the hearing would continue until all interested persons had been heard, or additional hearing dates added, if needed.

9. At the hearing on December 3, 2007, MDE filed copies of the following documents as required by Minn. R. 1400.2220:

- a. MDE's Request for Comments as published in the *State Register* on April 23, 2007;¹²
- b. the proposed rules dated October 3, 2007, including the Revisor's approval;¹³
- c. the Agency's Statement of Need and Reasonableness (SONAR);¹⁴
- d. the certification that MDE mailed a copy of the SONAR to the Legislative Reference Library on October 15, 2007;¹⁵
- e. the Notice of Hearing as published in the *State Register* on October 15, 2007;¹⁶
- f. the Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List and to the Parties Identified in the Additional Notice Plan on October 10, 2007, and Certificate of Accuracy of the Mailing List as of that date;¹⁷
- g. the Certificate of Sending the Notice of Hearing and the SONAR to various Legislators on October 12, 2007;¹⁸
- h. the written comments on the proposed rule MDE received during the comment period that followed the notice of hearing;¹⁹

¹⁰ SONAR at 6; MDE Ex. 10.

¹¹ MDE Ex. 6.

¹² MDE Ex. 1.

¹³ MDE Ex. 2.

¹⁴ MDE Ex. 3.

¹⁵ MDE Ex. 4.

¹⁶ MDE Ex. 5.

¹⁷ MDE Exs. 6, 7.

¹⁸ MDE Ex. 9.

- i. a list of stakeholders who participated in developing the rule amendments and the specific learning disability rule;²⁰ and
- j. the comments the agency received during the drafting stage of the rule amendments.²¹

10. The Administrative Law Judge finds that MDE has met all procedural requirements under applicable statutes and rules.

III. Statutory Authority

11. In its SONAR, MDE asserts that its statutory authority to adopt these rules is, in part, contained in Minn. Stat. § 125A.07.²² Section 125A.07 provides:

[T]he commissioner must adopt rules relative to qualifications of essential personnel, courses of study, methods of instruction, pupil eligibility, size of classes, rooms, equipment, supervision, parent consultation, and other necessary rules for instruction of children with a disability. These rules must provide standards and procedures appropriate for the implementation of and within the limitations of sections 125A.08 and 125A.091. These rules must also provide standards for the discipline, control, management and protection of children with a disability These rules are binding on state and local education, health, and human services agencies. The commissioner must adopt rules to determine eligibility for special education services.

MDE also relies upon Minn. Stat. § 121A.67 as statutory authority to amend rules governing the use of aversive and deprivation procedures by school district employees or persons under contract with a school district.²³ In addition, the Department cites Minnesota Laws, Chapter 263, Article 3, Section 16, as authority for amending the care and treatment rule (Minnesota Rule 3525.2325). The latter session law directs the Department to amend the care and treatment rule to conform with Minnesota Statutes, section 125.515.²⁴ Finally, MDE asserts generally that recent changes to the federal special education regulations require it to amend its rules to ensure compliance with the new federal laws.²⁵

12. Many of those commenting on the proposed rules challenged the Department's statutory authority to adopt them. The issues relating to statutory authority are discussed in more detail in the sections below. As discussed more

¹⁹ MDE Ex. 8.

²⁰ MDE Ex. 11.

²¹ MDE Ex. 12.

²² SONAR at 2.

²³ *Id.*

²⁴ *Id.* at 3.

²⁵ *Id.*

fully below, the Administrative Law Judge has determined that the Department's authority to adopt certain of the proposed rules (those relating to aversive and deprivation procedures) has expired under Minn. Stat. § 14.125, but the Department has general authority to adopt the remainder of the rules.

A. MDE's Statutory Authority to Amend and Repeal Aversive and Deprivation Procedure Rules

1. Arguments of Interested Persons and MDE's Response

13. Several individuals questioned whether the Department has the statutory authority to amend the rules governing aversive and deprivation procedures. The issue was first raised during the rule hearing by Peter Martin, attorney with Knutson, Flynn & Deans, representing the Minnesota School Board Association.²⁶ Mr. Martin later submitted written comments addressing this issue.²⁷ In post-hearing comments dated December 21, 2007, and January 11, 2008, Susan Torgerson, Charles Long and Tim Palmatier, attorneys with the Kennedy & Graven law firm, also asserted that the Department was acting in excess of its statutory authority in promulgating the proposed behavior intervention rules.²⁸

14. In particular, these comments challenged the Department's authority to amend the rules relating to behavioral interventions based on the 2005 legislative mandate in Minn. Stat. § 121A.67 to adopt such amendments. Because the Department failed to comply with the rulemaking timelines set forth in Minn. Stat. § 14.125, the commenters argued, it lost its statutory authority to proceed with the amendments described in section 121A.67.

15. During the 2005 Special Session, the legislature changed the language of Minn. Stat. § 121A.67, to require the commissioner to "*amend*" the rules governing the use of aversive and deprivation procedures.²⁹ The 2005 changes to section 121A.67 included a number of new requirements:

The commissioner, after consultation with interested parent organizations and advocacy groups, the Minnesota Administrators for Special Education, the Minnesota Association of School Administrators, Education Minnesota, the Minnesota School Boards Association, the Minnesota Police Officers Association, a representative of a bargaining unit that represents paraprofessionals, the Elementary School Principals Association, and the Secondary School Principals Association, must adopt amend rules governing the use of

²⁶ Hearing Transcript at 146-148.

²⁷ Post-hearing comments from Peter Martin (Dec. 24, 2007 and Jan. 11, 2008).

²⁸ Hearing Transcript at 234 (Testimony of Tim Palmatier); Letters from S. Torgerson, Long and Palmatier (Dec. 21, 2007, and Jan. 11, 2008).

²⁹ Minn. Session laws, 1 Sp. 2005, chap. 5, art. 3, § 4.

aversive and deprivation procedures by school district employees or persons under contract with a school district. The rules must:

- (1) promote the use of positive approaches behavioral interventions and supports and must not encourage or require the use of aversive or deprivation procedures;
- (2) require that planned application of aversive and deprivation procedures only be a part of an instituted after completing a functional behavior assessment and developing a behavior intervention plan that is included in or maintained with the individual education plan;
- (3) ~~require parents or guardians to be notified after the use of educational personnel to notify a parent or guardian of a pupil with an individual education plan on the same day~~ aversive or deprivation procedures are used in an emergency or in writing within two school days if district personnel are unable to provide same-day notice;
- (4) establish health and safety standards for the use of locked time-out procedures that require a safe environment, continuous monitoring of the child, ventilation, and adequate space, a locking mechanism that disengages automatically when not continuously engaged by school personnel, and full compliance with state and local fire and building codes, including state rules on time-out rooms; and
- (5) contain a list of prohibited procedures;
- (6) consolidate and clarify provisions related to behavior intervention plans;
- (7) require school districts to register with the commissioner any room used for locked time-out, which the commissioner must monitor by making announced and unannounced on-site visits;
- (8) place a student in locked time-out only if the intervention is:
 - (i) part of the comprehensive behavior intervention plan that is included in or maintained with the student's individual education plan, and the plan uses positive

behavioral interventions and supports, and data support its continued use; or

(ii) used in an emergency for the duration of the emergency only; and

(9) require a providing school district or cooperative to establish an oversight committee composed of at least one member with training in behavioral analysis and other appropriate education personnel to annually review aggregate data regarding the use of aversive and deprivation procedures.

Subd. 2. [REMOVAL BY PEACE OFFICER.] If a pupil who has an individual education plan is restrained or removed from a classroom, school building, or school grounds by a peace officer at the request of a school administrator or a school staff person during the school day twice in a 30-day period, the pupil's individual education program team must meet to determine if the pupil's individual education plan is adequate or if additional evaluation is needed.

[EFFECTIVE DATE.] Subdivision 1 of this section is effective the day following final enactment.³⁰

16. Section 14.125 requires an agency to “publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted, amended, or repealed.” If the agency does not meet this timeline, “the authority for the rules expires.”³¹ Furthermore, the agency is prohibited from using “other law in existence at the time of the expiration of rulemaking authority . . . as authority to adopt, amend, or repeal these rules.”³² The individuals filing comments opposing the proposed rules asserted that, because the legislative authority to amend the aversive and deprivation rules was granted on July 15, 2005 (the effective date of the law) but the Notice of Hearing was not published until October 15, 2007 (more than 18 months later), the Department lost its authority to promulgate the rules authorized by section 121A.67.

17. The Department, along with the Minnesota Disabilities Law Center (MDLC) and Michael Carr, a parent advocate, responded to these arguments in

³⁰ *Id.* The bill containing this law was signed by the Governor on July 14, 2005; thus it became effective on July 15, 2005.

³¹ Minn. Stat. § 14.125.

³² *Id.*

their post-hearing comments.³³ First, the Department argued that section 14.125 does not apply to the behavioral intervention rule changes because they “are primarily amendments to or repeal of existing rules.”³⁴ Section 14.125 permits “[a]n agency that publishes . . . a notice of hearing within the time limit specified . . .” to “subsequently amend or repeal the rules without additional legislative authorization.” The Department pointed out that section 14.125 only applies to rulemaking authority enacted after January 1, 1996.³⁵ Because the authority to adopt rules governing aversive and deprivation procedures under section 121A.67 dates back to 1988 and has been used by the Department over the years, the Department contended that it has authority to continue to amend the rules under the statute.

18. The Department stated that it “sought to honor the intent of the Minnesota Legislature and the many stakeholders who contributed to [the] 2005 legislative discussion.” In doing so, it brought together many interested parties over a period of time, none of whom raised the concern about statutory authority before the December 3, 2007 rule hearing. The Department cited the Administrative Law Judge’s authority, pursuant to Minn. Stat. § 14.15, to “disregard any error or defect in the proceeding due to the agency’s failure to satisfy any procedural requirement . . .”³⁶

19. In support of the Department, the MDLC argued that section 121A.67, subdivision 1, is “a directory statute not a mandatory one.” The subdivision, MDLC stated, “defines the time and mode for the discharge of promulgating rules in this area, which would serve to create consistency and uniformity.” The MDLC urged that “this interpretation . . . is consistent with . . . [the] report of the . . . [ALJ] in File 11-2000-17994, *In the Matter of the Proposed Permanent Rules Relating to Drainage Projects Impacting State-Owned Lands in Consolidated Conservation Areas . . .*” (Drainage Project Rule.) The MDLC argued that the reasoning in the Drainage Project Rule that a deadline date for rulemaking was directory rather than mandatory and did not deprive the agency of rulemaking authority also applies to this rule. Used in a variety of contexts in Minnesota case law, this “directory rather than mandatory” distinction is based on a “well-established rule of statutory construction that . . . provisions defining the time . . . in which public officers shall discharge their duties, and which are obviously designed merely to secure order, uniformity, system and dispatch in public business are generally deemed directory.”³⁷ In order for a statute to be considered directory rather than mandatory, it must have no statutorily defined

³³ Department’s Post-Hearing Submission at 1-4 (Dec. 31, 2007); Post-Hearing Comments from Daniel Stewart of the Minnesota Disability Law Center (MDLC Comments) at 2 (Jan. 2, 2008); Post-Hearing Comments from Michael Carr at 2 (Jan. 11, 2008).

³⁴ Department’s Post-Hearing Submission at 2 (Dec. 31, 2007).

³⁵ See Minn. Laws 1995, Ch. 233, Art. 2, § 58.

³⁶ Minn. Stat. § 14.15, subd. 5.

³⁷ *City of Chanhassen v. Carver County*, 369 N.W.2d 297, 299 (Minn. App. 1985) quoting *Szczzech v. Comm’r. of Public Safety*, 343 N.W. 2d 305, 307 (Minn. App. 1984).

consequence for failure to comply.³⁸ Without expressly stating this, the MDLC argument assumed that the deadlines and consequences contained in section 14.125 do not apply to Minn. Stat. § 121A.67.³⁹

20. Next, the MDLC asserted that if the aversive and deprivation procedure rulemaking is not permitted to proceed, sections 121A.66 and 121A.67 will conflict with the current rules, particularly the definitions sections of the rules. MDLC stated its understanding that section 121A.67 “was passed precisely because the Legislature desired MDE to exercise its rulemaking authority to address issues around aversive and deprivation procedures, which now appear in the proposed rules If the ALJ determines MDE lost its authority, this would appear to undermine legislative intent”⁴⁰ Finally, the MDLC cited the provisions of Minn. Stat. § 14.15 permitting the ALJ to waive procedural violations, arguing that, if the Department was bound by the timeline in section 14.125, its failure to meet the 18-month requirement was harmless and should be waived.⁴¹

21. Michael Carr’s post-hearing comments echoed the MDLC’s argument that the Department’s failure to meet the 18-month requirement was harmless. Mr. Carr also contended that the legislative intent behind the 18-month requirement was “to provide a basis for aggrieved parties to legally force administrative action when the department fails to take action.” Mr. Carr concluded that “[i]t is a stretch to conclude the legislature intended otherwise, “absent a specific indication that the time frame was intended to act as a bar.”⁴²

2. Analysis and Conclusion of Administrative Law Judge

22. After careful consideration of the competing arguments, the Administrative Law Judge has concluded that the Department’s failure to publish a notice of intent or a notice of hearing to amend the aversive and deprivation procedure rules by January 15, 2007 (18 months following the effective date of the legislative amendment to section 121A.67) caused the rulemaking authority granted by that statute to expire. The Department therefore lacks authority to adopt certain of the proposed rules. The rules affected by this ruling are detailed below, as well as the reasoning for the decision of the Administrative Law Judge.

23. As a threshold matter, the Administrative Law Judge finds that the rulemaking authority currently granted by section 121A.67 does not, in fact, date

³⁸ *City of Chanhassen*, 369 N.W. 2d at 299-300, citing *Sullivan v. Credit River Township*, 299 Minn. 170, 176-177, 217 N.W. 2d 502, 507 (Minn. 1974).

³⁹ In fact, Minn. Stat. § 121A.67 itself contains neither a deadline nor a consequence for failure to meet a deadline. The question, as the Department correctly states, is whether section 121A.67 falls under the limitations of section 14.125.

⁴⁰ MDLC Comments at 2 (Jan. 2, 2008).

⁴¹ *Id.*

⁴² Post-hearing Comments from Michael Carr at 2 (Jan. 11, 2008), quoting *Marshall County v. State of Minnesota*, 636 N.W. 2d 570, 575 (Minn. App. 2001).

back to 1988, as the Department contends. Before the 2005 legislative amendments, section 121A.67 required the Commissioner of Education to “adopt” rules governing the use of aversive and deprivation procedures by school district employees or persons under contract with a school district. During the 2005 Special Session, the legislature changed the language of Minn. Stat. § 121A.67, to require the commissioner to “amend” those rules in specified ways.⁴³ Because section 14.125 applies to laws enacted after January 1, 1996, “authorizing or requiring rules to be adopted, amended or repealed,”⁴⁴ and the 2005 amendment to section 121A.67 included new language requiring the Department to amend the rules governing the use of aversive and deprivation procedures, the Administrative Law Judge concludes that the requirements of section 14.125 apply to the Department’s attempt to exercise that authority as part of this rulemaking proceeding. The fact that the 2005 amendment also contained detailed directions to the Department regarding the content of the rule amendments to be made provides further support for the view that the Legislature intended the directive to be a new instruction to the Department and not simply a continuation of authority previously granted.⁴⁵

24. The Administrative Law Judge does not question the Department’s assertion that it brought together stakeholders to develop the rules it is now proposing and it has sought to honor the intent of the Legislature. However, the Legislature’s additional intention, spelled out in section 14.125, cannot properly be ignored. That intention is clear: proposed rule amendments must be brought to the point of publication of a notice to adopt a rule or a notice of hearing within 18 months of the effective date of the law requiring the rules to be amended, or the rulemaking authority expires. The Department did not meet that timeline here.⁴⁶

25. The Administrative Law Judge does not agree that the expiration of the Department’s rulemaking authority can be waived under Minn. Stat. § 14.15 as an “error or defect in the proceeding due to the agency’s failure to satisfy any procedural requirement.” Unlike other types of errors which may be waived—such as the failure to timely submit proof of publication in the State Register—the error that the agency asks to be waived in this case goes to the substantive grant of authority to promulgate rules. There is no suggestion in the Minnesota Administrative Procedure Act or the accompanying case law that the Legislature intended Administrative Law Judges to be permitted to restore rulemaking

⁴³ Minn. Session laws, 1 Sp. 2005, chap. 5, art. 3, §4.

⁴⁴ Emphasis added.

⁴⁵ Although the last sentence of section 14.125 permits an agency to amend or repeal rules without further authorization where the agency has previously adopted or amended the rules within the time limits required by section 14.125, that provision does not apply here.

⁴⁶ In addition to missing the 18-month deadline, the Department failed to publish its initial Request for Comments within 60 days of the effective date of the amendments to section 121A.67, as required by Minn. Stat. § 14.101. The Request for Comments was not published until April 2007, 21 months following the effective date of section 121A.67. No consequence is specified in this statute for the agency’s failure to comply.

authority when the Legislature, in Section 14.125, specifically provided for the lapse of that authority. Failure to meet the deadlines established by Section 14.125 is not a "procedural requirement" that may be waived by the Administrative Law Judge.

26. The arguments advanced by the MDLC and Mr. Carr regarding directory versus mandatory statutes are also unconvincing. According to relevant case law, the key inquiry is whether the Legislature has specified a consequence for failure to meet a statutory deadline. In the case of section 14.125, the Legislature clearly spelled out such a consequence, making the deadline in that statute mandatory, not simply directory.⁴⁷ The MDLC letter and Mr. Carr's comments relied upon the Drainage Project Rule Report and the *Marshall County* case. The *Marshall County* case was decided following passage of section 14.125 and deals with rulemaking. But the rulemaking authority at issue in both the Drainage Project Rule Report and the *Marshall County* case is contained in Minn. Stat. § 84A.55, subds. 9 and 11, statutory provisions that were enacted in 1984 and were never subsequently amended. Section 14.125, the statute which contains both the 18-month deadline and consequence for failure to meet the deadline, thus did not apply to those statutory provisions. Therefore, neither the reasoning in the Drainage Project Rule report nor the *Marshall County* case applies in this instance.

27. Having lost the authority to amend the aversive and deprivation procedure rules by failing to meet the deadline in the statute, the agency has lost the ability to make the amendments it seeks to make to those particular rules in this proceeding. Moreover, Minn. Stat. § 14.125 makes it clear that the MDE is not permitted to use its more general rulemaking authority under Minn. Stat. § 125A.07 as authority to amend these rules.⁴⁸ Accordingly, because the Department lacks statutory authority to amend its rules governing aversive and deprivation procedures, the following parts of the proposed rules are disapproved:

Proposed rule 3525.0850, subpart 1
Proposed rule 3525.0850, subpart 2⁴⁹

⁴⁷ *City of Chanhassen*, 369 N.W. 2d at 299-300, citing *Sullivan v. Credit River Township*, 299 Minn. 170, 176-177, 217 N.W. 2d 502, 507 (Minn. 1974); see *Heller v. Wolner*, 269 N.W.2d 31, 32 (Minn. 1978), citing *First Nat. Bank of Shakopee v. Dept. of Commerce*, 310 Minn. 127, 245 N.W. 2d 861 (1976).

⁴⁸ As noted above, Minn. Stat. § 14.125 specifies that, "[i]f the notice is not published within the time limit imposed by this section, the authority for the rules expires. The agency shall not use other law in existence at the time of the expiration of rulemaking authority under this section as authority to adopt, amend, or repeal these rules."

⁴⁹ Proposed rule parts 3525.0850, subpart 3, items A, B, C and D, are definitions of contingent observation, exclusionary time-out, positive behavioral interventions and supports and target behavior. None of these definitions is necessarily part of the rule on aversive and deprivation procedures and could be included in the proposed rule under the Department's general rulemaking authority. Therefore, the Department may proceed with those items of the proposed rules if it wishes.

Proposed rule 3525.0850, subpart 4
Proposed rule 3525.0850, subpart 5
Proposed rule 3525.0850, subpart 6
Proposed rule 3525.0850, subpart 7

Proposed rule 3525.0855, subpart 1
Proposed rule 3525.0855, subpart 2
Proposed rule 3525.0855, subpart 3
Proposed rule 3525.0855, subpart 4
Proposed rule 3525.0855, subpart 5

Proposed rule 3525.0860, subpart 1
Proposed rule 3525.0860, subpart 2
Proposed rule 3525.0860, subpart 3
Proposed rule 3525.0860, subpart 4
Proposed rule 3525.0860, subpart 5
Proposed rule 3525.0860, subpart 6
Proposed rule 3525.0860, subpart 7
Proposed rule 3525.0860, subpart 8

Proposed rule 3525.0865, subpart 1
Proposed rule 3525.0865, subpart 2
Proposed rule 3525.0865, subpart 3

Proposed rule 3525.0870, subpart 1
Proposed rule 3525.0870, subpart 2⁵⁰

Repealer of Minnesota Rules, parts 3525.0210, subparts 5, 6, 9, 13, 17, 29, 30, 46 and 47; and 3525.2900, subpart 5.

Due to the lack of statutory authority to adopt these rule amendments and repealers, they must be withdrawn from this rulemaking proceeding. The Department may, if it wishes, seek additional rulemaking authority from the Legislature and, once that is obtained, initiate a new rulemaking proceeding involving these and/or other provisions.

⁵⁰ Proposed rule part 3525.0870, subpart 3, requires that parents of a child be notified "[i]f a peace officer restrains or removes or child from a classroom, school building or school grounds during the school day." This subpart could apply outside of situations involving aversive and deprivation procedures and could be included in the proposed rule under the Department's general rulemaking authority. Therefore, the Department may proceed with that subpart of the rule if it wishes.

B. MDE's Statutory Authority to Adopt, Amend and Repeal Rules Other Than Those Relating to Aversive and Deprivation Procedures

1. General Rulemaking Authority under Minn. Stat. § 125A.07

28. Some comments also challenged the Department's statutory authority to promulgate other parts of the proposed rules. In particular, the Minnesota School Boards Association's comments questioned whether the Department's general rulemaking power under Minnesota Statute § 125A.07 had expired.⁵¹ As discussed above, section 14.125 states that, if an agency does not publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted, amended or repealed, the authority expires. Section 125A.07, the agency's general rulemaking authority, was enacted before January 1, 1996, the effective date of section 14.125. In 1998, however, the legislature severely limited MDE's rulemaking authority by stating that rules must be adopted, "but not to exceed the extent required by federal law as of July 1, 1999."⁵² Shortly thereafter, in 1999, the legislature reestablished the MDE's rulemaking authority to exceed federal law.⁵³ In the 1999 revision, the legislature specifically directed the MDE to "amend" state special education rules.⁵⁴ The revision was enacted on May 4, 1999.⁵⁵

29. The 1999 version of section 125A.07 specifically authorized and required the MDE to engage in special education rulemaking. Because the legislative authorization and requirement to amend rules post-dated January 1, 1996, section 14.125 applies to the grant of rulemaking authority under that statute.⁵⁶ That is, section 125A.07 falls within the purview of section 14.125 and its 18-month limitation. Upon complete review of the statute, however, the Administrative Law Judge concludes that MDE complied with section 14.125, and retains its general authority to promulgate and amend special education rules under section 125A.07.

30. The last sentence of section 14.125 states: "An agency that publishes a notice of intent to adopt rules or a notice of hearing within [18 months] may subsequently amend or repeal the rules without additional legislative authorization." On October 25, 1999, approximately six months after

⁵¹ Letters from Peter Martin (Dec. 24, 2007, and Jan. 11, 2008).

⁵² See Laws of Minn. 1998, Chapter 398, Art. 2, Section 8; see also Section 53(a) ("The state board of education must amend all rules relating to providing special instruction and services to children with a disability so that the rules do not impose requirements that exceed federal law").

⁵³ See Laws of Minn. 1999, Chapter 123, Section 6.

⁵⁴ See *Id.* at Section 19 ("Beginning no later than July 1, 1999, the commissioner shall amend Minnesota Rules, chapter 3525, for special education"); Section 20 ("The commissioner shall adopt rules to update Minnesota Rules, chapter 3525, for special education"). Section 19 became effective May 5, 1999; Section 20 became effective July 1, 1999). *Id.* at Section 22.

⁵⁵ *Id.*

⁵⁶ See Laws of Minn. 1995, Chapter 233, Art. 2, Section 58 (Section 14.125 "applies to laws authorizing or requiring rulemaking that are finally enacted after January 1, 1996").

the legislature directed it to amend special education rules, MDE published a "Notice of Intent to Adopt Rules."⁵⁷ Because the MDE published the notice of intent to adopt rules within 18 months of the effective date of the statute requiring rules to be amended, MDE satisfied the requirements of section 14.125. As such, they may now amend or repeal the rules without additional legislative authorization.

2. Authority for Care and Treatment Rules under Minn. Laws 2006, Chapter 263, Article 3, Section 16

31. In its Post-Hearing Submission, the Department also explained its statutory authority to adopt and amend the Care and Treatment rules, Minnesota Rules 3525.2325.⁵⁸ In May 2006, the legislature directed the Department to amend the Care and Treatment rules: "Before July 1, 2007, the Department of Education shall amend Minnesota Rules, part 3525.2325, to conform with Minnesota Statutes, section 125A.515."⁵⁹ The Department acknowledges that the Care and Treatment rule was not amended before July 1, 2007, as the session law directed.

32. The Administrative Law Judge finds, however, that the Department's failure to comply with the session law does not deprive it of the statutory authority to proceed with the rule amendments. The session law is directory in nature, and establishes no penalty for failure to meet the July 1, 2007, deadline. It is well established that statutory provisions which define the time and mode in which public officers shall discharge their duties are generally deemed to be directory, as opposed to mandatory.⁶⁰ The failure to amend the rules within the timeframe does not deprive the Department of the authority to promulgate the rule where the legislature does not specify any consequences for a failure to act.

33. The MDE's authority also remains intact under the statutory deadline set forth in section 14.125. Section 14.125, which does contain a penalty provision, directs that an agency must publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of the law requiring rules to be adopted or amended. Here, the session law requiring MDE to amend the Care and Treatment rule was effective August 1, 2006.⁶¹ The Department published its Notice of Hearing on October 15, 2007 -- within the 18-month timeframe. The Department complied with the timeframe set forth in

⁵⁷ See 24 S.R. 608.

⁵⁸ MDE's Dec. 31, 2007, Submission at 3-4.

⁵⁹ Minn. Laws 2006, Ch. 263, Art. 3, § 16.

⁶⁰ See *Heller v. Wolner*, 269 N.W.2d 31, 33 (Minn. 1978), citing *Wenger v. Wenger*, 200 Minn. 436, 438, 274 N.W. 517, 518 (1937) (Failure to hold hearing within 30-day statutory time period did not deprive court of jurisdiction where the statute does not provide any consequences to the parties for the court's failure to act).

⁶¹ See Minn. Stat. § 645.02 ("Each act, except one making appropriations, enacted finally at any session of the legislature takes effect on August 1 next following its final enactment, unless a different date is specified in the act").

section 14.125, and its authority to amend the Care and Treatment rule thus remains intact.

IV. Additional Notice Requirements

34. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or explain why these efforts were not made. As discussed above, MDE submitted an additional notice plan to the Office of Administrative Hearings, which was reviewed and approved by the Administrative Law Judge by letter dated October 5, 2007. During the rulemaking proceeding, MDE certified that it provided notice to those on the rulemaking list maintained by MDE and in accordance with its additional notice plan.⁶²

37. As described below, MDE made several efforts to inform and involve interested and affected parties in the rulemaking:

- a. MDE published a Request for Comments in the State Register on April 23, 2007.⁶³
- b. MDE sent a press release outlining the date, time and location of the public hearing and a description of the proposed rules to news outlets throughout the state.⁶⁴
- c. The proposed rules, the SONAR, and other information relating to the proposed rules have been available on MDE's website.⁶⁵
- d. MDE convened a public stakeholder group that met several times between March and May of 2007.⁶⁶
- e. A second workgroup met several times during the spring of 2007 to propose changes to the specific learning disability evaluation and identification rule and developed an initial draft of changes to Minnesota Rule 3525.1341.⁶⁷
- f. MDE presented the rules to the Special Education Advisory Panel (SEAP), which discussed the rules at its 2007 meetings.⁶⁸
- g. Throughout the rule drafting process, updated provisional drafts of the proposed rules were posted to the Department's website for interested parties to review and provide comment.⁶⁹

38. MDE has widely disseminated its proposed amendments to the special education rules. The fact that the public hearing was well-attended and voluminous written comments were submitted supports the conclusion that

⁶² MDE Exs. 6, 7.

adequate notice was provided by MDE. Therefore, the Administrative Law Judge finds that MDE has satisfied the notice requirements.

V. Impact on Farming Operations

39. Minn. Stat. § 14.111 imposes an additional requirement calling for notification to be provided to the Commissioner of Agriculture when rules are proposed that affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

40. Because the proposed rules will not affect farming operations, the requirements of Minn. Stat. § 14.111 need not be met in this proceeding.

VI. Compliance with Other Statutory Requirements

A. Cost and Alternative Assessments

41. Minn. Stat. § 14.131 requires an agency adopting rules to include the following information in its SONAR:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by

⁶³ SONAR at 7.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 1.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;

- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

42. With respect to the first factor, MDE indicated in its SONAR that the proposed rules will affect Minnesota children and their families, as well as school districts, including teachers, other school staff, and administrators.⁷⁰

43. With regard to the second factor, MDE asserted that the proposed rules would not create any additional costs to the Department. MDE is already staffed to provide training and support regarding the proposed rules, and staff assignments and resources will be reallocated accordingly. MDE anticipates that the guidance and clarification provided by these proposed rules will slightly ease the burden of the Department's oversight responsibilities by clarifying some areas of confusion that have led to repeated questions and complaints to the Department.⁷¹

44. Regarding the third factor, MDE asserted that there are no less costly methods for achieving the purposes of the proposed rules. The Department indicated that the proposed rules are intended to ensure that Minnesota rules conform to recent changes in federal regulations and state statutes, to respond to questions raised in the field, and to address compliance issues. MDE pointed out that it has the responsibility to ensure that Minnesota complies with federal laws regarding the provision of education to children with disabilities, so it must revise these rules to ensure the implementation of federal requirements as well as state statutes. The Department contended that the rules are also necessary to ensure a uniform and legally sufficient statewide system of special education for children with disabilities. The MDE stated that the proposed rules will result in a more consistent application of the law and, where there is a lack of clarity in the field regarding application of federal law or state statute, these rules will provide clarity, increase compliance, and reduce litigation. Amendment of the rules is the only satisfactory method by which the Department believes it can incorporate the changes that have been made in federal law. In addition, MDE also emphasized that it was directed by the

⁷⁰ *Id.* at 4.

⁷¹ *Id.*

legislature to amend the rules governing the use of aversive and deprivation procedures by school districts and the care and treatment rule.⁷²

45. With respect to the fourth factor, MDE asserted that there are no alternatives to the proposed rules. Many of the rules need to be updated due to changes in federal law and state statute. The rules ensure implementation of the federal law, and are one method by which the state demonstrates its compliance with federal law. By using a stakeholder group during the rulemaking process, the Department asserted that it had ensured that many different viewpoints were heard and a broad range of feedback was obtained during the drafting process. No other alternative methods for achieving the purpose of the proposed rules were seriously considered by the Department.⁷³

46. With regard to the fifth regulatory factor, MDE estimated that the proposed rules would be cost neutral. MDE anticipates that school districts are not likely to face increased costs to implement the rules. It noted that districts will continue to implement the amended rules and provide appropriate special education and related services to eligible Minnesota children as required by federal law, and stated that any costs created by the implementation of these rules are already being borne by all entities involved. MDE indicated that the proposed rules will clarify existing law and thereby decrease controversy and result in fewer due process complaints and less litigation, which it believes should decrease costs to districts and the Department.⁷⁴

47. Regarding the sixth factor, MDE noted that many of the proposed changes in the rules reflect federal regulatory changes. The Department risks loss of federal Part B funding if it does not make these changes. Moreover, if the rules are not in compliance with federal regulations, the districts and the Department could face increased disputes and litigation.⁷⁵

48. Finally, with respect to the seventh factor, the Department indicated that one of the goals of this rulemaking process is to bring Minnesota's current rules into alignment with revised federal regulations. The Department has completed an assessment of the areas in which state law exceeds the federal regulations.⁷⁶ It determined that Minnesota law exceeds federal requirements in the following areas:

⁷² *Id.* at 4-5.

⁷³ *Id.* at 5.

⁷⁴ *Id.*

⁷⁵ *Id.* at 5-6.

⁷⁶ *Id.* at 6. The memo can be found at <http://education.state.mn.us/mdeprod/groups/Compliance/documents/Memo/008665.pdf>.

- a. Minnesota provides special education services from birth to age 21. The federal requirement is that services be provided from age 3 to age 21.⁷⁷
- b. Minnesota provides transition services beginning at grade 9 or age 14. The federal requirement is that transition services be provided beginning at age 16, with some exceptions.⁷⁸
- c. In Minnesota, override procedures cannot be used to override a parent's refusal to consent to an initial evaluation. This is not the case with federal regulations.⁷⁹
- d. Minnesota requires that districts provide and participate in a conciliation conference if requested by parents. Minnesota also offers facilitated IEP meetings as a dispute resolution option. Neither of these dispute resolution processes is required by the IDEA.⁸⁰
- e. Minnesota requires that parents be informed of their right to various alternative dispute resolution options, including conciliation conferences, mediation and facilitated IEP team meetings whenever they object to any proposal for which they receive notice. The federal statutes and regulations require that parents be informed of the availability of mediations only after parents have requested a due process hearing.⁸¹
- f. Minnesota requires expedited due process hearings be held, and a decision issued, within ten days. The proposed federal regulations require that an expedited hearing be held within twenty days, with a decision issued within ten days of the hearing.⁸²

⁷⁷ Memo at 2, *citing* Minn. Stat. § 125.02.

⁷⁸ *Id.* at 2, *citing* Minn. Stat. § 125.08 and Minn. R. 3500.2900; Memo at 9, *citing* Minn. R. 3525.2810; Memo at 10, *citing* Minn. R. 3525.2900. Under the IDEA, the IEP must include "beginning at age 14, and updated annually, a statement of the transition service needs of the child under the applicable components of the child's IEP that focuses on the child's courses of study (such as participation in advanced-placement courses or a vocational education program);" and, "beginning at age 16 (or younger, if determined appropriate by the IEP Team), a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages" 20 U.S.C. § 1414(d)(1)(A)(vii)(I) and (II).

⁷⁹ Memo at 1-2, *citing* Minn. Stat. § 125.091.

⁸⁰ Memo at 3, *citing* Minn. Stat. § 125A.091; Memo at 10, *citing* Minn. R. 3525.3700.

⁸¹ Memo at 4, *citing* Minn. Stat. § 125A.091.

⁸² Memo at 4, *citing* Minn. Stat. § 125A.091 and 34 C.F.R. 300.532(c).

- g. Community Transition Interagency Committees, Parent Advisory Councils, and Interagency Early Intervention Committees are state-imposed requirements not required by the IDEA.⁸³
- h. Minnesota Rules prohibit districts from purchasing special education services when the service is available within the district. Federal law does not place this spending restriction on districts.⁸⁴
- i. Minnesota provides explicit caseload levels for some special education students. Specific caseload standards are not required by federal law.⁸⁵
- j. Minnesota requires each LEA to employ, singly or cooperatively, a special education director. The federal structure contemplates a local-level special education director; the requirement for a district special education director is a state-imposed requirement.⁸⁶
- k. The need for benchmarks and short-term objectives has been removed from the IDEA. The Minnesota requirement for these progress markers exceeds federal law.⁸⁷
- l. Minnesota requires a district to provide parents who have requested a due process hearing with notice of the basic procedures and safeguards to which they are entitled. This additional notice is not required by federal law.⁸⁸

49. Several individuals and organizations, including Randall Arnold, Assistant Director of Student Services/Special Education, St. Cloud Area School District 742, and teachers and administrators from Middleton Elementary School in Woodbury, were generally critical of the proposed rules based on their belief that the rules exceed and expand on minimal federal requirements.⁸⁹ Others, including parents, advocates, and practitioners, spoke in favor of the proposed rules. Several of those commenting argued that it was appropriate for the Minnesota requirements to exceed the federal requirements. For example, Matthew Fink, a student with disabilities, supported Minnesota's history of going above and beyond the federal minimum requirements and urged that the state keep pressing forward. He asserted that the federal minimum requirements should not be the benchmark by which the state assesses how well it is providing for disabled students.⁹⁰ Jody Manning, parent advocate and member of the SLD workgroup, also supported the fact that Minnesota requirements go above and

⁸³ Memo at 5-7, *citing* Minn. Stat. §§ 125A.22, 125A.24 and 125A.30.

⁸⁴ Memo at 7-8, *citing* Minn. R. 3525.0800.

⁸⁵ Memo at 9, *citing* Minn. R. 3525.2340.

⁸⁶ Memo at 10, *citing* Minn. R. 3525.2405.

⁸⁷ Memo at 9, *citing* Minn. R. 3525.2810.

⁸⁸ Memo at 10, *citing* Minn. R. 3525.3700.

⁸⁹ See, e.g., Hearing Transcript at 277; Public Ex. 5; Letter from Randall Arnold (Jan. 11, 2008).

⁹⁰ Hearing Transcript at 120-121.

beyond the federal standards in some areas because it brings positive opportunities for students with special needs. She noted that Minnesota has fewer due process hearings and fewer complaints when compared to other states.⁹¹

50. The Administrative Law Judge concludes that MDE has fulfilled its obligation under Minnesota Statute section 14.131 to discuss cost and alternative assessments in the SONAR. The question of whether or not Minnesota's special education requirements should exceed federal requirements involves matters of policy that are within the discretion of the Legislature and the Department. The issue of whether particular provisions of the Minnesota rules conflict with federal requirements will be addressed on a rule-by-rule basis in the following Analysis of Proposed Rules.

B. Performance-Based Regulation

51. Minn. Stat. § 14.131 also requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals."

52. MDE maintains that the rules as proposed are performance-based. Throughout the development of the proposed rules, the Department attempted to develop rules that are understandable for practitioners and families to ensure efficient and effective delivery of services. MDE proposes these amendments to make the rules clear in purpose and intent, flexible, and not overly prescriptive. MDE intends for the rules to allow the state to fulfill its obligation to implement federal law and to ensure that children receive appropriate services and protections.⁹²

53. The Administrative Law Judge finds that MDE has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

C. Consultation with the Commissioner of Finance

54. Under Minn. Stat. § 14.131, the agency is required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

⁹¹ Hearing Transcript at 208-209; Letter from Jody Manning (Dec. 19, 2007).

⁹² SONAR at 6-7.

55. On October 3, 2007, MDE provided the Commissioner of Finance with drafts of the proposed rules and SONAR and asked for evaluation of the proposed rules' fiscal impact on local units of government.⁹³

56. In reviewing the proposed rules and SONAR, the Department of Finance noted that the Department of Education could lose federal funding if it was found to be out of compliance with federal regulations; school districts could bear additional training costs when implementing the proposed rules relating to behavioral interventions; some school districts could experience additional costs related to training requirements for staff or in the evaluation of students under the proposed SLD rule; the cost of complying with the rule changes would not exceed \$25,000 for any district; and Minnesota districts are required to provide special education and related services to eligible children regardless of adoption of the proposed rules. The Department of Finance concluded that the proposed rules will have little fiscal impact on local units of government.⁹⁴

57. The Administrative Law Judge finds that the Department has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

D. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

58. Under Minn. Stat. § 14.127, MDE must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."⁹⁵ The Department must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁹⁶

59. In the SONAR, the Department indicated that it has determined the cost of complying with the proposed rules in the first year will not exceed \$25,000 for any small business or small city. In the view of the MDE, the proposed rules will not result in additional costs to the school districts because districts are required to provide special education and related services to eligible Minnesota children regardless of the adoption of the proposed rules.⁹⁷

60. The Administrative Law Judge finds that MDE has made the determination required by Minn. Stat. § 14.127 and approves that determination. Concerns raised during the rulemaking proceeding relating to costs associated with the rules are further discussed below.

⁹³ SONAR at 6.

⁹⁴ *Id.*; MDE Ex. 10.

⁹⁵ Minn. Stat. § 14.127, subd. 1.

⁹⁶ Minn. Stat. § 14.127, subd. 2.

⁹⁷ SONAR at 6.

VII. Rulemaking Legal Standards

61. Under Minnesota law,⁹⁸ one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.⁹⁹ The Department prepared a SONAR¹⁰⁰ in support of its proposed rules. At the hearing, the MDE primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by MDE staff at the public hearing, and by the MDE's written post-hearing submissions.

62. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.¹⁰¹ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.¹⁰² A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.¹⁰³ The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."¹⁰⁴

63. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.¹⁰⁵

64. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the Department complied with the rule adoption procedure, whether the rule grants undue discretion, whether the Department

⁹⁸ Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

⁹⁹ *Mammenga v. DNR of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Inst. v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

¹⁰⁰ MDE Ex. 3.

¹⁰¹ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

¹⁰² *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

¹⁰³ *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

¹⁰⁴ *Manufactured Housing Inst. v. Petterson*, 347 N.W.2d at 244.

¹⁰⁵ *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.¹⁰⁶

65. Because the MDE suggested changes to the proposed rules after original publication of the rule language in the State Register, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed. The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if “the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice,” the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice,” and the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.” In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests,” whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing,” and whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”

VIII. Analysis of the Proposed Rules

66. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered. Moreover, because sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary.

67. The Administrative Law Judge finds that the Department has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

¹⁰⁶ Minn. R. 1400.2100.

IX. Broad Issues Relating to the Proposed Rules

68. Many school districts, special education teachers, and others opposed the proposed rules in written comments or oral testimony. Numerous others, including parent advocacy groups, parents, and students, testified in support of the proposed rules or filed written comments in favor of their adoption during the current rulemaking process.

69. Many of those filing comments on the proposed rules and offering testimony at the public hearing raised broad concerns about the costs and administrative burdens imposed by the proposed rules and other special education requirements, and questioned whether the Department should proceed with rulemaking at the present time. These concerns are discussed below.

A. Concerns about Propriety of Proceeding with the Proposed Rules at the Present Time

70. During the spring of 2007, legislation was enacted that directed the Bureau of Mediation Services to convene a task force to (1) identify areas of Minnesota law that exceed or expand upon minimum federal special education requirements as well as areas of Minnesota law that should be amended to conform with minimum federal requirements, and (2) make recommendations to the Legislature. The task force is obligated to provide its report by mid-February of 2008. The Department concluded that the scope and purpose of this rulemaking proceeding was significantly different from the scope and purpose of the task force and decided that it was essential to move forward with the current rule package. The Department believes that the work of the task force will be helpful in connection with a second phase of rulemaking that is anticipated by the Department in the future.¹⁰⁷ In its post-hearing submission, the Department indicated that, as part of this rulemaking process, it had notified key legislators about the progress of these proposed rules. The Department stressed that, had the Legislature viewed the task force and this rulemaking process as mutually exclusive, it could have ordered the Department not to adopt any rules until the task force completed its report. The Legislature did not take such action.¹⁰⁸

71. Many of those commenting on the proposed rules, including Darren Kermes, Legislative Co-Chair for the Minnesota Administrators for Special Education and Interim Executive Director for the Minnesota River Valley Special Education Cooperative;¹⁰⁹ Mary Ruprecht of the Rum River Special Education Cooperative;¹¹⁰ Tim Palmatier, school district attorney;¹¹¹ Tom Schoepf, Director of Special Programs for ISD 197;¹¹² Steve Weber, Onamia Early Intervention

¹⁰⁷ Hearing Transcript at 16-17.

¹⁰⁸ MDE's Dec. 31, 2007, Submission at 5.

¹⁰⁹ Letter from Darren Kermes (Dec. 11, 2007).

¹¹⁰ Hearing Transcript at 69; Public Ex. 1.

¹¹¹ Hearing Transcript at 234-237.

¹¹² Letter from Tom Schoepf (Nov. 26, 2007).

Program (ISD 480);¹¹³ Mark Sleeper, Superintendent of the Princeton Public Schools;¹¹⁴ Don Schuld, Assistant Superintendent for the Stillwater Area Public Schools;¹¹⁵ Dr. Kimberly Gibbons and Dr. Holly Windram of the St. Croix River Education District;¹¹⁶ Roxanne Nauman, Principal of Pinewood Elementary in Rochester;¹¹⁷ and Elisabeth Lodge Rogers, Director of Student Services and Special Education in the St. Cloud area;¹¹⁸ urged the Department to withdraw the proposed rules until after the report of the legislatively-mandated task force is completed. In the alternative, they argued that the Administrative Law Judge should order that the rulemaking process be suspended. Mr. Palmatier provided a letter from Representative Mindy Greiling, one of the principal authors of the bill developing this task force, in which she requested that the Commissioner of Education coordinate the work of the task force with the Department's current rulemaking plans and work with the task force to identify any proposed rule that must move forward in order to comply with federal requirements and those that can be held back for further consideration."¹¹⁹

72. In contrast, other individuals and organizations, including Paula Goldberg, Executive Director of the PACER Center; Daniel Stewart and Linda Bonney of the Minnesota Disability Law Center (MDLC); Mary Powell, Executive Director of the Autism Society of Minnesota; Jacki McCormack, Senior Advocate for Arc Greater Twin Cities; Maureen Engstrom and Jenny Kempfert of Arc Northland; Kim Kang, Matthew Fink, Barb Ziemke, Michael Carr, Connie and Jerry Hesse, Erin Zolotukhin-Ridgway, and Carolyn Anderson, expressed support for the proposed rules and opposed any delay in the rulemaking process as contrary to the best interests of children with disabilities.¹²⁰ Virginia Richardson, Daniel Stewart, and Jacki McCormack, members of the task force, supported the Department's decision to move ahead with the special education rules in order to bring Minnesota into compliance with federal rules issued under the IDEA.¹²¹ In addition, Jody Manning, a member of the specific learning disability workgroup, expressed support for the rules moving forward to ensure compliance with federal standards and allay funding concerns.¹²²

¹¹³ Letter from Steve Weber (Dec. 3, 2007).

¹¹⁴ Letter from Mark Sleeper (Oct. 23, 2007).

¹¹⁵ Letter from Don Schuld (Nov. 21, 2007).

¹¹⁶ Letter from Kimberly Gibbons and Holly Windram (Jan. 7, 2008).

¹¹⁷ Letter from Roxanne Nauman (Nov. 26, 2007).

¹¹⁸ Hearing Transcript at 228; Letters from Elisabeth Lodge Rogers (Nov. 28, 2007, Dec. 18, 2007, and Jan. 11, 2008).

¹¹⁹ Hearing Transcript at 235-236.

¹²⁰ Hearing Transcript at 60, 116-117, 128, 160-161, 182, 253, 279-280; Letters from Paula Goldberg (Dec. 4, 2007); Daniel Stewart (Nov. 21, 2007); Connie and Jerry Hesse (Dec. 19, 2007); Jacki McCormack (Dec. 10, 2007); Maureen Engstrom and Jenny Kempfert (Dec. 20, 2007); Erin Zolotukhin-Ridgway (Dec. 25, 2007); Barb Ziemke (Dec. 3, 2007).

¹²¹ Hearing Transcript at 206-207; Letter from Daniel Stewart (Nov. 21, 2007); Letter from Mary Powell (Dec. 15, 2007); Letters from Jacki McCormack (Dec. 10 and 21, 2007).

¹²² Hearing Transcript at 208; Letter from Jody Manning (Dec. 19, 2007).

73. The Department has declined to withdraw or postpone the proposed rules. The Minnesota Administrative Procedure Act does not require that agencies await the report of a legislative task force before proceeding with rulemaking, or give the Administrative Law Judge authority to order suspension of the rulemaking process under such circumstances. Accordingly, the proposed rules are not defective because they are being proposed for adoption at this time, and disapproval of the rules is not warranted on that basis.

74. Several individuals urged the Administrative Law Judge to place the proposed rules "on hold" and require that the Department engage in additional efforts to reach consensus with interested parties on the substance of the rules.¹²³ The Administrative Law Judge does not have authority to issue such an order in this proceeding. The Minnesota Administrative Procedure Act sets forth a process for agencies to follow to ensure public participation in the formulation of administrative rules, but does not require that the agency and affected members of the public reach a consensus before the agency may initiate rulemaking. Although the Department retains the right to elect to withdraw the proposed rules and proceed in another fashion, it is not the proper role of the Judge to require that approach or to otherwise invade the policy-making discretion of the agency.

B. Cost Concerns

75. A significant number of people and organizations disagreed with the Department's cost analysis and stated that the proposed rules would substantially increase costs and were not cost-neutral. For example, the Minnesota Administrators for Special Education commented that the proposed rule relating to criteria upon reevaluation will increase district costs because it will require districts to provide special-education services to children who no longer meet eligibility criteria, as well as children up to age 21.¹²⁴ Antoinette Johns, Director of Special Education for Northeast Metropolitan 916 Intermediate School District, expressed concerns about increased expectations by the MDE exceeding federal requirements, generating more paperwork, and necessitating more expenditures.¹²⁵ Susan Butler, Director of Special Education for the Anoka-Hennepin School District, commented that there would be ongoing (not merely temporary) increased costs associated with implementing the proposed behavior intervention rules.¹²⁶ Elisabeth Lodge Rogers submitted an estimate of increased costs to her district she believes will be associated with the proposed changes to the least restrictive environment rule and the new reevaluation criteria rule.¹²⁷ Gerald Von Korff, attorney with the Rinke Noonan Law Firm, submitted post-hearing comments supporting Dr. Rogers' position. He asserted that a

¹²³ See, e.g., Letter from Kathy McKay (Dec. 10, 2007); Letter from Chris Lindholm (Dec. 21, 2007); Letter from Darren Kermes (Dec. 11, 2007).

¹²⁴ Public Ex. 8 at 4.

¹²⁵ Letter from Antoinette Johns ((Dec. 21, 2007).

¹²⁶ Letter from Susan Butler at 2-4 (Jan. 8, 2008).

¹²⁷ Letter from Elisabeth Lodge Rogers (Jan. 11, 2008).

financial crisis is faced by public school districts across the state as a result of the growing special education mandate deficit and contended that the relief provided by the Legislature during the last legislative session merely transferred money from the regular education budget to the special education budget to achieve some reduction in the special education deficit. He indicated that the special education deficit remains at approximately \$300 million per year.¹²⁸

76. The St. Cloud Area School District 742 (ISD 742) presented detailed comments as to why the Department's proposed rules are not cost-neutral as argued by the Department in the SONAR.¹²⁹ ISD 742 stated that, historically, the cost of meeting under-funded mandates from the state and federal governments in the district exceeded all available special education revenues by approximately \$5 million per year. ISD 742 estimates that the proposed rules will impose additional unfunded special education costs to the district in excess of \$1.3 million per year.¹³⁰ Specifically, ISD 742 asserts that the increased costs to the district will arise from the proposed changes regarding IEP meetings (\$152,000), reevaluation criteria which establish continued special education eligibility based solely on the continuing presence of a disability-based need (\$564,953), and requiring the replication of school day services in extracurricular activities to meet Least Restrictive Environment requirements (\$585,050).¹³¹ ISD 742 argued that the increased rate of operating expenses per student, resulting largely from increase in the cost of special education, has far out-paced state and federal special education funding. The district expressed regret that each year it is required to take money away from its general and regular education budgets to pay for the unfunded or partially-funded mandates set out by the state and the Department. ISD 742 believes that "[t]he only sense in which special education could be considered 'revenue neutral' is that local school districts like ours are compelled to make devastating and crippling cuts in other educational programs in order to cover the rapid unfunded growth in special education."¹³²

77. In its post-hearing comments, MDE reiterated its statements from the SONAR and maintained that the overall impact of the proposed rules will be cost-neutral for many school districts.¹³³ The Department noted that it disagreed with the argument made by some that the proposed rules represent an unfunded mandate at the state level. It indicated that many of the rule changes are required in order for the state to remain in compliance with new federal law (such as the changes in the specific learning disability criteria), and others are required to clarify for districts and staff what is already required by federal law. MDE insists that, while some of the proposed rules may increase costs to school

¹²⁸ Letter from Gerald Von Korff (Jan. 11, 2008). See also Letter from Howard Armstrong (Jan. 11, 2008).

¹²⁹ Letter from ISD 742 at 1 (Dec. 21, 2007).

¹³⁰ *Id.*

¹³¹ *Id.* at 3.

¹³² *Id.* at 4.

¹³³ Department's Dec. 31, 2007, Submission at 7.

districts, other parts of the proposed rules are designed to reduce costs by improving clarity and reducing the need for due process litigation. Further, MDE asserts that many districts will actually see their costs decrease as a result of the proposed rule changes, particularly in the area of behavior interventions, as staff are trained to conduct functional behavioral assessments and implement positive behavior interventions that have the benefit of helping avoid more costly interventions. In the Department's view, because the requirements set forth in the least restrictive environment rule and the proposed criteria upon reevaluation rule are derived directly from federal law, they do not reflect new state requirements that carry with them the burden of unexpected new costs. MDE argues that many districts around the state have already put in place some of the proposed requirements that commentators argue will have a cost impact.¹³⁴ With respect to more general concerns about special education funding that were raised by Gerald Von Korff and others,, the Department asserted that state aid to education was increased by \$788 million over the base budget for fiscal year 2008-09 biennium, a 6.1% increase, and that general education funding, special education funding, and total K-12 education funding all increased each year.¹³⁵

78. The Department stated in its SONAR that it does not anticipate any increase in the number of children appropriately identified for SLD eligibility under the proposed rules and thus believes that the criteria itself will not have a statewide fiscal impact. However, the Department acknowledged that, "because of the added clarity and specificity in the proposed rule, some school districts may expect additional costs related to training requirements for their staff or in the evaluation of students."¹³⁶

79. The costs associated with the proposed rules are somewhat speculative at this point. Moreover, several of the particular rule provisions that drew the most criticism for cost-related reasons have been found by the Administrative Law Judge to either lack statutory authority (the aversive and deprivation rules) or contain other defects (see discussion below relating to the LRE amendment and the reevaluation criteria rule).

80. The Administrative Law Judge concludes that the Department has adequately attempted to take costs into consideration in formulating the proposed rules. Issues and concerns relating to expenditures necessary to comply with the remaining rules are more appropriately raised with the Legislature.

C. Concerns about Increasing Regulation and Paperwork Requirements

81. Among the primary arguments made in opposition to the proposed rules was the assertion that they will increase the already substantial number of

¹³⁴ *Id.* at 7-8.

¹³⁵ MDE's Jan. 11, 2008, Submission.

¹³⁶ SONAR at 112.

regulations and recordkeeping burdens placed on special education professionals. For example, Daryl Miller of the Minnesota Administrators for Special Education expressed concern that the proposed rules would negatively impact student outcomes because teacher time would be spent in administrative or clerical tasks rather than with students. He urged that overly prescriptive regulation be avoided.¹³⁷ Cherie Peterson, Assistant Director of Special Education for the Anoka-Hennepin School District, asserted that the proposed behavior intervention rules included several additional paperwork and requirements.¹³⁸ Several administrators, teachers, and clinicians working with the Rosemount-Apple Valley-Eagan Area Schools (ISD 196), the Anoka-Hennepin School District (ISD 11), the Bemidji Regional Interdistrict Council (ISD 998) Special Education Cooperative, the Middleton Elementary School in Woodbury, the Onamia School District (ISD 480), the Rum River Special Education Cooperative, and many other districts and facilities objected to the paperwork requirements and the associated costs and time spent away from providing direct services to children.¹³⁹

82. The Minnesota Association of School Administrators (MASA) asserted that “[t]eachers are leaving the field because of the due process paperwork required to document compliance with regulations that do not produce better outcomes for students.”¹⁴⁰ MASA’s concerns were echoed by the Minnesota Administrators for Special Education (MASE), which stated that “[t]hese rules will divert more time of teachers away from face to face contact with students.”¹⁴¹ Individuals affiliated with the Forest Lake Area Schools (ISD 831), the Stillwater Area Public Schools (ISD 834), the Prior Lake-Savage Area Schools (ISD 719), the Mid-State Education District (ISD 6979), and the Pierz Area Public Schools (ISD 484), were just some of the more than 100 educational organizations, teachers, psychologists, speech language pathologists, and other professionals who commented that children are losing the instructional expertise of good teachers to burdensome compliance activities.

83. Mary Ruprecht, Director of Special Education for the Rum River Special Education Cooperative in Cambridge, Minnesota, objected to the MDE’s “ever-inflating regulations” as both unnecessary and unreasonable. Ms. Ruprecht stated that “overregulation contributes greatly to the special education teacher shortage and increases the cost of special education programs to local

¹³⁷ Hearing Transcript at 260-263; Letter from Daryl Miller (January 11, 2008).

¹³⁸ Letter from Cherie Peterson (Jan. 11, 2008).

¹³⁹ See, e.g., Public Ex. 5; Letters from Mary Kreger and John Currie (Nov. 26, 2007); Stephen Troen, James Roberts, and Christopher Endicott (November 26, 2007); Gary Anger, Renee Arrowood, Tonia Humble, Rebecca Sonsalla, Denise Vonasek, and Melissa Worm (Nov. 29, 2007); Denny Ulmer (Nov. 21, 2007); Jennifer Salava (Nov. 28, 2007); Mary Jelinek (Nov. 28, 2007); Steve Degenaar (Dec. 3, 2007); Lisa Kelly (Nov. 28, 2007); Gary Lewis (Nov. 26, 2007); Steve Weber (Dec. 3, 2007); Susan Butler (Jan. 8, 2008); Cherie Peterson (Jan. 11, 2008); Rum River Special Education Advisory Board of Superintendents (Jan. 11, 2008)..

¹⁴⁰ Pre-hearing comment of Minnesota Association of School Administrators (MASA) (Nov. 29, 2007).

¹⁴¹ Letter from Daryl Miller (January 11, 2008).

districts." She further contended that "the layers of process required by these rules, particularly those rules for behavior intervention . . . will result in less instructional time and, therefore, decreased outcomes for students with disabilities." In her view, the proposed rules are overly prescriptive in order to "legislate against incompetence."¹⁴² Jeffrey Borchardt, a behavior analyst who serves as a consultant for Rum River Special Education Cooperative, and Amber Hedstrom Keppel, an EBD teacher with the Cooperative, stated that many of the proposed rules appear to increase paperwork, documentation, and meeting time, and would result in an increase in the time special education teachers will have to spend away from instruction and direct contact with students.¹⁴³

84. Nan Records, Director of Special Education for several central Minnesota school districts, challenged the need for and reasonableness of the rules. She asserted that they merely mandate practices that are already commonly used in Minnesota and will place the increased cost burdens on districts without improvement in outcomes for the overwhelming majority of students.¹⁴⁴ Deb Wall, a special education teacher in the Forest Lake District, asserted that the excessive amount of documentation required by special education regulations is driving talented special education teachers from the field. She expressed concern that the amount of time that must be devoted to paperwork results in depriving students of valuable learning time. She pointed out that, while some districts employ due process specialists to provide clerical assistance, other districts do not, and emphasized the costs that would be associated with such positions.¹⁴⁵ Randall Arnold, a special education administrator for the St. Cloud School District, contended that the proposed rules will create additional paperwork requirements and involve substantial costs while adding to the difficulty experienced by parents and educators in traversing the maze of due process requirements.¹⁴⁶

85. Peter Martin, an attorney representing the Minnesota School Board Association, emphasized that the IDEA directed the states receiving federal funding to "minimize the number of rules, regulations and policies to which the local educational agencies and schools located in the state are subject under this title." Mr. Martin also stressed that the IDEA's policy objectives included the objective that resources be focused "on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results" and emphasized that, contrary to these directives, the Minnesota special education rules set forth in chapter 3525 will increase, not decrease, the amount of required paperwork.¹⁴⁷ Stan Nerhaugen, a retired director of special education, expressed concern that the paperwork burden in the special

¹⁴² Hearing Transcript at 65; Public Ex. 1.

¹⁴³ Hearing Transcript at 97-100; Letter from Jeffrey Borchardt (Dec. 3, 2007).

¹⁴⁴ Hearing Transcript at 216-221; Letter from Nan Records (Dec. 5, 2007).

¹⁴⁵ Hearing Transcript at 249-251; Letter from Deb Wall (Nov. 28, 2007).

¹⁴⁶ Hearing Transcript at 270-271; Letter from Randall Arnold (Dec. 3, 2007).

¹⁴⁷ Hearing Transcript at 148-150. Cited provisions of the IDEA are located at 20 U.S.C. §§ 1400(c)(5)(G) and 1407(a)(3).

education area contributes to teacher burnout and also reduces the time teachers have for instructional planning and communication with their peers. He questioned whether the Department, in considering the proposed rules, took into account how increased time needed for reporting would affect special education.¹⁴⁸

86. Paula Goldberg, Executive Director of the PACER Center, commented that paperwork is part of an appropriate accountability system and stated that the proposed rules will provide needed clarity.¹⁴⁹ In addition, Amy Goetz, a parent of children with disabilities and an attorney representing students and families in special education matters, asserted that paperwork is a fair price to pay for reducing the risk of harm to students and staff. If educators need assistance in paperwork, she suggested that more funds should be designated toward administrative assistance.¹⁵⁰

87. In its post-hearing comments, the MDE acknowledged that there are more rule parts in the proposed rules than in the existing rules due largely to the proposed revision of rules relating to behavior intervention and specific learning disability, but contended that these revisions make the special education rules more clear, readable, and usable. In addition, the Department maintained that, based upon a simple word count, the proposed rules are shorter than the rules as they exist today. The Department also indicated that it attempted to shorten the rules where possible and was aware of ongoing concerns regarding paperwork. The Department contended that the proposed rules in fact significantly reduce paperwork work by eliminating school districts' responsibility for making a yearly submission of the district's total special education system plan. It further asserted that the majority of the other proposed rules require no paperwork or are paperwork-neutral.¹⁵¹ Regarding the further argument that paperwork requirements deprive staff of teaching time, the Department noted:

The purpose of the rules is not to increase paperwork or cost, or to take staff time from instruction. The purpose of the rules is to ensure compliance with state and federal law; consistent provision of special education surface services around the state; and appropriate educational services for all children with disabilities. If the rules require funds to be spent on staff training, then the Department observes that those costs will be recouped in improved services and staff who are more qualified to provide special education services, who will have more time to work with their students, and who will have more tools to rely on in their day-to-day work.

¹⁴⁸ Hearing Transcript at 155-157.

¹⁴⁹ Hearing Transcript at 60; Letter from Paula Goldberg (Jan. 11, 2008).

¹⁵⁰ Hearing Transcript at 245.

¹⁵¹ Department's Dec. 31, 2007, Submission at 5.

Regarding increased paperwork, every requirement in these proposed rules is designed to give educators and/or parents more information about their students, which will improve their ability to serve those students. Similarly, regarding evaluation reports, while it is true that a solid evaluation report requires time and money, evaluation reports are required by federal and state law.¹⁵²

87. The primary portions of the proposed rules that required greater documentation were those relating to the use of behavioral interventions, locked time-out rooms, mechanical restraints, and manual restraints. As noted above, the Department lacks statutory authority to adopt these rules at the present time. The remaining proposed rules involved in this proceeding have not been shown to be unnecessary or unreasonable due to their sheer number or the documentation requirements or costs associated with them.

X. Rule-by-Rule Analysis

88. Only the terms that received comments or otherwise require discussion are discussed below. The MDE has demonstrated that the remaining rules are needed and reasonable, and within their statutory authority.

Proposed Rule Part 3525.0210 – Definitions

Subpart 35 - Parent

89. Kim Buechel Mesun, Assistant General Counsel and Manager of the Special Education Monitoring and Compliance Team for the Minneapolis Public Schools, raised a concern with respect to the portion of the proposed rules' definition of "parent" that states that, "[i]f a judicial decree or order identifies a specific party under items A through D to act as the 'parent' of a child or to make educational decisions on behalf of a child, then such party shall be the 'parent' for purposes of this part." Ms. Mesun asserted that, while court orders often identify the county as the guardian of children and give the county or county social workers the authority to make educational decisions for the child, the MDE has told the district in the past that county social workers cannot be appointed as a surrogate parent or act as a parent for purposes of giving consent under the IDEA. Ms. Mesun recommended that the proposed language be changed to clarify whether or not county social workers can serve as "parents" or surrogate parents for purposes of the IDEA.¹⁵³

90. In the SONAR, the Department indicated that the amendments to the definition of "parent" made in the proposed rules were intended to ensure consistency between federal and Minnesota law and to make it easier to understand. The Department did not provide further response to Ms. Mesun's comments in its post-hearing submissions. While the definition in the proposed

¹⁵² MDE's December 31, 2007, Submission at 9-10.

¹⁵³ Letter from Kim Buechel Mesun (Dec. 21, 2007).

rules has been shown to be needed and reasonable, the Administrative Law Judge urges the Department to consider Ms. Mesun's comments and make further clarifications to the rule, if deemed appropriate. Such modifications, if made, would not render the rules substantially different from the rules as originally proposed.

Proposed Rule Part 3525.0400 – Least Restrictive Environment

91. The existing rules require that “[t]o the maximum extent appropriate,” children with disabilities shall be educated with children who do not have disabilities and shall attend regular classes. They go on to specify that a child with a disability shall be removed from a regular educational program only where there is an indication that the child will be better served outside the regular program and “only when the nature or severity of the disability is such that education in a regular educational program with the use of supplementary aids and services cannot be accomplished satisfactorily.” The current rules also state that the needs of the child “shall determine the type and amount of services needed.”

92. The proposed amendments to part 3525.0400 would add the following sentence to the rule: “A regular education environment includes regular classes and participation in nonacademic and extracurricular services and activities.” In the SONAR, the MDE indicated that this change was made to comply with the federal requirements relating to least restrictive environment. The Department also emphasized that existing rule part 3525.3010, subp. 3, already includes nonacademic extracurricular activities as well as academic activities in the requirement that children with disabilities are educated with children who are not disabled, to the maximum extent appropriate.¹⁵⁴

93. Many individuals and organizations, including the PACER Center, the Minnesota Disability Law Center (MDLC), Arc Greater Twin Cities, Matthew Fink, Cheri Fink, Joanna Stone, Barb Ziemke, Jody Manning, and Carolyn Anderson, supported the proposed amendment to the rules as necessary to clarify that the regular education environment applies to non-academic and extracurricular activities as well as to regular education classrooms. Arc Twin Cities suggested that the language of the proposed rule be clarified by deleting the words “participation in.” PACER asserted that there should be no additional cost associated with the proposed rules because a free and appropriate public education has always included extracurricular activities. Those supporting the proposed rules asserted that children with disabilities often experience barriers to participation in extracurricular activities and expressed hope that the amendment would improve their ability to participate. They stressed the positive results of inclusion in these activities in the development of social interaction and leadership skills. They also pointed out that such participation is important because colleges often consider the extent to which college applicants have

¹⁵⁴ SONAR at 20.

participated in extracurricular and nonacademic activities in determining whether or not to grant admission. Matthew Fink noted that participation in extracurricular activities is important in developing skills and social connections necessary to make a high school or middle school experience full and rewarding for students with disabilities. Ms. Manning emphasized that extracurricular activities encourage the development of skills that may improve the child's opportunities to participate in community, recreational, and leisure activities in later life.¹⁵⁵

94. Peter Martin, representing the Minnesota School Boards Association; Mary Ruprecht, Director of Rum River Special Education; Elisabeth Lodge Rogers, Director of Special Education for the St. Cloud Area Schools; Nan Records, Director of Special Education for the Sherburne and Northern Wright Special Education Cooperative; numerous administrators and educators from the Rochester Public Schools; and others¹⁵⁶ objected to this rule amendment and argued that the inclusion of extracurricular and nonacademic activities would exceed the federal requirements and require substantial additional expenditures. They recommended that the legislative task force be allowed to proceed with its work and that the Department proceed with rulemaking on this topic only after studying the task force recommendations and holding a series of stakeholder group meetings.

95. The Minnesota School Boards Association contended that the proposed rule's use of different language than that used in the federal regulations relating to LRE creates a different state standard. It asserted that, if the Department merely intends to follow the federal requirement, it should use the federal language. The Association further argued that the language of the proposed rule "implies an entitlement on the part of all children with disabilities to participation in nonacademic and extracurricular activities as part of an IEP" and might enable a special education student "to demand additional instruction and services in nonacademics and extracurricular activities (at significant additional cost to school districts) even if the student does not need such instruction and services to receive a FAPE [free appropriate public education]."¹⁵⁷ Similarly, Dr. Andrea Bie of the Minnesota School Psychologists Association stated that the link created by the proposed rules between LRE and extracurricular activities

¹⁵⁵ Hearing Transcript at 60, 111-113, 114-117, 126-127, 128-129, 180-182, 212-214, 252; Letters from MDLC (Dec. 21, 2007); Jody Manning (Dec. 19, 2007); Paula Goldberg (Jan. 11, 2008); Barb Ziemke (Dec. 3, 2007); Jacki McCormack (Dec. 21, 2007); Carolyn Anderson (Dec. 3, 2007).

¹⁵⁶ See, e.g., Letters from Paula Krippner (Dec. 3, 2007); Stephanie Corbey (Dec. 1, 2007); Ronald Ruhnke (Dec. 3, 2007); Tammy Lensing (Dec. 6, 2007); Danny Saehr (Dec. 6, 2007); Steve Drake (Dec. 6, 2007), Dawn Meyer (Dec. 6, 2007), Jill Hoheisel (Dec. 6, 2007); Cara Quinn (Jan. 8, 2008); Don Schuld (Nov. 21, 2007); Roxanne Nauman (Nov. 26, 2007); Elisabeth Lodge Rogers (Nov. 28, 2007); Cory Larson (Dec. 10, 2007); Chris Blauer (Dec. 6, 2007).

¹⁵⁷ Comments by the Minnesota School Boards Association (Dec. 24, 2007).

suggests that extracurricular activities become part of the regular school day and indicated that the Association was opposed to that approach.¹⁵⁸

96. Bruce Watkins, Superintendent, and Elisabeth Lodge Rogers, Director of Student Services, St. Cloud Area Schools, asserted that, by adding participation in nonacademic and extracurricular services and activities to the definition of regular education environment, the proposed rules linked extracurricular activities to LRE. In their view, this suggests that replication of all school day special education services is necessary in extra-curricular activities in order to meet LRE and to provide a free appropriate education. Dr. Rogers argued that the IDEA does not guarantee participation in extracurricular activities. She also asserted that court decisions¹⁵⁹ have found that the federal requirement that students with disabilities be afforded an equal opportunity for participation does not require that services and activities actually be provided to students with disabilities, does not entitle disabled students to a greater opportunity for participation in nonacademic and extracurricular activities than their non-disabled peers, and does not make participation in such activities a mandatory element of a student's IEP. Dr. Rogers stated that the MDE has required her school district to provide a paraprofessional in the past for a student participating in adapted extracurricular activities. She pointed out that 480 students in her district currently receive support from a paraprofessional and estimated that, if all of those students also were provided a paraprofessional for participation in a 12-week long extracurricular activity for eight hours a week, the additional cost would be \$585,050. She argued that it was disingenuous for the MDE to assert that the proposed rules are cost neutral. She asserted that the language of the proposed rule is not needed because districts currently accept responsibility for working to ensure equitable opportunities for all students to participate in extracurricular activities, and that the language of the proposed rule is vague and ambiguous and will lead to increased costs and disputes. Based upon case law, Dr. Rogers contended that a child's IEP cannot exempt the child from the qualifications required by competitive sports.¹⁶⁰

97. Ms. Records contended that the insertion of the proposed language from 34 C.F.R. § 300.117 into the LRE rule would vastly expand special education services in Minnesota over the federal requirements. If the Department had merely wished to come into compliance with the IDEA rather than exceed federal requirements, Ms. Records asserted that the Department would only have needed to create a separate section entitled "nonacademic settings" and incorporate the language from 34 C.F.R. §§ 300.117 and

¹⁵⁸ Letter from Andrea Bie (Dec. 21, 2007); see also Letters from Julia Gerak (Nov. 27, 2007) and Kimberly Gibbons (Dec. 17, 2007).

¹⁵⁹ Dr. Rogers cited *Board of Education of Ellicottville Central School District*, 104 LRP 40380 (2004) and *Lauderdale County Board of Education*, 36 IDELR178 (Ala. 2002).

¹⁶⁰ Hearing Transcript at 228-231; Letters from Elisabeth Lodge Rogers (Nov. 28, 2007, Dec. 18, 2007, and Jan. 11, 2008); Letter from Bruce Watkins and Elisabeth Lodge Rogers (Dec. 21, 2007).

300.107.¹⁶¹ Similarly, Dr. Steve Weber, who works with the Onamia Early Intervention Program, commented that the language of the proposed rules "suggests extra curricular activities become part of school day, thus increasing unfunded positions/obligations and forcing school districts to be liable for activities away from the school and not considered a part of the academic day."¹⁶²

98. Representatives from the Rochester Public Schools and others asserted that the proposed rules exceed the intent of the federal regulations by identifying extracurricular activities as part of the school day. Many of them agreed with Dr. Rogers' assertion that the proposed rules would require that school districts must "basically replicate school day services in extra curricular activities in order to meet LRE."¹⁶³ Carla Nohr Schulz, Director of Special Education in Farmington, expressed concerns that the costs of paraprofessionals and additional buses for extracurricular activities would take away resources that would otherwise support basic educational curriculum.¹⁶⁴ Loy Woelber, a parent of a child with a disability and the superintendent of a district in Southwest Minnesota, also expressed concerns about the practicality of the proposed amendment in testimony during the public hearing.¹⁶⁵ James Kamphenkel, Vice Chair of the Sauk Centre Board of Education, commented that the proposed amendment "will in fact impede student opportunity, increase the likelihood of disputes and far exceed federal regulations."¹⁶⁶ Ann Mitchell, a member of the Sauk Centre School Board, commented that she found the proposed rule to be confusing and wondered if there must be some type of IEP for each student and/or each extracurricular activity. She indicated that her district could not afford to find out the answers to these questions through litigation.¹⁶⁷ Mary Ruprecht of the Rum River Special Education Cooperative expressed concern that the proposed rules could be read to require implementation of positive interventions under a behavior intervention plan before a student could be pulled out of a practice or game.¹⁶⁸

99. The portion of the IDEA discussing the least restrictive environment requirement does not expressly mention extracurricular or nonacademic

¹⁶¹ Letter from Nan Records (Dec. 5, 2007).

¹⁶² Letter from Steve Weber (Dec. 3, 2007).

¹⁶³ See, e.g., Letters from Colette Sweeney (Nov. 29, 2007); Judith Daul (Nov. 28, 2007); Cory McIntyre and Sharon Alexander (Nov. 26, 2007); Mary Alcot (Nov. 26, 2007); Kay Tessum (Nov. 26, 2007); Susanne Griffin-Ziebart (Jan. 6, 2008); Cecilia Krystosek (Jan. 4, 2008); Cathy Tryggestad (Jan. 3, 2008); Mary Lang (Jan. 3, 2008); Bonnie Marod (Jan. 7, 2008); Kay Campbell (Nov. 30, 2007); Gloria Sebasky (Dec. 3, 2007); Jolene Goodrich (Dec. 3, 2007); John Freeman (December 3, 2007); Cheri Scephurek (Dec. 3, 2007).

¹⁶⁴ Letter from Carla Nohr Schulz (Dec. 21, 2007).

¹⁶⁵ Hearing Transcript at 104-105.

¹⁶⁶ Letter from James Kamphenkel (Dec. 11, 2007).

¹⁶⁷ Letter from Ann Mitchell (Dec. 6, 2007).

¹⁶⁸ Letter from Mary Ruprecht (Nov. 21, 2007).

activities,¹⁶⁹ nor does the general LRE rule promulgated by the U.S. Department of Education under the IDEA.¹⁷⁰ However, the federal rules do specify that:

Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.¹⁷¹

The federal rules go on to state in a separate provision:

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Sec. 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings."¹⁷²

¹⁶⁹ See 20 U.S.C. § 1412(a)(5)(A) (requiring that states have in effect policies and procedures to ensure that, "[t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily").

¹⁷⁰ 34 C.F.R. § 300.114, relating to LRE requirements, states in relevant part:

(a) General.

(1) Except as provided in Sec. 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and Sections 300.115 through 300.120.

(2) Each public agency must ensure that--

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

¹⁷¹ 34 C.F.R. § 300.107(a).

¹⁷² 34 C.F.R. § 300.117. In addition, 34 C.F.R. §300.109 states, "The State must have in effect policies and procedures to demonstrate that the State has established a goal of providing full educational opportunity to all children with disabilities, aged birth through 21, and a detailed timetable for accomplishing that goal."

100. The requirements of the federal rules quoted above are echoed in part 3525.3010, subps. 2 and 3, of the existing Minnesota special education rules. Subpart 2 of that rule, relating to general LRE requirements, states that "[e]ach district must ensure that pupils are placed in the least restrictive environment according to part 3525.0400 and Code of Federal Regulations, title 34, section 300.552."¹⁷³ Subpart 3, relating to non-academic settings, states that, "In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Code of Federal Regulations, title 34, section 300.306, each district must ensure that each pupil participates with nondisabled students in those services and activities to the maximum extent appropriate to the needs of that pupil."¹⁷⁴

101. During the federal rulemaking process in connection with the most recent round of IDEA regulations, some of those commenting recommended that "regular education environment" be defined in the federal rules to mean the regular classroom and the non-academic environment. Others suggested that the regulations require children to be in the regular classroom and in nonacademic activities with nondisabled peers. The U.S. Department of Education declined to incorporate these changes in the rules. The agency provided the following explanation in its comments in the Federal Register:

It is not necessary to define "regular education environment" or to repeat that children with disabilities should be included in the regular classroom and in nonacademic activities with their nondisabled peers. The LRE requirements in §§ 300.114 through 300.120, consistent with section 612(a)(5) of the Act, are clear that each public agency must ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. Section 300.117, consistent with section 612(a)(5) of the Act, is clear that this includes nonacademic and extracurricular services and activities.¹⁷⁵

102. In its post-hearing comments, the Department stated that the proposed addition to rule part 3525.0400 "simply summarizes what the federal regulations require These regulations make clear that nonacademic and extracurricular services and activities must be available to children with disabilities. Moreover, this is not a new requirement but was required by the 1997 version of IDEA as well." The MDE further contended that the fact that many school districts expressed concern regarding this requirement and felt that it exceeded the federal requirements underscores the need for the modification of the rule. It asserts that the proposed rules will make it clear that children with

¹⁷³ 34 C.F.R. § 300.552, relating to educational placement of a child with a disability, has since been renumbered 34 C.F.R. § 300.116.

¹⁷⁴ 34 C.F.R. § 300.306 relates to determinations of eligibility.

¹⁷⁵ 71 Fed. Reg. 46670 (Aug. 14, 2006).

disabilities must be provided with the opportunity to participate in extracurricular activities even where extra supports may be required to ensure that participation.¹⁷⁶

103. The Administrative Law Judge concludes that the MDE has not shown that the proposed modification to part 3525.0400 is necessary or reasonable to ensure that Minnesota special education practice is consistent with federal IDEA requirements and interpretations. The existing rules of the Department pertaining to this subject are consistent with federal rules and laws and already make it clear that children with disabilities must participate with nondisabled students in nonacademic and extracurricular services and activities “to the maximum extent appropriate” to their needs. In fact, the U.S. Department of Education declined to make the modification that is now proposed by MDE to the federal rules, on the ground that it was not necessary.

104. Moreover, rather than merely clarifying the current requirement, it is arguable that the proposed modification of the definition of “regular education environment” to include participation in nonacademic and extracurricular services and activities would expand the circumstances under which a child with a disability would be entitled to participate in such activities beyond the current federal requirements and would more broadly mandate participation regardless of the determination made by the IEP team. For example, the current requirement that a student with disabilities be afforded an “equal opportunity for participation” in nonacademic and extracurricular activities has been construed to require that the student’s IEP include such participation if the team determines that it is appropriate to provide FAPE and meet the student’s needs. Thus, in order for participation in nonacademic and extracurricular services and activities to be a mandatory element of a student’s IEP, it has been necessary for the student to bear the burden of showing that FAPE cannot be provided without such participation.¹⁷⁷ Under the proposed rule amendment, however, it is arguable that a student’s participation in nonacademic and extracurricular activities would be mandated regardless of the determination made by the IEP team and regardless of whether such participation is necessary for the child to receive a FAPE. If that is the case, it is possible that the school district would have the burden to show that a particular extracurricular program cannot be made accessible despite the use of supplementary aids and services. While the Department may wish to adopt as a matter of policy an approach that is more expansive than that required by federal law, it has not supplied any facts supporting the need for and reasonableness of a more expansive approach or even acknowledged that the proposed rules could have such an outcome. In fact, the only rationale it has offered for this proposed rule change is to “comply with federal requirements” and “address confusion in the field.”

¹⁷⁶ MDE’s Dec. 31, 2007, Submission at 10-11; MDE’s Jan. 11, 2008, Submission at 5.

¹⁷⁷ See, e.g., *Board of Education of the Ellicottville Central School District*, 104 LRP 40380 (SEA N.Y. 2004); *Lauderdale County Board of Education*, 36 IDELR 178 (SEA Ala. 2002); Letter to Anonymous, 17 IDELR 180 (OSEP 1990).

105. The Department's failure to show that the language of the proposed rules specifying that "[a] regular education environment includes regular classes and participation in nonacademic and extracurricular services and activities" is needed and reasonable constitutes a defect in the proposed rules. To correct the defect, this portion of the proposed amendment to part 3525.0400 must be withdrawn.

Proposed Rule Part 3525.0850 – Positive Behavioral Interventions and Supports

106. This portion of the proposed rules attracted extensive comment. However, as more fully discussed above in Part III(A) of this Report, the Department has been found to lack statutory authority to adopt the vast majority of the provisions set forth in this rule part. Accordingly, all subparts of this rule except subpart 3 must be withdrawn from this rulemaking proceeding and will not be discussed here.

Subpart 3 - Definitions

107. Subpart 3, items A, B, C, and D, relate to definitions of "contingent observation," "exclusionary time-out," "positive behavioral interventions and supports" and "target behavior." Because none of these definitions is necessarily part of the rule on aversive and deprivation procedures, the Department does have authority to include these provisions in the proposed rule under its general rulemaking authority. Therefore, the Department may proceed with its proposal to adopt these four definitions if it wishes.

108. Rick Amado, a behavior analyst, commented that the definition of "contingent observation" contained in item A of Subpart 3 was incomplete. He further indicated that the definition of "exclusionary time-out" contained in item B should refer to positive reinforcement in the description of the time-out procedure, and stated that the proper descriptive term for this approach is "time-out from positive reinforcement." Mr. Amado urged that the rules use language that is standard in the industry.¹⁷⁸

109. The Department did not respond in its post-hearing submissions to Mr. Amado's suggestions for modification of the above definitions. While the definitions as proposed have been shown to be needed and reasonable, the Department is encouraged to consider Mr. Amado's recommendations and, if appropriate, further modify these rule provisions.

Proposed Rule Part 3525.0855 – Behavioral Intervention Plans

110. This portion of the proposed rules attracted extensive comment. However, as more fully discussed above in Part III(A) of this Report, the Department has been found to lack statutory authority to adopt the provisions set

¹⁷⁸ Hearing Transcript at 187-189.

forth in this rule part. Accordingly, this portion of the proposed rules must be withdrawn from this rulemaking proceeding and will not be discussed here.

Proposed Rule Part 3525.0860 – Regulated Interventions

111. This portion of the proposed rules attracted extensive comment. However, as more fully discussed above in Part III(A) of this Report, the Department has been found to lack statutory authority to adopt the provisions set forth in this rule part. Accordingly, this portion of the proposed rules must be withdrawn from this rulemaking proceeding and will not be discussed here.

Proposed Rule Part 3525.0865 – Prohibited Procedures

112. This portion of the proposed rules attracted extensive comment. However, as more fully discussed above in Part III(A) of this Report, the Department has been found to lack statutory authority to adopt the provisions set forth in this rule part. Accordingly, this portion of the proposed rules must be withdrawn from this rulemaking proceeding and will not be discussed here.

Proposed Rule Part 3525.0870 – Emergency and Notice of Peace Officer Involvement

113. This portion of the proposed rules attracted extensive comment. However, as more fully discussed above in Part III(A) of this Report, the Department has been found to lack statutory authority to adopt the vast majority of the provisions set forth in this rule part. Accordingly, all subparts of this rule except subpart 3 must be withdrawn from this rulemaking proceeding and will not be discussed here.

Subpart 3 – Notice of peace officer involvement

114. Proposed rule part 3525.0870, subpart 3, sets forth new language requiring that, “[i]f a peace officer restrains or removes a child from a classroom, school building, or school grounds during the school day, the district must notify the child's parent or guardian on the same day the child is restrained or removed or in writing within two school days if district personnel are unable to provide same-day notice.” This subpart could apply outside of situations involving aversive and deprivation procedures and could be included in the proposed rule under the Department's general rulemaking authority. Therefore, the Department may proceed with this subpart of the rule if it wishes.

115. The National Alliance on Mental Illness of Minnesota (NAMI) supported the immediate notification of parents if an officer removes a child from the building. NAMI pointed out that this is particularly important if the child is brought to juvenile detention or jail because parents need to make arrangements for medication and other matters.¹⁷⁹ Jacki McCormick, representing Arc Twin

¹⁷⁹ Letter from Sue Abderholden, Executive Director of NAMI Minnesota (Dec. 4, 2007).

Cities, expressed concern about the length of time it could take for a parent to receive this information and the methods that may or may not be used to contact the parents, and urged that every attempt should be made to notify parents by telephone. She further suggested that language be added to this section requiring that an IEP meeting be held after emergency police involvement to review the IEP. Paula Goldberg, representing the PACER Center, asserted in pre- and post-hearing comments that the proposed rule should require notification on the same day "and" written notification within 48 hours.¹⁸⁰ The Department declined to make this change because it did not believe it was necessary to protect the notification rights of a child or parent.¹⁸¹

116. Susan Butler, Director of Special Education in the Anoka-Hennepin School District, objected to the reference to police involvement in this section because she believes that it implies that police involvement is a behavior intervention and that school administrators are directing the work of the police. She urged that the language be deleted and that law enforcement be given the discretion and responsibility to decide how and when to contact parents.¹⁸²

117. Scott Hare, Director of Special Services for the Belle Plaine, Jordan, and Montgomery-Lonsdale schools, as well as Ms. Butler, Mr. Schuld, numerous educators and administrators with the Rochester Public Schools, and others, objected to this reporting requirement. They asserted that the proposed rule will create another potential compliance issue for local school district staff and additional forms to be completed and will add to the already burdensome paperwork involved in special education. While Rochester Public Schools agreed that timely communication with parents about the status of their children is good public relations, they asserted that such notification is not required by federal regulations and should not become an added legal requirement. A number of individuals expressed concern that the notification requirement might compromise police investigations.¹⁸³ Scott Marks and Gina Wieler of the Minnesota Juvenile Officers Association commented that this proposed rule is redundant because police officers are currently contacting parents during law-enforcement investigations. They also expressed concern that notification of parents might lead to an unsafe environment if parents arrived during active investigations and notification by school administrators could violate state criminal statutes prohibiting the obstruction of legal process.¹⁸⁴

¹⁸⁰ SONAR at 85; Letter from Paula Goldberg (Jan. 11, 2008).

¹⁸¹ SONAR at 85.

¹⁸² Letter from Susan Butler at 10-11 (Dec. 6, 2007).

¹⁸³ Hearing Transcript at 44-45, 48; Letters from Colette Sweeney (Nov. 29, 2007); Judith Daul (Nov. 28, 2007); Cory McIntyre and Sharon Alexander (Nov. 26, 2007); Mary Alcot (Nov. 26, 2007); Kay Tessum (Nov. 26, 2007); Susanne Griffin-Ziebart (Jan. 6, 2008); Don Schuld (Nov. 21, 2007); Julia Gerak (Nov. 27, 2007); Mary Ruprecht (Nov. 21, 2007); Elisabeth Lodge Rogers (Nov. 28, 2007).

¹⁸⁴ Hearing Transcript at 45-49; Public Ex. 4.

118. In response, the Department indicated that the proposed rule "reinforces communication between parents and schools and codifies that parents have a right to know where their children are while they are entrusted to the care of schools." Because the requirement can be fulfilled by a telephone call, the Department contended that the rule is "paperwork neutral." The Department stated that the rule does not govern police investigative powers or duties and police officers will have the discretion and responsibility to decide how and when to contact parents about removal of a student from school or arrest.¹⁸⁵

119. The Department has shown that the provisions of subpart 3 of the proposed rule are needed and reasonable to ensure that schools will attempt to provide parents with notification should a peace officer restrain or remove a child from school during the school day. The proposed rule does not impose any additional paperwork requirements, nor does it interfere with police investigative powers.

Proposed Rule Part 3525.1325 – Autism Spectrum Disorders (ASD)

120. The existing rule states that "a clinical or medical diagnosis is not required for a pupil to be eligible for special education services, and even with a clinical or medical diagnosis, a pupil must meet the criteria in subpart 3 to be eligible." The only changes proposed by the Department to be made to this rule part in the current proceeding would replace the words "pupil" or "pupils" with "child" or "children," consistent with changes made throughout Chapter 3525.

121. The Minnesota Psychological Association proposed that the wording of subpart 5 be changed to state, "A clinical or medical diagnosis is required for a child to be eligible for special education services." The Association asserted that requiring a clinical diagnosis for those with ASD would ensure accurate identification of those who would benefit from special education services and also render the requirements for assessing this group of students consistent with those specified in the rules for other groups. The MPA indicated that it is important that professionals trained in the diagnosis of learning and mental health difficulties be involved in the process of identifying special needs students, and stated that such an approach would help children with complex learning and behavioral issues receive appropriate services while ensuring that sufficient safeguards are included in behavioral interventions.¹⁸⁶

122. The Department's proposed rules are not defective due to their failure to incorporate the suggested modifications. Because the changes initially proposed to this rule part were very limited in scope, any attempt by the Department to incorporate the suggested substantive changes in this proceeding would likely have resulted in a finding that the rules as finally proposed were substantially different from the rules as originally proposed. The Department is

¹⁸⁵ Department's Dec. 31, 2007, Submission at 26.

¹⁸⁶ Letter from Mark Miller (Dec. 20, 2007).

encouraged, however, to take these comments into consideration when it proceeds with future rulemaking.

Proposed Rule Part 3525.1327 – Deaf-Blind

Proposed Rule Part 3525.1331 – Deaf and Hard of Hearing

123. The Department's proposed rules would add only one substantive change to these rule provisions: it would replace the word "English" with the word "language" in part 3525.1331, subpart 2, item C. Therefore, as proposed for amendment, the rule would identify as one possible eligibility criterion for special education instruction and related services that the child's hearing loss "affects the use or understanding of spoken ~~English~~ language" The Department noted in the SONAR that it proposes this change because "it is inappropriate to define deafness based upon a child's understanding solely of spoken of English as opposed to a child's understanding of any spoken language."¹⁸⁷ The only other changes proposed to be made to parts 3525.1327 and 3525.1331 would replace the words "pupil" or "pupils" with "child" or "children," consistent with changes made throughout Chapter 3525.

124. Numerous comments on this portion of the proposed rules were received both before and after the rulemaking hearing. For example, Lisa Ewan, a former teacher of deaf and hard of hearing students and the principal of Metro Deaf School in St. Paul, testified at the hearing concerning several proposed rule changes supported by members of the deaf and hard of hearing community as well as audiologists and parents.¹⁸⁸ Carolyn Anderson, parent advocate, also testified in support of the changes to the proposed rules offered by the Minnesota Commission Serving Deaf and Hard of Hearing Persons and the workgroup of audiologists and teachers of the deaf who submitted comments. In particular, she recommended that the proposed rules be revised to indicate that children not yet enrolled in kindergarten must meet the criteria set forth in subpart 2 A only and that a teacher of the deaf or hard of hearing be required to be a member of the team determining eligibility and planning educational programming for students with hearing impairments.¹⁸⁹ Candace Lindow-Davies, parent of a child who is deaf and coordinator of a statewide parent support program, stressed the importance of early intervention for children with hearing impairments and recommended modification of the proposed rules to ensure that eligibility not be limited to those who have already developed delays.¹⁹⁰ Sherry Landrud, an educator of the deaf, supported modifications in the proposed rules on behalf of deaf and hard of hearing statewide coordinators and educational audiologists.¹⁹¹ Finally, Joyce Daugaard, a teaching specialist at the University of Minnesota in the deaf and hard of hearing teacher education program, recommended changes

¹⁸⁷ SONAR at 94.

¹⁸⁸ Hearing Transcript at 121-126; Public Ex. 7.

¹⁸⁹ Hearing Transcript at 130; Letter from Carolyn Anderson (Dec. 3, 2007).

¹⁹⁰ Hearing Transcript at 131-133.

¹⁹¹ Hearing Transcript at 133-135.

in the deaf and hard of hearing criteria on behalf of teacher colleagues who participated in the workgroup. In particular, she urged that the rules be modified to require that the team determining eligibility and educational programming for a child with hearing loss include a teacher of the deaf and hard of hearing to ensure that the child's specialized communication needs are adequately considered.¹⁹² PACER urged the MDE to address the concerns expressed by parents as soon as possible.¹⁹³

125. Most, if not all, of the comments made with respect to this portion of the proposed rules pertained to suggested amendments to these rule parts that have not been proposed in this rulemaking proceeding. Many of those who commented requested the Department to amend the rule based on proposals that were developed by a workgroup involving the Minnesota Commission Serving the Deaf and Hard of Hearing. The suggested amendments included altering the eligibility criteria for pre-kindergarten children older than age three; changing a current rule reference from "certified audiologist" to "licensed audiologist;" specifying Hertz ranges for eligibility to improve consistency in identification throughout the state and incorporate technological advances; and requiring that the determination team include a teacher of the deaf and hard of hearing.¹⁹⁴

126. The Department has responded that it is revising the special education rule in at least two separate phases. In this first round of rulemaking, the Department indicated that it is amending rules to comply with federal law and state statute as well as addressing lack of uniform rule application and confusion. The Department acknowledges that "state eligibility criteria in a number of the disability categories could benefit from review and revision," but emphasized that only the criteria for eligibility for Specific Learning Disability is included in this first round of rulemaking. The Department further acknowledges that the proposed changes to the deaf and hard of hearing criteria "may be necessary, but they will be considered and proposed in the subsequent rulemaking process," which is expected to be more substantive and policy-based.¹⁹⁵

127. The Department's proposed rules are not defective due to their failure to incorporate the suggested changes relating to those with hearing impairments. The Department has provided a rational explanation for its approach, and its policy-making discretion encompasses its decision to proceed with substantive amendment of this provision at a later date. Moreover, because the changes initially proposed by the Department to these rule parts were very limited in scope, any attempt by the Department to incorporate the suggested substantive changes in this proceeding would likely have resulted in a finding that the rules as finally proposed were substantially different from the rules as

¹⁹² Hearing Transcript at 136-137.

¹⁹³ Letter from Paula Goldberg (Jan. 11, 2008).

¹⁹⁴ See e.g., Letter from Jennifer Lee (November 29, 2007).

¹⁹⁵ MDE's Dec.31, 2007, Submission at 27; see also Hearing Transcript at 14-15.

originally proposed. The Department is encouraged, however, to take the comments filed in this proceeding into consideration when it goes forward with future rulemaking involving these issues.

Proposed Rule Part 3525.1335 - Other Health Disabilities

128. The only changes proposed to be made to this rule as part of this rulemaking proceeding would replace the word "pupil" with the word "child," consistent with changes made throughout Chapter 3525.

129. Dr. Sandra Streitman, a licensed school psychologist, suggested that a more substantive change be made to the language with respect to ADHD evaluations. The current rule indicates that the eligibility findings must be supported in part by a review of the child's health history, "including the verification of a medical diagnosis of a health condition" Dr. Streitman recommended that this language be modified to require the verification of a medical diagnosis of a health condition "by a physician or a licensed psychologist in the case of ADHD." She indicated that this language would be more consistent with current practice in the United States, since ADHD evaluations are often conducted by psychologists, and it would be in keeping with the scope of practice and expertise of psychologists. In addition, she asserted that it would be cost- and time-effective if psychologists were added to the list of formally recognize diagnosticians because many psychologists work within special education teams in school districts.¹⁹⁶

130. Michael Brunner and Mark Miller, Licensed Psychologists, submitted comments on behalf of the Minnesota Psychological Association (MPA) regarding part 3525.1335. MPA suggested a change in wording in subpart 2, item A, subitem (2), similar to that recommended by Dr. Streitman. The language proposed by MPA to be added to the rules would specify that, in the case of a diagnosis of ADD or ADHD, there is written and signed documentation of a medical diagnosis by a licensed physician "or licensed psychologist." MPA indicated that licensed psychologists are among the most highly trained mental health professionals who are capable of providing design verification of the diagnosis of ADD or ADHD and diagnose and treat such individuals on a routine basis.¹⁹⁷

131. The Department's proposed rules are not defective due to their failure to incorporate the suggested modifications. Because the changes initially proposed to this rule part were very limited in scope, any attempt by the Department to incorporate the suggested substantive changes in this proceeding would likely have resulted in a finding that the rules as finally proposed were substantially different from the rules as originally proposed. The Department is

¹⁹⁶ Letter from Sandra Streitman (December 2, 2007).

¹⁹⁷ Letter from Michael Brunner (Dec. 2, 2007); Letter from Mark Miller (Dec. 20, 2007).

encouraged, however, to take these comments into consideration when it proceeds with future rulemaking.

Proposed Rule Part 3525.1341 – Specific Learning Disability

132. Based upon changes in the IDEA and the rules issued under the IDEA, the MDE proposed significant amendments to the rule pertaining to specific learning disability criteria. The proposed rules were the subject of voluminous comment.

133. The IDEA, as amended in 2004, added the following new provisions relating to children with specific learning disabilities:

(A) In general

Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

(B) Additional authority

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).¹⁹⁸

134. In August of 2006, the U.S. Department of Education adopted amendments to its rules under the IDEA.¹⁹⁹ As modified, the federal rules specify that the states must adopt criteria for determining whether a child has a SLD consistent with section 300.309 and that the criteria adopted: (1) *must not require* the use of a severe discrepancy between intellectual ability and achievement for determining whether the child has a SLD; (2) *must permit* the use of a process based on the child's response to scientific, research-based intervention; and (3) *may permit* the use of other alternative research-based procedures.²⁰⁰ Among other things, the federal rules as revised also require that the group determining SLD eligibility include the child's parents and a team of qualified professionals;²⁰¹ clarify that a determination of SLD eligibility may be found if a child does not achieve adequately for the child's age or meet state-

¹⁹⁸ 20 U.S.C. § 1414(b)(6).

¹⁹⁹ 71 Fed. Reg. 46543 *et seq.* (Aug. 14, 2006).

²⁰⁰ 34 C.F.R. § 300.307 (emphasis added).

²⁰¹ 34 C.F.R. § 300.308.

approved grade-level standards in one or more of eight specified areas when provided with appropriate learning experiences or instruction;²⁰² require that the group consider as part of the evaluation whether the child has limited English proficiency²⁰³ or whether the child was given appropriate reading and math instruction;²⁰⁴ require that public agencies promptly request parental consent to evaluate a child with a suspected SLD who is referred for evaluation or who has not made adequate progress after an appropriate period of time;²⁰⁵ require that the group use information obtained from observation of the child in his or her learning environment;²⁰⁶ and specify that the documentation of the determination of SLD eligibility must include certain specified information relating to SRBI strategies used, data collected, and parental notification; whether the child has made sufficient progress to meet age or state-approved grade-level standards; whether the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both.²⁰⁷

135. In January of 2007, a workgroup composed of representatives from the Department, Minnesota schools, learning disability leadership groups, higher education facilities, and professional and advocacy organizations such as MASE, PACER, Education Minnesota, and the Learning Disabilities Association, was formed to update the specific learning disabilities (SLD) rule. The Department decided that it was necessary to form this workgroup due to (1) changes in the IDEA relating to specific learning disability evaluation and identification and the need for state rules to be consistent with new regulations under the IDEA (such as those concerning the use of data from the child's response to scientific, research-based interventions); and (2) the fact that Minnesota's state application for federal funds was only conditionally approved during 2007 due to the need to have Minnesota criteria aligned with federal law. The workgroup met several times between January and March of 2007 and made recommendations concerning the proposed rules.²⁰⁸

Subpart 1 – Definition

136. The proposed rules modify the definition of "specific learning disability" by incorporating language taken directly from the IDEA and federal rules promulgated under the IDEA. As proposed, the rules explain that an SLD disorder manifests itself as a failure of a child to learn at an adequate rate for the child's age or to meet state-approved grade-level standards. In its SONAR, the Department explained that the proposed rules are intended to clarify the definition of SLD and, consistent with federal requirements, make it clear that it is not necessary in all cases to find a severe discrepancy between intellectual

²⁰² 34 C.F.R. § 300.309(a).

²⁰³ 34 C.F.R. § 300.309(a)(3)(vi).

²⁰⁴ 34 C.F.R. § 300.309(b).

²⁰⁵ 34 C.F.R. § 300.309(c).

²⁰⁶ 34 C.F.R. § 300.310.

²⁰⁷ 34 C.F.R. § 300.311.

²⁰⁸ Hearing Transcript at 18-20, 28.

ability and achievement. In addition, the amendments are designed to incorporate federal requirements that SLD cannot be found if a child's failure to learn at an adequate rate or meeting state-approved grade-level standards is primarily the result of limited English proficiency or a lack of appropriate instruction in reading or math.²⁰⁹

137. The Upper Midwest Branch of the International Dyslexia Foundation and Parent Advocates for Students with Dyslexia supported the steps taken by the Department to change the focus from identification based on expectations relative to an IQ score to expectations relative to age and grade-level state-approved standards.²¹⁰ Dr. Martha Rosen, Manager of Psychological Services for the Minneapolis Public Schools, supported the reference to "state-approved grade-level standards" in item A of the proposed rules.²¹¹

138. Several individuals generally asserted that the proposed SLD rule contained language that is unclear or ambiguous and recommended that definitions be added in many areas to ensure that the proposed rule could be applied consistently across school districts in Minnesota.²¹² Don Schuld, Assistant Superintendent of the Stillwater Area Public Schools; Cara Quinn, Director of Special Education for the Community of Peace Academy; Julia Gerak, School Psychologist; and Susan Butler, Director of Special Education for the Anoka-Hennepin School District, objected to the absence of a definition of the term "scientific, research-based intervention" (SRBI) in the proposed rules. Ms. Butler suggested that the proposed rules also include a definition of "response to intervention" (RTI) and recommended that the rules specify what interventions should be used. Ms. Quinn urged that "alternative research-based procedure" also be defined.²¹³ Earl Mathison, Superintendent of the Uppsala Area Schools, asserted that ambiguous language in these SLD rules would increase confusion, mistrust, and litigation, and urged that the Department adopt definitions as part of the proposed rules to avoid costs associated with disputes over the meaning of terminology used.²¹⁴ Ronald Ruhnke, School Psychologist for the South Washington County Schools, commented that the "dual criteria" components of the SLD rule will cause confusion, and suggested that the Department provide

²⁰⁹ SONAR at 98-100; see 34 CFR §§ 300.8(c)(10), 300.307, 300.309.

²¹⁰ Letter from C. Wilson Anderson, Jr. (Dec. 24, 2007); Letter from Cindee McCarthy (Dec. 24, 2007).

²¹¹ Letter from Martha Rosen (Dec. 6, 2007).

²¹² See, e.g., Letters from Kathy McKay (Dec. 10, 2007); Chris Lindholm (Dec. 21, 2007); Tammy Lensing (Dec. 6, 2007); Danny Saehr (Dec. 6, 2007); Steve Drake (Dec. 6, 2007); Dawn Meyer (Dec. 6, 2007); Jill Hoheisel (Dec. 6, 2007); Mary Jelinek (Nov. 28, 2007); Cherie Peterson (Dec. 17, 2007).

²¹³ Hearing Transcript at 165-166; Letter from Cara Quinn (Jan. 8, 2008); Letters from Susan Butler at 15 (Dec. 6, 2007) and 20 (Jan. 8, 2008); Letter from Don Schuld (Nov. 21, 2007); Letter from Julia Gerak (Nov. 27, 2007).

²¹⁴ Letter of Tammy Lensing (Dec. 6, 2007); Letter of Earl Mathison (Nov. 20, 2008).

clarification regarding assessment of academic performance and information processing, and application of SRBI relating to eligibility.²¹⁵

139. The Department did not specifically respond to all of these suggestions in its post-hearing submissions, and did not make any modifications to subpart 1 of the proposed rules. While the definition of SLD contained in subpart 1 has been shown to be needed and reasonable as proposed, the Department may wish to consider whether to add further definitions to the proposed rules. In particular, the Administrative Law Judge believes that it would be helpful to have a definition of SRBI included in the proposed rules, since that term is referenced frequently in the rules and may be unfamiliar to many individuals reviewing the rules. The federal rules promulgated under the IDEA specify that the term “scientifically based research” has the meaning given that term in section 9101(37) of the Elementary and Secondary Education Act.²¹⁶ The Department may, if it wishes, incorporate a similar definition in the proposed rules. If the definition is incorporated by reference, it is suggested that the rule provide a complete cross-reference to the codified law containing the federal definition (20 U.S.C. § 7801(37)) so that it may be more easily located. The addition of a definition of SRBI to the proposed rules would serve to clarify the rules and would not constitute a substantial change from the rules as originally proposed.

Subpart 2 – Criteria

140. Subpart 2 of the proposed rules sets forth the criteria a child must meet in order to be deemed eligible and in need of special education and related services for SLD. The rules specify that children are eligible and in need of special education and related services for SLD if they meet *either* the criteria set forth in items A, B, and C of subpart 2, *or* the criteria set forth in items A, B, and D of subpart 2. In all cases, to be eligible under SLD criteria, a child will need to satisfy items A and B. The opening paragraph of subpart 2 also includes a new requirement relating to interventions prior to SLD evaluation. The proposed rules state, “The child must receive two interventions prior to evaluation as defined in Minnesota Statutes, section 125A.56.”

141. The MDLC, the Coalition for Children with Disabilities, and Marcy Pohlman (parent of a child with a learning disability, an independent advocate, a retired special education teacher, a board member of the International Dyslexia Association Upper Midwest Branch, and a member of the SLD Leadership Workgroup) objected to the statement in the proposed rules requiring two interventions prior to evaluation. They expressed concern that requiring two pre-referral interventions might delay evaluation. In addition, they commented that this part of the proposed rules erroneously suggests that two interventions are always required, and should mention that the statute permits a special education

²¹⁵ Letter from Ronald Ruhnke (Dec. 3, 2007).

²¹⁶ 34 C.F.R. § 300.35; 71 Fed. Reg. 46576 (Aug. 14, 2006).

team to waive this requirement if it determined that the pupil's need for evaluation is urgent, and that this must not be used to deny a student's right to a special education evaluation. The MDLC also objected because this language was not proposed for any other special education criteria, and suggested removing it or including it in a different portion of the rules. Jody Manning, PACER, and the Upper Midwest Branch of the International Dyslexia Association, suggested that the proposed rules clarify that parents have a right to request an evaluation at any time in the process, even if the school district is attempting interventions.²¹⁷ Dr. Rosen suggested that more information be included in the proposed rules concerning the implementation of the requirement that there be two interventions prior to evaluation.²¹⁸

142. In its post-hearing submissions, the Department declined to modify the language of subpart 2 to make the changes suggested by those commenting on the proposed rules. Although the Department acknowledged that the special education evaluation team is permitted by Minn. Stat. § 125A.56 to waive the two interventions prior to referral, the Department asserted that "there is no need to duplicate the language of the statute" in the rule because "the citation to state law is included in the rule."²¹⁹

143. Minn. Stat. § 125A.56, subd. 1(a), states:

Before a pupil is referred for a special education evaluation, the district must conduct and document at least two instructional strategies, alternatives, or interventions using a system of scientific, research-based instruction and intervention in academics or behavior, based on the pupil's needs, while the pupil is in the regular classroom. The pupil's teacher must document the results. *A special education evaluation team may waive this requirement when it determines the pupil's need for the evaluation is urgent. This section may not be used to deny a pupil's right to a special education evaluation.*²²⁰

144. The proposed rules repeat the general instruction to conduct two interventions contained in the statute, but omit the mention of possible exceptions to this requirement that are also set forth in the statute. As written, the proposed rules imply that two interventions must be conducted in all cases. The mere fact that the proposed rules refer the reader to the statute for the definition of "intervention" does not put the reader on notice that there are some circumstances under which two interventions will not be required. As a result, the Administrative Law Judge finds that the language of the first paragraph of

²¹⁷ Hearing Transcript at 215, 266; Public Ex. 10; Letters from MDLC (Nov. 19 and 21, 2007); Paula Goldberg (Dec. 4, 2007); Jody Manning (Dec. 19, 2007); Mary Powell (Dec. 21, 2007); C. Wilson Anderson, Jr. (Dec. 24, 2007).

²¹⁸ Letter from Martha Rosen (Dec. 6, 2007).

²¹⁹ MDE's Dec. 31, 2007, Submission at 29.

²²⁰ Emphasis added.

subpart 2 of the proposed rules conflicts with the statute and is defective. To remedy this defect, the Administrative Law Judge recommends that the language of subpart 2 be revised to state, "The child must receive two interventions prior to evaluation as defined in Minnesota Statutes, section 125A.56, unless the child's parent has requested a special education evaluation or a special education evaluation team determines that the child's need for evaluation is urgent and waives this requirement." This language would render the proposed rules consistent with Minnesota Statutes and would not result in a rule that is substantially different from the rule as originally proposed.

Overview of SLD Criteria – Subpart 2, Items A - D

145. Item A of the proposed rules requires that, to be eligible and in need of special education and related services for a SLD, it must be found that the child "does not achieve adequately" in response to appropriate classroom instruction in one or more of the areas identified in the rule, and either "does not make adequate progress to meet age or state-approved grade-level standards" in one or more of those areas when using a process based on the child's response to SRBI, or "exhibits a pattern of strengths and weaknesses in performance, achievement, or both" with respect to age, state-approved grade-level standards, or intellectual development "that is determined by the group to be relevant to the identification" of a SLD. As originally proposed, the rules further stated that the "performance measures used to verify this finding must be both representative of the child's curriculum and useful for developing instructional goals and objectives." In addition, the rules indicate that documentation is required to verify a finding under subitem A, which may include "evidence of low achievement from . . . cumulative record reviews; classwork samples; anecdotal teacher records; statewide and districtwide assessments; formal, diagnostic, and informal tests; curriculum-based evaluation results; and results from targeted support programs in general education."

146. In its post-hearing comments, the Department modified the first sentence of the last paragraph of item A to require that the performance measures used to verify a finding that the child does not achieve adequately in certain specified areas "must be ~~both~~ representative of the child's curriculum ~~and~~ or useful for developing instructional goals and objectives."²²¹

147. Item B of the proposed rules requires that, to be eligible and in need of special education and related services for a SLD, it must also be found that the child "has a disorder in one or more of the basic psychological processes and includes an information processing condition that is manifested in a variety of settings" by behaviors that are specified in the proposed rules. In its post-hearing comments, the Department modified item B to state:

²²¹ MDE's Dec. 31, 2007, Submission at 27.

The child has a disorder in one or more of the basic psychological processes and includes an information processing condition that is manifested in a variety of settings by behaviors such as: ~~inadequate; or lack of expected acquisition of information; lack of organizational; planning and sequencing; working memory, including verbal, visual, or spatial; skills, for example, following written and oral directions; spatial arrangements; correct use of developmental order in relating events; transfer of information onto paper; visual and auditory memory processing; speed of processing; verbal and nonverbal expression; transfer of information; and motor control for written tasks such as pencil and paper assignments, drawing, and copying.~~

The Department indicated that it was making these modifications to correct inadvertent clerical errors and update the section with more current and specific terminology.²²²

148. To be eligible under SLD criteria, a child will also need to satisfy not only the criteria set forth in items A and B but also the further criteria set forth in either item C or D.

149. The language of item C requires demonstration of a severe discrepancy between general intellectual ability and achievement in one or more of several identified areas: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, reading fluency, mathematics calculation, or mathematical problem solving. The rule states that "[t]he demonstration of a severe discrepancy shall not be based solely on the use of standardized tests" and that standardized test results shall be considered by the group "as only one component of the eligibility criteria." The proposed rule indicates that "[t]he instruments used to assess the child's general intellectual ability and achievement must be individually administered and interpreted by an appropriately licensed person using standardized procedures." Finally, the proposed rule states, "For initial placement, the severe discrepancy must be equal to or greater than 1.75 standard deviations below the mean of the distribution of difference scores for the general population of individuals at the child's chronological age level." The language of item C of the proposed rules primarily consists of language moved from existing rule part 3525.1341, subpart 2, item B, with a few minor modifications. For example, the terms "mathematical calculation" and "mathematical reasoning" were replaced by "mathematics calculation" and "mathematical problem-solving," and the term "reading fluency" was added. The Department stated in the SONAR that these changes were made in order to align the rules with federal law.²²³ The reference to "the team" contained in the current rules was also changed to "the group" in the proposed rules.

²²² MDE's Dec. 31, 2007, Submission at 27.

²²³ SONAR at 104-105.

150. As proposed, item D of the rules adds a new fourth criterion relating to SLD eligibility encompassing situations in which the child demonstrates an inadequate rate of progress. As proposed, the rules indicates that a child's rate of progress "is measured over time through progress monitoring while using intensive scientific, research-based interventions (SRBI), which may be used prior to a referral, or as part of an evaluation for special education. A minimum of 12 data points are required from a consistent intervention implemented over at least seven school weeks in order to establish the rate of progress. . . ." The proposed rules go on to discuss circumstances under which the rate of progress shall be deemed to be inadequate, including situations in which the rate of improvement is minimal and continued intervention will not likely result in reaching age or state-approved grade-level standards; progress will likely not be maintained when instructional supports are removed; the child's level of performance in repeated assessments of achievement falls below the child's age or state-approved grade-level standards; and the level of achievement is at or below the fifth percentile on one or more valid and reliable achievement tests. In its SONAR, the Department indicated that this new rule was added to meet federal requirements that states permit the use of a process based on the child's response to SRBI.²²⁴

Comments Regarding Item A

151. Several interested parties objected to item A of the proposed rules as overbroad or vague and asked for clarification of terminology used. For example, Cherie Peterson of the Anoka-Hennepin School District commented that replacing the current rule language regarding "severe underachievement" with the phrase "does not achieve adequately in one or more of the following areas" results in a criterion that is even more vague and subject to individual interpretation. She also contended that item A is not consistent with the language in item C referring to "severe discrepancy" and would open the doors of special education to a significant number of additional students.²²⁵ Susan Butler of the Anoka-Hennepin School District noted that many students who do not achieve adequately are not disabled and that failure to "achieve adequately" in one or more areas does not meet the definition of a learning disability.²²⁶ Dr. Kimberly Gibbons, Executive Director of the St. Croix River Education District, and many others, including representatives from school districts in Stillwater, Rochester, St. Cloud, Minneapolis, and St. Paul, requested clarification of the difference between "performance" and "achievement" in assessing whether a child exhibits a pattern of strengths and weaknesses under item A(2).²²⁷ Dr. Martha Rosen of the Minneapolis Public Schools suggested that item A focus on the underachievement criterion for eligibility and that the information relating to

²²⁴ SONAR at 106.

²²⁵ Letter from Cherie Peterson at 5, 6 (Dec. 17, 2007).

²²⁶ Letter from Susan Butler at 11, 13 (Dec. 6, 2007).

²²⁷ See, e.g., Letters from Kimberly Gibbons (Dec. 17, 2007); Cara Quinn (Jan. 8, 2008), Don Schuld (Nov. 21, 2007), Julia Gerak (Nov. 27, 2007).

failure to make progress in response to interventions be included elsewhere to avoid confusion.²²⁸

152. In the SONAR, the Department indicated that item A was primarily drawn from the federal rules promulgated under the IDEA. The Department pointed out that the federal regulations do not require a specific degree of severity for a child's underachievement in order to qualify as SLD, but do qualify the standard by stating that the child must either make "inadequate progress" in response to SRBI or "exhibit a pattern of strengths and weaknesses" in areas deemed relevant by the SLD determination group. The Department further indicated that the paragraph set forth following item A(2) relating to performance measures and evidence of low achievement was moved from existing rules part 3525.1341, subp. 2(A). Although this language is not required by federal law, the MDE retained it in the rules because it "continues to be useful to the field when developing goals and objectives for children."²²⁹

153. With respect to concerns about the lack of specificity in the portion of the proposed rules referring to a pattern of strengths and weaknesses in performance and/or achievement, the Department noted in its post-hearing submissions that "a clinically significant profile of strengths and weaknesses is consistent with the federal definition of a SLD, provides for a measurable standard, and is supported by its use as criteria by at least four other states: Georgia, North Carolina, Maine, and New Mexico."²³⁰ The Department indicated that advice from the federal Office of Special Education Programs (OSEP) concerning the implementation of a profile of strengths and weaknesses "continues to evolve," and stated that further clarification is being sought from OSEP and will be provided through the revision of the SLD manual. Drs. Gibbons and Windram of the St. Croix River Education District responded that, without clarification of this issue, it is not reasonable to expect that evaluation teams will adequately understand the criteria.²³¹

154. Item A of the proposed rules for the most part echoes the language of the federal IDEA rules. Those rules use the same or similar language as the proposed rules in setting out the standards to be applied in determining the existence of a SLD, such as failure to "achieve adequately," failure to "make sufficient progress to meet age or State-approved grade-level standards," and exhibition of "a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development."²³² While these standards leave much to the judgment of the districts and the individual determination groups, that does not necessarily render the rule defective, particularly since it is expected that additional federal guidance in this area will be forthcoming. The language set forth in the final

²²⁸ Letter from Martha Rosen (Dec. 6, 2007).

²²⁹ SONAR at 102-103.

²³⁰ MDE's Dec. 31, 2007, Submission at 31.

²³¹ Letter from Kimberly Gibbons and Holly Windram (Jan. 7, 2008)

²³² See 34 C.F.R. § 309(a).

paragraph of item A stems primarily from existing Minnesota rules (with a few exceptions),²³³ and is not inconsistent with federal law. Accordingly, the Administrative Law Judge does not find that the proposed rule is defective due to lack of specificity.

155. While no defect is found in the language of item A, it is suggested that the Department consider modifying the wording of the final paragraph to improve readability, as follows:

The performance measures used to verify this finding must be representative of the child's curriculum or useful for developing instructional goals and objectives. Documentation is required to verify this finding, ~~and may include~~ Such documentation includes evidence of low achievement from, ~~for example, the following sources, when available:~~ cumulative record reviews; classwork samples; anecdotal teacher records; statewide and districtwide assessments; formal, diagnostic, and informal tests; curriculum-based evaluation results; and results from target support programs in general education.

Such a modification would not constitute a substantial change from the rules as originally proposed.

Comments Regarding Item B

156. Many individuals also objected to item B of subpart 2. Several generally commented that the proposed rules did not reflect the recommendations of the SLD workgroup.²³⁴ In particular, several administrators and educators from the Rochester and Stillwater school districts, as well as other interested parties, stated that the consensus of the SLD workgroup was that information processing would be part of the definition but not included in the SLD criteria, and teams would not be required to measure information processing.²³⁵ Dr. Bie of the Minnesota School Psychologists Association and Drs. Gibbons and Casey of the St. Croix River Education District stated that there is no valid way to assess information processing and suggested that it be deleted from the

²³³ See Minn. R. 3525.1341, subp. 2(A). It appears that the references in the proposed rules to "statewide and districtwide assessments," "diagnostic" tests, and results from "targeted support programs in general education" are new.

²³⁴ See, e.g., Letters from Tammy Lensing, Danny Saehr, Steve Drake, Dawn Meyer, and Jill Hoheisel (all received on Dec. 6, 2007); letter from Steve Weber (Dec. 3, 2007).

²³⁵ See, e.g., Letters from Colette Sweeney (Nov. 29, 2007); Judith Daul (Nov. 28, 2007); Cory McIntyre and Sharon Alexander (Nov. 26, 2007); Mary Alcot (Nov. 26, 2007); Kay Tessum (Nov. 26, 2007); Susanne Griffin-Ziebart (Jan. 6, 2008); Don Schuld (Nov. 21, 2007); Julia Gerak (Nov. 27, 2007); Mary Ruprecht (Nov. 21, 2007); Randall Arnold (Dec. 3, 2007); Elisabeth Lodge Rogers (Nov. 28, 2007); Implementation Team of the St. Croix River Education District (Dec. 17, 2007, and Jan. 7, 2008); Kimberly Gibbons (Dec. 17, 2007); Randall Arnold (Dec. 3, 2007).

proposed rules.²³⁶ Dr. Rosen of the Minneapolis Public Schools and Cara Quinn of the Community of Peace Academy agreed that the reliability and validity of such measures had been questioned and urged that information processing not be included in the criteria. Dr. Rosen also suggested that the behaviors listed in item B be moved to the definition of SLD set forth in subpart 1.²³⁷ In contrast, Jody Manning, a member of the workgroup, testified that, while some of the terminology had been altered, the proposed rules did follow the general recommendations of the workgroup.²³⁸

157. The portion of the SONAR relating to item B indicates that the language was, for the most part, merely moved from current rule part 3525.1341, subp. 2(C). The Department indicated that "Minnesota has traditionally used the term 'information processing condition' to mean the same thing as the more lengthy federal terminology [a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written]" defining SLD. In its post-hearing submissions, the Department explained:

The Department believes that information processing is a critical feature distinguishing specific learning disability from low ability or other disability categories. Development of a profile of processing strengths and weaknesses that corresponds with academic difficulties validates the notion that academic difficulties are the expression of intrinsic information processing difficulties. A quote from Joseph Torgesen reflects the purpose of evaluating strengths and weaknesses in information processing: "[e]ven if psychological processes are not directly remediable, knowing about its presence may direct our attention to the need for special and/or sustained instruction to build the specific skills that the processing weakness makes difficult for the child to acquire."

The MDE provided citations to several examples of research, standardized assessments, and articles in this area, and contended that the evaluation of strengths and weaknesses in information processing may help direct attention to the need for special or sustained instruction to build the specific skills that a processing weakness makes it difficult for the child to acquire.²³⁹

158. In further rebuttal, the St. Croix River Education District responded that it is unreasonable for the Department to require that time be spent on assessing information processing given the paucity of empirical support and lack of instructional utility, and continued to urge that the requirement to measure information processing be removed from the rules.²⁴⁰ Randall Arnold responded

²³⁶ Letters from Andrea Bie (Dec. 21, 2007); Kimberly Gibbons (Dec. 17, 2007); Ann Casey (Jan. 8, 2008).

²³⁷ Letter from Martha Rosen (Dec. 6, 2007); Letter from Cara Quinn (Jan. 8, 2008)..

²³⁸ Hearing Transcript at 214; Letter from Jody Manning (Dec. 19, 2007).

²³⁹ MDE's Dec. 31, 2007, Submission at 31-32.

²⁴⁰ Letter from Kimberly Gibbons and Holly Windram (Jan. 7, 2008).

that "there are many research citations which can be offered which suggest that distinguishing a specific learning disability from low ability or other disability categories offers no advantage over a systematic response-to-intervention process in finding what works for improving academic achievement in students." He objected to the exercise of documenting information processing as an unnecessary expenditure of resources.²⁴¹

159. The Department has set forth a rational basis for its decision to retain the reference to information processing in the proposed rules. It has identified several standardized assessment tools, screening tools, and interview approaches that it believes can be used to obtain data on information processing, and has cited ten sources that it contends supports its view that information processing is a critical feature of SLD. It has also pointed out that the current rules include a similar provision. Although those objecting to the proposed rules have a differing view of the approach that should be taken, it is not the proper role of the Administrative Law Judge to determine which approach is "best."

160. The Anoka-Hennepin School District asserted that a SLD does not properly involve "motor control for written tasks such as pencil and paper assignments, drawing, and copying" as described in the rules as originally proposed, and stated that inclusion of that description would further expand the definition of SLD and the number of students who could be found eligible.²⁴² As noted above, the Department modified the language of the proposed rule after the hearing to refer only to "motor control for written tasks" but otherwise retained the reference. The Department did not otherwise respond to these comments. Minn. R. 3525.1341, subp. 2(C) of the current rules includes the same phrase as the original version of the proposed rules.

161. In this portion of the proposed rules, the Department simply moved the language of existing rule part 3525.1341, subp. 2(C) to item B. The existing rules also include a reference to "motor control for written tasks such as pencil and paper assignments, drawing, and copying." Under these circumstances, the inclusion of a similar phrase in the rules as finally proposed for adoption does not constitute a defect.

162. Although no defect has been found in the language of item B, the Administrative Law Judge finds the wording of the first sentence of item B (stating that the child "has a disorder in one or more of the basic psychological processes *and includes an information processing condition . . .*") to be awkward. The Administrative Law Judge suggests that the Department review that language and make appropriate modifications to clarify its intent. This might be accomplished by changing the language to refer to a disorder in one or more of the basic psychological processes "including" an information processing

²⁴¹ Letter from Randall Arnold (Jan. 11, 2008).

²⁴² Letter from Susan Butler at 14 (Dec. 6, 2007); Letter from Cherie Peterson (Dec. 17, 2007).

condition or "which includes" an information processing condition. Such a modification would not constitute a substantial change.

Comments Regarding Item C

163. Most of those commenting on the "severe discrepancy" criterion set forth in item C objected to the inclusion of a requirement that "[t]he instruments used to assess the child's general intellectual ability and achievement must be individually administered and interpreted by an appropriately licensed person using standardized procedures." Dr. Gibbons and several others, including Don Schuld, Assistant Superintendent of the Stillwater Public Schools; Jennifer Salava, a school psychologist for ISD 196; and Cara Quinn, Director of Special Education for the Community of Peace Academy; recommended that the requirement that districts administer individual tests of intellectual ability be deleted because IQ tests are not helpful in designing effective interventions.²⁴³

164. Dr. Rosen of the Minneapolis Public Schools commented that intelligence tests may not adequately reflect the student's expected achievement and recommended adding a statement to the proposed rules stating that performance measures used to verify this finding must be useful for developing instructional goals and objectives, and the instruments used to establish discrepancy must be validated for the purpose of determining special education eligibility.²⁴⁴ The Department responded in its post-hearing comments that, in accordance with current practice, information gathered from a comprehensive evaluation must fit the purpose of determining eligibility as well as informing the development of an instructional plan. The MDE indicated that the use of instruments validated for the purpose of determining special education eligibility is currently standard procedure and asserted that the requirement in the proposed rules that instruments used to assess general intellectual ability and achievement must be administered and interpreted by an appropriately licensed person using "standardized procedures" already addresses this concern.²⁴⁵

165. Item C also specifies that, "[f]or initial placement, the severe discrepancy must be equal to or greater than 1.75 standard deviations below the mean of the distribution of difference scores for the general population of individuals at the child's chronological age level." The Upper Midwest Branch of the International Dyslexia Association argued that the 1.75 standard deviation requirement lacked scientific validity for identifying SLD and was inconsistent with the prior statement in the rule that standardized test results will not be the sole consideration for eligibility. They recommended that the requirement be reduced or replaced with other alternative research-based procedures.²⁴⁶

²⁴³ Letters from Kimberly Gibbons (Dec. 17, 2007); Don Schuld (Nov. 21, 2007). Jennifer Salava (Nov. 28, 2007); Cara Quinn (Jan. 8, 2008).

²⁴⁴ Letter from Martha Rosen (Dec. 6, 2007).

²⁴⁵ MDE's Dec. 31, 2007, Submission at 32.

²⁴⁶ Letter from C. Wilson Anderson, Jr. (Dec. 24, 2007).

166. Item C of the proposed rules is, with minor terminology changes, the same as current rule 3525.1341, subp. 2(B). The proposed rule continues to use the same language as the current rule with respect to the use of instruments to assess the child's general intellectual ability and achievement, and includes the same reference to 1.75 standard deviations below the mean. The IDEA and the federal rules merely indicate that local educational agencies "shall not be required" to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability; they do not *prohibit* the use of a severe discrepancy approach as one possible criterion for SLD eligibility. The continued use of such a criterion in the proposed rules is not contrary to federal law and falls within the Department's policymaking discretion.

Comments Regarding Item D

167. Item D, which addresses the new criterion relating to the use of scientific, research-based interventions, attracted the most comment of the four criteria. As a threshold matter, Joseph Bauer, a school psychologist, recommended that the first sentence of item D define the areas to be monitored for progress by reiterating the areas set forth in item A. He suggested that the first sentence be modified to state, "The child demonstrates an inadequate rate of progress in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, reading fluency, mathematics calculation, or mathematical problem solving."²⁴⁷ The Department did not specifically respond to this suggestion.

168. While the first sentence of the rule as proposed is not defective, the Administrative Law Judge believes that the language suggested by Mr. Bauer would provide additional clarity regarding the areas to be monitored for progress. The Department is not required to make this modification, but may do so if it wishes. If the Department elects to change this language, the modification would not result in a substantial change to the rule.

169. The Minnesota Special Education Advisory Panel (SEAP) supported the addition of SRBI to the proposed rules, but expressed concern that there will need to be a significant investment in professional development and technical assistance to Minnesota school districts and families in order to build capacity to implement this new rule.²⁴⁸ The MDE acknowledged in its post-hearing comments that implementation of SRBI requires systemic changes, and that districts will determine if and when they are ready to use the SRBI process to determine eligibility.²⁴⁹

²⁴⁷ Letter from Joseph Bauer (Nov. 19, 2007).

²⁴⁸ Letter from Kim Riesgraf, Linda Bonney, Pam Taylor, and David Olson (Nov. 5, 2007).

²⁴⁹ MDE's Dec. 31, 2007, Submission at 28.

SRBI Procedures

170. The Rochester Public Schools, the St. Croix River Education District, and the Anoka-Hennepin School District recommended that procedures used to implement SRBI be articulated in the rule and expressed concern that, without such guidance, there will be too much variability in how SRBI systems are implemented from one district to the next. They also noted that the Department's plan to articulate guidelines in a manual will not have the force of a rule.²⁵⁰

171. The Department responded that insertion of specific procedures in the proposed rules would constitute a substantial change and would lead to the rules being overly prescriptive. Because the MDE believes SRBI applies to more disability categories than SLD, it expects to promulgate a separate rule in the future relating to SRBI. The Department indicated that it would take the comments in this rulemaking proceeding under consideration and forward them to a committee that is convening to develop guidelines on how to implement an effective system of SRBI.²⁵¹

172. The Administrative Law Judge agrees that the incorporation of particular SRBI procedures in this rulemaking proceeding would render the proposed rules substantially different than the rules as originally proposed. The Department is urged to consider this subject in future rulemaking.

Parental Consent to SRBI

173. The MDLC, the Coalition for Children with Disabilities, and the Upper Midwest Branch of the International Dyslexia Association also urged that there be a clear parental consent requirement for districts that use SRBI.²⁵² The Department responded in its post-hearing comments that, because the system of SRBI is not part of the special education evaluation process, parental consent is not required by law.²⁵³

174. Although parental consent is required for initial evaluations for special education eligibility, the Administrative Law Judge is unaware of any requirement for parental consent for interventions used prior to the commencement of the evaluation process. Although the Department could require such consent as a matter of policy and is free to consider doing so, the proposed rules are not defective due to their failure to include such a requirement. It is noted that subpart 3(F) of the proposed rule does require (with respect to children who have participated in a process that assesses the child's response to SRBI) that the documentation supporting a determination that the

²⁵⁰ See, e.g., Letter from Ann Casey (Jan. 8, 2008); Letters from Susan Butler at 12 (Dec. 6, 2007) and at 18 (Jan. 8, 2008).

²⁵¹ MDE's Dec. 31, 2007, Submission at 32.

²⁵² Hearing Transcript at 63, 214-215; Public Ex. 3; Letters from MDLC (Nov. 19, 2007); Paula Goldberg (Dec. 4, 2007 and Jan. 11, 2008); Jody Manning (Dec. 19, 2007); Mary Powell (Dec. 21, 2007); C. Wilson Anderson, Jr. (Dec. 24, 2007).

²⁵³ MDE's Dec. 31, 2007, Submission at 28.

SLD eligibility criteria have been met must include "documentation that the parents were notified about the state's policies regarding the amount and nature of child performance data that would be collected and the general education services that would be provided, strategies for increasing the child's rate of learning, and the parents right to request a special education evaluation."

Data Collection Requirements

175. Item D of the proposed rules specifies that SRBI may be used either prior to a special education referral or as a part of an evaluation for special education. A number of individuals and organizations commenting on the proposed rules objected to this portion of the proposed rules. The MDLC, the PACER Center, the Coalition for Children with Disabilities, the Upper Midwest Branch of the International Dyslexia Association, Jody Manning, and Susan Thompson expressed concern that using progress monitoring and SRBI as part of an evaluation may cause an SLD evaluation to exceed 30 school days, and urged that the rules require that evaluations of students with learning disabilities be completed within the usual timeline of 30 school days.²⁵⁴ They also recommended that item D state a maximum time period for interventions. The MDLC pointed out that the proposed rule language requires that a "consistent" intervention be implemented over at least seven school weeks to establish the rate of progress. The MDLC pointed out that, if two or more interventions were attempted before a "consistent" intervention was used for seven school weeks, this process could take even longer. In fact, the MDLC contended that the search for a "consistent" intervention could possibly take an entire year. In addition, the MDLC asserted that the process could be delayed substantially over the summer because a "school day" timeframe is contemplated in the proposed rules. The MDLC recommended that several detailed wording changes be made in the proposed rules to require the pre-referral interventions as a part of the SRBI/RTI route to eligibility or, in the alternative, that the rules specify a maximum timeframe of 60 days.²⁵⁵

176. In its SONAR, the Department emphasized that the data collection process may begin prior to referral for determination of eligibility for special education. For example, the Department indicated that, if a local educational agency is implementing a system of scientific, research-based instruction and interventions, all students are screened regularly, typically three times each year. Children who have low performance on a screening measure are provided additional support, such as small group instruction using SRBI. Based upon a lack of response to an intervention or multiple interventions, or if a disability is

²⁵⁴ See Minn. R. 3525.2550 (requiring that the IEP team conduct an evaluation for special education purposes within a reasonable time not to exceed 30 school days from the date the district receives parental permission to conduct the evaluation or the expiration of the 14-calendar day parental response time).

²⁵⁵ Hearing Transcript at 63, 214-215; Public Ex. 3; Letter from MDLC (Nov. 19, 2007); Paula Goldberg (Dec. 4, 2007 and Jan. 11, 2008); Jody Manning (Dec. 19, 2007); Mary Powell (Dec. 21, 2007); C. Wilson Anderson, Jr. (Dec. 24, 2007).

suspected, a referral is made for special education evaluation. The Department indicated that data gathered before the formal evaluation begins can be used to meet the seven-week requirement, and interventions that were started prior to referral for SLD eligibility determination can be continued during the evaluation timeline as part of the comprehensive evaluation. The Department also pointed out that the use of SRBI is not limited to specific learning disabilities but can be used with respect to any of the special education categorical disability areas.²⁵⁶ Finally, the Department noted that the parents and the school district may mutually agree to extend the timeline for an initial evaluation, acknowledged that parents can request a special education evaluation at any time, and stressed that no parental rights are created or lost by virtue of the proposed rules.²⁵⁷

177. In its post-hearing responses, the Department emphasized that the evaluation requirements (including timelines, components of an evaluation, and parent consent) are already covered by existing evaluation laws, and provided the following clarification:

The Department understands there is confusion over how interventions cross over from being a means of improving academic achievement to being the basis for an indication of a disability. Students participating in interventions are not presumed to have a disability until data indicate that poor achievement persists despite escalating intensity and individualized instruction. The purpose of establishing escalating interventions is to avoid the use [of] high-cost resources and special education services to solve academic problems that can be remediated through targeted intervention. Data from interventions will be used to verify that there is persistent underachievement despite high quality and intensive instruction.

Assuming that interventions are a means to delay evaluation negates the purpose of SRBI, which is the implementation of efficient screening and escalating interventions to remediate academic difficulties. Thus, early intervention systems are not part of the 30-day timeline for a special education evaluation, unless a parent or team determines that evaluations should proceed while data from SRBI is being collected. Intervention and data collection can continue to take place within the existing evaluation process and timelines. The team should use all relevant and available data to make eligibility decisions.

* * *

The requirements for length of SRBI or pre-referral interventions are not meant to parallel the formal special education evaluation timelines, but are derived from what is reported as research-best practice in remediating academic difficulties for all students who are

²⁵⁶ SONAR at 101, 106-107.

²⁵⁷ SONAR at 107; see 34 C.F.R. § 300.309.

struggling. The confusion over timelines stems from the fact that students participating in a system of SRBI or pre-referral interventions may participate in interventions at the first sign of inadequate achievement. Sometime during the intervention process, a parent or teacher may begin to suspect a disability. Once a disability is suspected, an existing set of procedures for completing a formal evaluation is triggered and due process applies. The formal evaluation process includes the timelines to which MDLC refers. The data from interventions, either through a system of SRBI or pre-referral, provided prior to the suspicion of a disability is admissible as supporting evidence that inadequate achievement was not due to poor or lack of appropriate instruction.²⁵⁸

178. The Department declined to set a maximum length of time for data collection. Due to the range of interventions and the number of individual variables that are involved in determining the appropriate amount of time, the Department did not believe it would be reasonable to specify a maximum amount of data or time within this rule.²⁵⁹

179. Others commenting on the proposed rules raised concerns about the requirement in item D that “a minimum of 12 data points are required from a consistent intervention implemented over seven school weeks in order to establish the rate of progress.” Representatives of the St. Croix River Education District, the Anoka-Hennepin School District, the Minneapolis Public Schools, the Stillwater Area Public Schools, the St. Cloud Area Schools, and the Rochester Public Schools suggested that the term “consistent” be deleted from the rule to ensure that teams would have the flexibility to change ineffective interventions and gather data across interventions. Many of those filing comments suggested that the rule be modified to state, “A minimum of 12 data points are required from interventions implemented over at least seven school weeks in order to establish the rate of progress.” Without such a change, they were concerned that districts would find it necessary to maintain ineffective interventions to obtain the number of data points or meet the seven-week requirement. In the alternative, Dr. Casey suggested that the entire phrase be eliminated so that teams can make professional, data-based decisions regarding the appropriate length of an intervention for an individual student.²⁶⁰

²⁵⁸ MDE's Dec. 31, 2007, Submission at 29.

²⁵⁹ SONAR at 107-108.

²⁶⁰ Hearing Transcript at 166-168, 240-242; Letters from Ann Casey (Jan. 8, 2008); Martha Rosen (Dec. 6, 2007); Cara Quinn (Jan. 8, 2008); Colette Sweeney (Nov. 29, 2007); Judith Daul (Nov. 28, 2007); Cory McIntyre and Sharon Alexander (Nov. 26, 2007); Mary Alcot (Nov. 26, 2007); Kay Tessum (Nov. 26, 2007); Susanne Griffin-Ziebart (Jan. 6, 2008); Susan Butler (Dec. 6, 2007, and Jan. 8, 2008); Don Schuld (Nov. 21, 2007); Julia Gerak (Nov. 27, 2007); Randall Arnold (Dec. 3, 2007); Elisabeth Lodge Rogers (Nov. 28, 2007); Kimberly Gibbons (Dec. 17, 2007).

180. Dr. Rosen of the Minneapolis Public Schools objected to the seven-week requirement as arbitrary and recommended that professional judgment be brought to bear rather than inflexible timelines. Ms. Butler of the Anoka-Hennepin School District commented that there needs to be an individualized comprehensive assessment to determine that a student's delays are not the result of cognitive impairment. Representatives from the Rochester and Stillwater Public Schools also questioned the 12-data-point requirement. They asserted that it is often ill-advised to measure performance in the areas of math and writing more than two times per month and that, as a result, the proposed rules would require a student to be in an intervention at least six months before making an eligibility determination.²⁶¹

181. In its SONAR, the Department stated that it decided to set a standard for the minimum amount of data required to determine rate of progress to ensure consistency within the state. The Department explained that it chose the requirement of a minimum of 12 data points over seven school weeks using a single intervention based upon a synthesis of numerous articles, presentations, and manuals that address the measurement of response to SRBI. The Department acknowledged that there is no consensus currently in the field, but asserted that the numbers it selected are within the current range of practice. The MDE indicated that, in general, the literature supports the need for progress to be monitored twice a week for between six and 12 weeks. The Department's selection of a minimal level of at least 12 data points over at least seven weeks falls within that range and establishes a consistent threshold for SLD eligibility determination in the state.²⁶² The Department further explained in its post-hearing submissions that the comments received during rulemaking show that there is a lack of uniformity in the field regarding the length of time for intervention and data collection, and underscore the need for the rule to establish minimum amounts that can be reliably used in establishing a persistent pattern of underachievement despite quality instruction.²⁶³

Fidelity of Implementation

182. Several individuals and groups commenting on the proposed rules recommended that language be added requiring that the SRBIs be implemented with "fidelity," i.e., that the program be implemented consistently and in accordance with its designed intent. Individuals and groups making this suggestion included Susan Thompson, a parent of children with SLD and co-founder of a parent advocacy group; the Minnesota School Psychologists Association; the St. Croix River Education District; the Anoka-Hennepin School District; the Stillwater Area Public Schools; and educators and administrators

²⁶¹ Hearing Transcript at 166-168, 240-242; Martha Rosen (Dec. 6, 2007); Colette Sweeney (Nov. 29, 2007); Judith Daul (Nov. 28, 2007); Cory McIntyre and Sharon Alexander (Nov. 26, 2007); Mary Alcot (Nov. 26, 2007); Kay Tessum (Nov. 26, 2007); Susanne Griffin-Ziebart (Jan. 6, 2008); Susan Butler (Dec. 6, 2007, and Jan. 8, 2008); Don Schuld (Nov. 21, 2007).

²⁶² SONAR at 106-108.

²⁶³ MDE's Dec. 31, 2007, Submission at 33.

from the Rochester Public Schools. They urged the Department to revise the proposed rules to include the following language: "The team must verify that interventions were implemented with fidelity through direct observation if the student is not making adequate progress." Many of those commenting on the proposed rules also recommended that language be added stating that interventions selected for students will be well-matched to student needs, and that teams will provide an explicit rationale as to why the intervention was selected for the particular student. The Anoka-Hennepin School District also stated that it was not clear if or how SRBI related to the two interventions required prior to referral and raised concern that reliance on low achievement over a 30-day period will increase the number of students identified as disabled.²⁶⁴

183. In its post-hearing submissions, the Department "agreed that the fidelity of implementation of interventions through observation is a good practice" which is important in successful implementation of SRBI and necessary to reduce the likelihood of inappropriate identification. The Department further stated that it "will recommend it in the SLD manual." However, the Department noted that it disagreed with limiting the measurement of fidelity to direct observation of a student engaged in an intervention. It stated that the concept of fidelity of implementation applies to many levels and asserted that there is no one best way to measure fidelity. The Department indicated that it "prefers to allow districts to develop their means of evaluating fidelity to fit within their resources and organizational structure." The Department contended that the proposed rules identify the "core features of a successful system of SRBI, including fidelity of implementation" that a district must explain in its plan."²⁶⁵

184. The Department also declined to delete the word "consistent" from the proposed rules, stating that the SLD workgroup preferred the word "consistent" over "faithfully implemented." The Department indicated that "[d]istricts should employ best practices in making decisions about when to change interventions."²⁶⁶

185. In rebuttal comments, Susan Butler acknowledged that there are multiple ways to ensure fidelity, but urged the Department to identify it as a foundational expectation in the SRBI process.²⁶⁷ Similarly, Drs. Windram and Gibbons asserted that fidelity of implementation is essential, and sufficiently important to include in rule and not solely in the SLD manual. They asserted

²⁶⁴ Hearing Transcript at 106-108, 238-240; Public Ex. 3; Letters from Colette Sweeney (Nov. 29, 2007); Judith Daul (Nov. 28, 2007); Cory McIntyre and Sharon Alexander (Nov. 26, 2007); Mary Alcot (Nov. 26, 2007); Kay Tessum (Nov. 26, 2007); Susanne Griffin-Ziebart (Jan. 6, 2008); Jennifer Salava (Nov. 28, 2007), Susan Butler (Dec. 6, 2007, and Jan. 8, 2008); Andrea Bie (Dec. 21, 2007); Julia Gerak (Nov. 27, 2007); Don Schuld (Nov. 21, 2007); Elisabeth Lodge Rogers (Nov. 28, 2007); Implementation Team of the St. Croix River Education District (Dec. 17, 2007); Kimberly Gibbons (Dec. 17, 2007); Holly Windram and Kimberly Gibbons (Jan. 7, 2008).

²⁶⁵ MDE's Dec. 31, 2007, Submission at 33, 35.

²⁶⁶ MDE's Dec. 31, 2007, Submission at 33.

²⁶⁷ Letter from Susan Butler at 22 (Jan. 8, 2008).

that, while there are many methods by which to document treatment integrity, direct observation has been shown in research as being the most reliable and valid method. In addition, Drs. Windram and Gibbons objected to the Department's refusal to delete the reference to "consistent" use of an intervention over seven weeks from the proposed rules. They argued that, by requiring a minimum of 12 data points from a consistent intervention, the language of the proposed rule prohibits districts from using best practices in deciding when to change interventions.²⁶⁸

186. The proposed rules are not rendered unreasonable by virtue of their requirement that rate of progress be established by a minimum of 12 data points from a consistent intervention implemented over at least seven school weeks. The Department has provided a rational basis for its selection of this standard in the proposed rules. In addition, the failure of the proposed rules to incorporate a requirement that the interventions be implemented with "fidelity" does not render them defective. This is particularly the case since the federal definition of "scientifically based research" appears to include several requirements that encompass the concept.²⁶⁹ However, the Department may, after further consideration, elect to include a reference to the concept of fidelity of implementation in the proposed rules without bringing about a substantial change in the rules.

Fifth Percentile

187. As proposed, item D(4) specifies that rate of progress is inadequate when, among other things, the student's level of achievement is at or below the fifth percentile on one or more valid and reliable achievement tests using either state or national comparisons. Lois Kester, school psychologist for ISD 518, Ms.

²⁶⁸ Letter from Kimberly Gibbons and Holly Windram (Jan. 7, 2008).

²⁶⁹ See 34 C.F.R. § 300.35, incorporating the definition in section 9101(37) of the Elementary and Secondary Education Act, codified as 20 U.S.C. § 7801. The definition indicates that "scientifically based research" means "research that involves the application of rigorous, systematic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs." The term is further defined to include research that "(1) [e]mploys systematic, empirical methods that draw on observation or experiment; (2) [i]nvolves rigorous data analyses that are adequate to test the stated hypotheses and justify the general conclusions drawn; (3) relies on measurements or observational methods that provide reliable and valid data across evaluators and observers, across multiple measurements and observations, and across studies by the same or different investigators; (4) [i]s evaluated using experimental or quasi-experimental designs in which individuals, entities, programs, or activities are assigned to different conditions and with appropriate controls to evaluate the effects of the condition of interest, with a preference for random-assignment experiments, or other designs to the extent that those designs contain within-condition or across-condition controls; (5) ensures that experimental studies are presented in sufficient detail and clarity to allow for replication or, at a minimum, offer the opportunity to build systematically on their findings; and (6) has been accepted by a peer reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review." As noted in Finding 139 above, the Administrative Law Judge has recommended that the MDE incorporate this definition in the proposed rules.

Thompson, Ms. Pohlman, the Upper Midwest Branch of the International Dyslexia Association, and others suggested that this language be revised. The International Dyslexia Association and Parent Advocates for Students with Dyslexia asserted that the fifth percentile score requirement should be changed or eliminated because it would “increase the numbers of children placed on a path of continuous failure” and was contrary to current RTI models. Although Ms. Kester commented that item D was for the most part well-written and consistent with RTI approaches, she asserted that the requirement in subitem 4 that the student be at or below the fifth percentile on an achievement test “seems to negate the entire intent” of RTI, where “daily performance rather [than] test performance is what is measured.” She cautioned that the application of such a standard would mean that “no bright students with learning disabilities would ever be able to be served.” Ms. Kester urged that the intervention process, along with daily work samples, parent and teacher information, and observations, should provide an adequate basis to consider SLD placement without requiring students to meet the fifth percentile requirement.²⁷⁰

188. Ms. Thompson asserted that item D(4) is so restrictive that it effectively requires use of the existence of a severe discrepancy to qualify for SLD services, contrary to federal law. She requested that the Department consider eliminating the fifth percentile requirement, pointing out that federal law does not establish a minimum threshold. In addition, she argued that, the higher a student’s IQ, the more the fifth percentile requirement poses difficulty for a student seeking eligibility under the specific learning disability category.²⁷¹ Ms. Pohlman agreed that the fifth percentile requirement is problematic and asserted that this requirement is inconsistent with item D, subitem 3, because the latter subitem seems to indicate that a score below the 25th percentile will result in eligibility.²⁷² Dr. Rosen of the Minneapolis Public Schools also suggested that subitem 4 be deleted because it is “an arbitrary cut-off for eligibility with no apparent basis in research findings.” She further recommended that subitems (1)-(3) be connected by “or” rather than “and.”²⁷³ Randall Arnold questioned why the proposed rules prescribe a rigid definition for the level of achievement under the SRBI model, but do not impose a similar quantifiable definition of what constitutes underachievement under the aptitude-achievement discrepancy model.²⁷⁴

189. In its post-hearing submissions and SONAR, the Department cited several studies that support the use of the fifth percentile in item D. The Department further indicated that the Minnesota Responsiveness to Intervention Task Force reached consensus on an outline for an RTI model that uses the fifth percentile as a level at which interventions may need to be further individualized.

²⁷⁰ Letter from Lois Kester (Jan. 4, 2008); Letter from C. Wilson Anderson, Jr. (Dec. 24, 2007); Letter from Cindee McCarthy (Dec. 24, 2007).

²⁷¹ Hearing Transcript at 107-110; Public Ex. 3.

²⁷² Hearing Transcript at 267; Public Ex. 10.

²⁷³ Letter from Martha Rosen (Dec. 6, 2007).

²⁷⁴ Hearing Transcript at 275; Letters from Randall Arnold (Dec. 3, 2007, and Jan. 11, 2008).

The Department further indicated that it believed that the use of state or national comparison data will be the most consistent and reliable way to identify children with SLD. It pointed out that many local districts do not have valid and reliable local norms and there may be large differences between districts if local norms are used exclusively. The Department stated that it will collect information on students identified by both the fifth percentile cutoff and the severe discrepancy model to determine whether there are meaningful differences between them and, if appropriate, amend the rule at a later time.²⁷⁵

190. Cherie Peterson, Assistant Director of Special Education for the Anoka-Hennepin School District, objected to the Department's statement that it would collect information on students identified via both pathways to determine if there are meaningful differences between them and amend the rule if it becomes apparent that students are being inappropriately identified as SLD or being denied their right to FAPE, and questioned whether districts would be responsible for compensatory education for students who were not identified and for continuing to provide services to those who were improperly identified. Ms. Peterson also argued that it is inappropriate for the Department to include information and expectations in the proposed rules that it acknowledges are confusing and will need further clarification. Although she indicated that a revision of the SLD manual would be helpful, she stated that those working in the field are doomed to failure if rules are adopted without providing tools to understand them, and predicted that the lack of clarity will likely increase the number of complaints and hearing requests.²⁷⁶

191. Subpart 2 of the proposed rules does not include a great deal of detail about the manner in which it is to be implemented, and many interested parties continue to have questions about the process. For this reason, the Department is encouraged to consider whether further clarification can be provided in the rules prior to adoption, rather than requiring the parties to wait for revision of the SLD manual.²⁷⁷ However, based upon a review of the rules as currently proposed, the Administrative Law Judge concludes that school districts and others who will need to interpret and apply the proposed rules have been given adequate information to guide them in implementing the rules. In keeping with the 2004 amendments to the IDEA and the 2006 amendments to the rules adopted under the IDEA, the proposed rules do not require local educational agencies to take severe discrepancy between achievement and intellectual ability into consideration in determining eligibility for SLD; the severe discrepancy approach simply remains one possible option. Moreover, the proposed rules permit the use of a process that determines if the child responds to SRBI as part of the evaluation procedures, and also comply with other aspects of the federal

²⁷⁵ SONAR at 108; MDE's Dec. 31, 2007, Submission at 33-34.

²⁷⁶ Letter from Cherie Peterson at 8-9 (Jan. 11, 2008).

²⁷⁷ Of course, the Department must consider whether information it contemplates including in such a manual falls within the meaning of a "rule" and is subject to the rulemaking procedures of the Minnesota Administrative Procedure Act. See Minn. Stat. §§ 14.02, subd. 4, 14.38, and 14.381; G. Beck et al., *Minnesota Administrative Procedure* § 16.4 (2d ed. 1998).

law and federal rules relating exclusionary factors and other matters. Apart from the defect noted in Finding 144, Subpart 2 of the proposed rules, as modified and finally proposed for adoption, has been shown to be needed and reasonable. The modifications to items A and B proposed by the Department after the hearing and the modification suggested by the Administrative Law Judge to correct the defect discussed in Finding 144 do not result in a rule that is substantially different from the rule as originally proposed.

192. While the language set forth in item D is not defective as proposed, the Administrative Law Judge suggests that the Department consider revising the language of item D(4) (stating "the level of achievement must be at or below the fifth percentile . . .") to parallel the language of D(1) – (3). This could be accomplished by revising D(4) to state "the child's level of achievement is at or below the fifth percentile" Such a modification, if made, would serve to clarify this provision and would not constitute a substantial change.

Subpart 3 – Determination of specific learning disability

193. Subpart 3 of the proposed rules sets forth the documentation required for a determination that the criteria for eligibility for SLD have been met. Under the proposed language, such documentation must include an observation of the child in the child's learning environment that documents the child's academic performance and behavior in the areas of difficulty; a statement of whether the child has a specific learning disability; the group's basis for making the determination; educationally relevant medical findings; whether the child meets the criteria set forth in subpart 2, items A, B, and C, or items A, B, and D; and, if the child has participated in a process that assesses his or her response to SRBI, certain information relating to the strategies used, the data collected, and the notification provided to the parents concerning the state's policies regarding the amount and nature of child performance data that would be collected and the general education services that would be provided, strategies for increasing the child's rate of learning, and the parents right to request a special education evaluation. In the SONAR, the Department indicated that this section was reorganized to pull all of the requirements applicable to the determination of SLD into a single location. Some of the requirements set forth in item A were moved from the current rules (3525.1341, subp. 2(A)(2)); the remainder of the requirements included in subpart 3 of the proposed rules were drawn from federal requirements, specifically 34 C.F.R. §§ 300.306, 300.309, 300.310 and 300.311.

194. Item A of subpart 3 states that, "In determining whether a child has a specific learning disability, the group of qualified professionals, as provided by Code of Federal Regulations, title 34, section 300.308, must: (1) use information from an observation . . . that was done before the child was referred for a special education evaluation; or (2) conduct an observation . . . after the child has been referred . . .; and (3) document the relevant behavior . . . and the relationship of that behavior to the child's academic functioning" The Anoka-Hennepin

School District questioned who would conduct this observation and what training they would be required to have.²⁷⁸ The Department did not provide a response to this inquiry. The federal rules indicate that the group is composed of the child's parents and a team of qualified professionals which must include the child's regular teacher or, if the child does not have a regular teacher, a regular classroom teacher or individual qualified to teach a child of his or her age, and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.²⁷⁹ If there was no earlier observation on which the group could rely, presumably the group would decide which person was best suited to conduct a new observation. The proposed rules are not defective because they fail to specify the particular background or training the person conducting the observation must have.

195. Representatives from the school districts in St. Cloud and Rochester as well as the St. Croix River Education District commented that the proposed rules should require teams to provide a rationale with respect to why a particular intervention was selected for a particular student. The Minneapolis and St. Cloud school districts requested that the reference to aptitude tests contained in Item C, subitem (1) be stricken, and the Anoka-Hennepin School District also expressed concern that aptitude tests are no longer required. She also questioned whether the group would have an adequate foundation to determine the presence of a learning disability based upon the data required by the proposed rules and asserted that, without administering an IQ test, it would not be possible to determine that underachievement was not the result of developmental cognitive disabilities. The MDLC requested that the proposed rules clarify how disagreements concerning eligibility will be handled, address independent evaluations, and discuss the standard for reevaluation.²⁸⁰

196. The Department declined to modify the proposed rules to require districts to provide a rationale for the selection of each intervention because, in its view, that would bring about a substantive change in the proposed rule and increase paperwork, staffing, and the cost of implementation. The MDE also declined to delete the language that refers to aptitude tests because that language is drawn directly from federal rules.²⁸¹ The Department stated that data indicating aptitude is required to rule out developmental cognitive disability as a possible disability. Finally, in response to the concerns raised by the MDLC, the

²⁷⁸ Letter from Susan Butler at 16 (Dec. 6, 2007).

²⁷⁹ 34 C.F.R. 300.308.

²⁸⁰ See, e.g., Letter from Martha Rosen (Dec. 6, 2007); Letter from Susan Butler at 16-17 (Dec. 6, 2007); Letter from Implementation Team of St. Croix River Education District (Dec. 17, 2007).

²⁸¹ 34 C.F.R. §300.306(c)(1)(i) (stating that, in interpreting evaluation data for the purpose of determining if a child is a child with a disability under 34 C.F.R. § 300.8, and the educational needs of the child, each public agency must--(i) Draw upon information from a variety of sources, including *aptitude and achievement tests*, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and (ii) Ensure that information obtained from all of these sources is documented and carefully considered) (emphasis added).

Department stated that, in its view, independent evaluations could provide additional data for meeting eligibility criteria using either option C or D. The Department indicated that IEP teams will have data from existing and prior programming showing that special education is appropriate and that the child's eligibility should be maintained, and stated that it is standard practice for teams to consider the impact of exiting a child and how the removal of supports will affect the child's educational progress. The Department indicated that it would further address the concerns raised by MDLC in the SLD companion manual.

197. The Upper Midwest Branch of the International Dyslexia Association, Parent Advocates for Students with Dyslexia, and Marcy Pohlman suggested that the proposed rules clarify that parents are members of "the group" making evaluation decisions that is referenced in subpart 3 of the proposed rule, and that parents will be able to fully participate in making related determinations and provide relevant information relating to evidence of achievement.²⁸² Susan Butler of the Anoka-Hennepin School District asserted that the parent or classroom teacher cannot override the results of the evaluation.²⁸³

198. In its post-hearing response, the Department acknowledged that 34 CFR § 300.308 makes it clear that the group making a determination of whether a child has an SLD includes the child's parents. However, the Department stated that, "by streamlining the rules, the Department needed to include more citations to federal law and state statute," and declined to include the language suggested by Ms. Pohlman and the dyslexia organizations.²⁸⁴

199. The federal regulation to which the Department refers (34 C.F.R. § 300.308) states as follows:

The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in Sec. 300.8, must be made *by the child's parents and a team of qualified professionals*, which must include—

- (a) (1) The child's regular teacher; or
- (2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
- (3) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age; and

²⁸² Letter from Susan Butler at 21 (Jan. 8, 2008).

²⁸³ Hearing Transcript at 266; Public Ex. 10; Letter from C. Wilson Anderson, Jr. (Dec. 24, 2007); Letter from Cindee McCarthy (Dec. 24, 2007).

²⁸⁴ MDE's December 31, 2007, Submission at 34.

- (b) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.²⁸⁵

200. Subpart 3 of the rule as proposed refers to the group making the SLD eligibility determination only as a "group of qualified professionals," and does not incorporate the language of the federal rule that makes it clear that the determination is made by the child's parents as well as the team of qualified professionals. The proposed rule thereby suggests, contrary to federal requirements, that the parents have no role in the determination. This implication cannot be excused as a mere "streamlining" of federal regulations, nor should the public be required or expected to check the language of the federal rule to realize that parents are to have a broader role than the state rule implies. This constitutes a defect in the proposed rules: To remedy the defect, the Administrative Law Judge suggests that the Department modify the language of item A of subpart 3 to refer to "the child's parents and the group of qualified professionals" or, in the alternative, add a definition of the group to the definitions contained in subpart 1 of the proposed SLD rule. This modification will ensure that the state rules are consistent with federal requirements and will not result in a rule that is substantially different from the rule as originally proposed.

201. Subpart 3 of the proposed rules, as recommended for modification by the Administrative Law Judge to correct the defect noted above, has been shown to be needed and reasonable to provide parents and school personnel with a comprehensive list of the requirements with respect to a determination of SLD. The Department is encouraged to consider the specific language changes proposed by the MDLC and, if deemed appropriate, make further modifications in the rule language.

Subpart 4 – Verification

202. Subpart 4 of the proposed rules seeks to incorporate new rule language requiring that each group member provide written certification regarding whether the group's report reflects the conclusions of that group member and, if it does not, provide a separate statement presenting that member's conclusions. The language of this portion of the proposed rules is consistent with federal regulations adopted under the IDEA.²⁸⁶ The remainder of subpart 4 includes a new requirement that the district's plan for identifying a child with a SLD must be included with its total special education system (TSES) plan and that the district court "must implement its interventions consistent with that plan." The proposed rules specify that the district's plan "should detail the specific SRBI approach, including timelines for progression through the model;

²⁸⁵ 34 C.F.R. §300.308 (emphasis added).

²⁸⁶ 34 C.F.R. § 300.311 (b).

any SRBI that is used, by content area; the parent notification and consent policies for participation in SRBI; and the district staff training plan." In its SONAR, the Department indicated that these requirements were included in the proposed rules in response to concerns raised by the workgroup, the stakeholder group, and in public comment. The provision is designed to ensure that approaches that are being implemented are applied consistently throughout the district.²⁸⁷

203. Susan Butler of Anoka-Hennepin School District commented that requiring each district to define the SRBI creates a further barrier to having statewide criteria. Ms. Peterson of the Anoka-Hennepin School District asserted that, even if a single district develops a plan that maintains consistency within the district, there will be significant discrepancies between districts and fractured services and transitions when students move from one district to another unless the proposed rules are clarified. The Minneapolis Public Schools, as well as the St. Cloud, Rochester, Anoka-Hennepin, and St. Croix River school districts, again objected to the failure of the proposed rules to include a requirement that interventions be implemented with fidelity.²⁸⁸ Dr. Rosen of the Minneapolis Public Schools objected to this subpart of the proposed rules as ambiguous and urged that it be deleted. She asserted that there are many SRBI approaches, strategies, and methods and it would not be appropriate to single out a specific SRBI approach for a district and thereby limit students' access to a narrow range of instructional options.²⁸⁹

204. The Department's response to the fidelity of implementation issue has been previously discussed, along with the conclusion of the Administrative Law Judge that the rules are not rendered defective by virtue of their failure to address the matter. It is important to note that Subpart 4 does include a requirement that school districts must implement their interventions "consistent with" the approach they identify as part of their TSES plan. The Department did not otherwise specifically respond to the concerns raised by those commenting on the proposed rules, but did generally point out that a broad range of interventions exist, some districts do not already have an SRBI system in place, and districts should be permitted to decide if and when they are ready to use the SRBI process and what approach will fit within their resources and organizational structure. It is within the Department's policymaking discretion to decide whether to require a uniform, state-wide SRBI approach at this point or instead allow each district to formulate its own plan. Moreover, there is nothing in the proposed rules themselves that requires districts to narrowly define the scope of the SRBI approaches they use.

205. The Administrative Law Judge concludes that subpart 4, as proposed, has been demonstrated to be needed and reasonable to ensure that

²⁸⁷ SONAR at 112.

²⁸⁸ See, e.g., Letters from Ann Casey (Jan. 8, 2008); Martha Rosen (Dec. 6, 2007); Susan Butler at 12, 15, 17 (Dec. 6, 2007); Cherie Peterson (Dec. 17, 2007).

²⁸⁹ Letter from Martha Rosen (Dec. 6, 2007).

group members provide the written certification required by federal rules and that each district prepares a SRBI implementation plan that will be applied consistently throughout the district. The rules are not defective by virtue of their failure to expressly require that an intervention be implemented with “fidelity” or include more detailed requirements regarding the measurement of fidelity.

Proposed Rule 3525.1343 – Speech or Language Impairments

206. The only changes proposed to be made to this rule as part of this rulemaking proceeding would replace the word “pupil” with the word “child,” consistent with changes made throughout Chapter 3525.

207. Nine speech-language pathologists²⁹⁰ filed comments urging that the title “educational speech-language pathologist” used in the current rules be changed to “speech-language pathologist” to be consistent with terminology used elsewhere in Minnesota Rules. They indicated that the Board of Teaching changed the title several years ago.²⁹¹ The MDE did not provide any response to this request in its post-hearing comments.

208. The proposed rules are not rendered defective by their failure to make the requested change in the title. However, if the Department makes this minor modification to update the title, it would not constitute a substantial change.

Proposed Rule 3525.2325 – Education Programs for K-12 Children with Disabilities and Regular Students Placed Outside the Normal School Site for Care and Treatment

209. The proposed rules contain extensive amendments to the existing care and treatment rule. In the SONAR, the Department indicated that it was revising this rule to bring it into alignment with recent changes to the state care and treatment statute (Minn. Stat. §125A.515) and to improve the clarity of the rule.²⁹² As discussed in Section III(B)(2) of this Report, the Department was directed by the Legislature to make changes to the rule to conform to the statute.²⁹³ The MDE indicated that it agrees that the rule needs to be changed because there has been confusion in the field about when the rule applies and whether it conflicts with Minn. Stat. § 125A.515.²⁹⁴

210. Minn. Stat. § 125A.515 generally requires that the Commissioner of Education approve education programs for placement of children and youth in residential facilities, including detention centers, before being licensed by the

²⁹⁰ Letters from Meredith Boo (Nov. 29, 2007), Katie Dalton (Nov. 29, 2007), Liz Barnett (Nov. 29, 2007), Robin Johnson (Nov. 30, 2007), Debra Jensen (Nov. 29, 2007), Susan Kenney Bonnema (Dec. 10, 2007), Cindy McInroy (Dec. 17, 2007), Judith Gelderman (Jan. 11, 2008).

²⁹¹ Minn. R. 8710.6000.

²⁹² SONAR at 119.

²⁹³ 2006 Minn. Laws 263, Art. 3, § 16 (erroneously cited on p. 119 of the SONAR as 2006 Minn. Laws 163, §16).

²⁹⁴ SONAR at 119.

Department of Human Services (DHS) or the Department of Corrections (DOC), and specifies that such education programs must conform to state and federal education laws including the IDEA. Among other things, the statute identifies which district must provide education services; requires education services to be provided to a student beginning within three business days after the student enters the care and treatment facility; permits the first four days of the student's placement to be used to screen the student for educational and safety issues; requires that regular education services be provided to a student who does not meet the eligibility criteria for special education; requires certain communications between the care and treatment facility, the providing district, and the resident district to obtain transcripts, IEPs and evaluation reports; requires that an IEP meeting be conducted by the providing agency; states that the providing district is, at a minimum, responsible for the education necessary for a student who is not performing at grade level and a school day of the same length as the school day of the providing district unless the unique needs of the student require an alteration; specifies that the providing district must prepare an exit report if the student's placement is 15 business days in length or longer; states that education shall be provided in a regular educational setting when allowed by the student's needs; provides for educational placement decisions to be made by the IEP team of the providing district when applicable; specifies that the providing district and the care and treatment facility shall cooperatively develop discipline and behavior management procedures; and states that education services provided to students who have been placed under the statute are reimbursable in accordance with special education and general education statutes.

211. Although Minn. Stat. § 125A.515 specifies that it applies only to placements in facilities licensed by DHS or DOC,²⁹⁵ subdivision 10 of the statute was amended in 2006 to state as follows:

Subd. 10. Students unable to attend school but not covered under this section. Students who are absent from, or predicted to be absent from, school for 15 consecutive or intermittent days, and placed at home or in facilities not licensed by the Departments of Corrections or Human Services are entitled to regular and special education services consistent with this section or Minnesota Rules, part 3525.2325. These students include students with and without disabilities who are home due to accident or illness, in a hospital or other medical facility, or in a day treatment center.²⁹⁶

²⁹⁵ See Minn. Stat. § 125A.515, subd. 1.

²⁹⁶ Minn. Laws 2006, Ch. 263, Art. 3, § 8. Prior to the 2006 amendment, Minn. Stat. § 125A.515, subd. 10 stated:

Subd. 10. Students unable to attend school but not placed in care and treatment facilities. Students who are absent from, or predicted to be absent from, school for 15 consecutive or intermittent days, at home or in facilities not licensed by the departments of corrections or human services are not students placed for care and treatment. These students include students with and without

The Department asserted in its post-hearing comments that subdivision 10 was amended "in order to correct the fact that the statute had previously been read to invalidate the rule and, therefore, services for students in care and treatment who were not in a facility licensed by DHS or DOC. This denial of services to children previously protected by the rule was inadvertent, and thus corrected by Subdivision 10" ²⁹⁷

212. Two other state statutes also have some bearing on educational services provided to students and children placed for care and treatment. Minn. Stat. § 125A.51 addresses which school district is responsible for providing instruction and transportation for a pupil *without a disability* who has a short-term or temporary physical or emotional illness or disability and is temporarily placed for care and treatment in a day program, residential program, or homeless shelter for that illness or disability. Minn. Stat. § 125A.15 provides standards for determining responsibility for special instruction and services for a child *with a disability* who is temporarily placed for care and treatment in a day program or residential program in another district.

Subpart 1 – When education is required

213. Subpart 1 of the existing rules states that the district in which the facility is located must provide regular education, special education, or both, to a "pupil or regular education student in kindergarten through grade 12 placed in a facility, or in the student's home for care and treatment." The proposed rules would strike the language of the current rule and replace it with the statement that "[a]ll children with disabilities and regular education students in kindergarten through grade 12 who are placed for care and treatment in the student's home or in any facility, center, or program must receive regular education, special education, or both."

214. In the SONAR, the Department indicated that the language of the proposed rules is intended to "emphasize that all children and students in kindergarten through grade 12 who are placed in any setting for care and treatment must receive education services pursuant to this rule."²⁹⁸ The Department noted that the MDLC, PACER, and the Autism Society of Minnesota suggested prior to the rule hearing that the language should be changed to apply to all children and the phrase "kindergarten through grade 12" should be removed. With respect to these concerns, the SONAR stated:

These rules do not propose to change the scope of education services available to children and students placed in care and treatment. The proposed rule language currently encompasses all

disabilities who are home due to accident or illness, in a hospital or other medical facility, or in a day treatment center. These students are entitled to education services through their district of residence.

²⁹⁷ MDE's Dec. 31, 2007, Submission at 38.

²⁹⁸ SONAR at 120.

children with disabilities as well as students--those who receive regular education services but not special education services--in kindergarten through to grade 12. Based on that language, any child or student who is entitled to education services under federal laws and Minnesota statutes and rules will receive education services under this rule. Therefore, the Department does not believe it is necessary to alter the rule to change its scope.²⁹⁹

215. In their testimony at the hearing and post-hearing comments, the MDLC, the Coalition for Children with Disabilities, and others continued to express concern that subpart 1 of the proposed rules states that the only children placed in care and treatment settings who are eligible for education services are those who are in kindergarten through grade 12. The MDLC asserted that the rule would result in confusion for educators and parents because no such age limitation exists. It recommended that the language of the proposed rules be changed to include children from birth to age five.³⁰⁰

216. The Department noted in its post-hearing submission that it did not agree with the MDLC on this point. Although the Department acknowledged that children who qualify for early intervention services or for special education services are eligible to receive services from birth, the Department contended that they become eligible to receive *regular* education services only after they reach the age for kindergarten, or become eligible for pre-kindergarten services in districts that offer such programs. The Department indicated that it intended the proposed rule to "guarantee education services comparable to those that would be available to children with disabilities or regular education services if they were able to attend school in their regular setting, but not greater than that."³⁰¹

217. The Administrative Law Judge concludes that the language of the proposed rules implies that students who are eligible for early intervention or special education services and are placed for care and treatment are only entitled to receive early intervention or special education services if they are in kindergarten through grade 12. This implication is contrary to state and federal law because children may be eligible for early intervention and special education services from birth to age 21. Accordingly, this language is a defect in the proposed rules. To remedy the defect, the Administrative Law Judge recommends that the language of subpart 1 be changed to incorporate language similar to the following: "All children with disabilities and regular education students who are placed for care and treatment in the student's home or in any facility, center, or program must receive regular education, special education, or both, during the time they are in kindergarten through grade 12. In addition, children with disabilities who are placed for care and treatment in the student's

²⁹⁹ SONAR at 120.

³⁰⁰ Letter from Linda Bonney and Jaynie Leung (Dec. 18, 2007); Letter from Mary Powell (Dec. 20, 2007).

³⁰¹ MDE's Dec. 31, 2007, Submission at 39.

home or in any facility, center, or program must receive special education and related services for which they are eligible from their birth until their entry into kindergarten and from the end of grade 12 to age 21." Neither of these modifications would render the rules substantially different from the rules as originally proposed.

218. Subpart 1, Item A, of the proposed rules indicates in part that education services must be provided to a child with a disability or a regular education student "whenever the child or student is either prevented from attending or predicted to be absent from the normal school site for 15 or more intermittent or consecutive school days according to the placing authority, such as a medical doctor, psychologist, psychiatrist, judge, or a court-appointed authority." Item B states that, for purposes of this rule part, children with disabilities and regular education students "are considered to be placed for care and treatment when they are placed by a placing authority other than the district" in one of several listed programs and facilities. Although the rule language is reorganized somewhat in the proposed rules, nearly all of the content is derived from the existing rules. The list of programs and facilities continues to include those mentioned in the current rules (chemical dependency and substance abuse treatment centers; shelter care facilities; home, due to accident or illness; hospitals; day treatment centers; correctional facilities; residential treatment centers; and mental health programs), but the proposed rules include as a final catch-all category "any other placement for medical care, treatment, or rehabilitation." In the SONAR, the Department indicated that it added this language to ensure that all children placed for care and treatment receive the education services to which they are entitled even if they are placed in a facility that does not otherwise fall within one of the other listed categories.³⁰²

219. The MDLC supported the addition of the catch-all category in item B(9) as reasonable, necessary, and within the statutory guidelines. It believes that clarification is needed because the list of placements set forth in Minn. Stat. § 125A.515, subd. 10, is not all-inclusive.³⁰³

220. A parent who placed her child in an out-of-state residential treatment commented that parents should be able to make such decisions without needing the approval or agreement of the school district, and suggested that the rules require that the home school district have responsibility for providing a free and appropriate education regardless of how a student ended up in residential treatment. The Department responded that the purpose of the proposed rule is to ensure education services for children who cannot attend their regular school setting for "legitimate care and treatment reasons" where such decisions have been made by an appropriate authority, such as a court or

³⁰² SONAR at 124.

³⁰³ Letter from Linda Bonney and Jaynie Leung (Dec. 18, 2007). Minn. Stat. § 125A.515, subd. 10, states that the students to be encompassed "include students with and without disabilities who are home due to accident or illness, in a hospital or other medical facility, or in a day treatment center."

medical authority. The Department indicated that placements made solely at the discretion of the parent are not encompassed by the rule because the rule is aimed at ensuring that there is an objective need for the child or regular education student to be placed in care and treatment.³⁰⁴

221. The PACER Center urged that the Department clarify whether an IEP team can place a child in a day treatment program.³⁰⁵ Amy Goetz argued that the proposed rule is contrary to federal law because it suggests that IEP teams lack authority to decide that a student with a disability needs a day treatment or residential treatment placement. She contended that the proposed rules would continue to entrench an inappropriate characterization of mental health supports as “medical” in nature, rather than “educational,” contrary to the ruling of the U.S. Court of Appeals for the Eighth Circuit in *Independent School District No. 284 v. A.C.*³⁰⁶ As a result, she argued that the proposed rules cannot properly remove residential or day treatment placements from the continuum of alternative placements. She further contended that the proposed rules would have the effect of requiring that juvenile courts issue orders referring students with disabilities who need mental health services and supports in order to be successful at school, and would thereby shift associated costs onto the counties. She recommended that the proposed rule be deferred for further stakeholder input, noting that there is significant confusion in the field regarding such placements. In the alternative, she suggested that the Department clarify that nothing in the rule prohibits IEP teams from deciding that a particular student needs a day treatment program in order to learn and taking steps to effect that placement at no cost to parents.³⁰⁷

222. In its post-hearing response, the Department acknowledged that an IEP team may also recommend placement in a program outside a school for reasons relating to educational need, and stated that this rule does not govern the authority of an IEP team to recommend placement in a day treatment or similar program for educational reasons. The MDE stated that, unlike other rules contained in Chapter 3525, the care and treatment rule is not specifically a special education rule; it protects the right of every student and child to receive education services when he or she is unable to attend school due to care and treatment placement. The Department noted that such placements are usually made by a medical, county, or court authority. It did not propose any modification to the language of the proposed rules.³⁰⁸

223. The Administrative Law Judge concludes that subpart 1 of the proposed rules has been shown to be needed and reasonable as proposed, and

³⁰⁴ MDE's Dec. 31, 2007, Submission at 39.

³⁰⁵ Letter from Paula Goldberg (Jan. 11, 2008).

³⁰⁶ 258 F.3d 769 (8th Cir. 2001) (holding that a residential placement was necessary to provide student with educational benefit where student's emotional and behavioral problems needed to be addressed in order for her to learn).

³⁰⁷ Hearing Transcript at 246-248; Letters from Amy Goetz (Nov. 16, 2007, and Nov. 21, 2007).

³⁰⁸ MDE's Dec. 31, 2007, Submission at 38-39.

the Department is not required to modify the language of the rule. The proposed rule does not restrict placing authorities to medical doctors, psychologists, psychiatrists, judges, or court-appointed authorities, but merely lists these individuals as examples of placing authorities. The Department explained that these are the authorities that typically make such placements. Because the same list of placing authorities is included in subpart 1(B) of the existing rules, it does not appear that the MDE is attempting to change the substantive content of this provision during this rulemaking proceeding. Moreover, the Department clarified in its post-hearing comments that the rule does not govern the authority of an IEP team to recommend placement in a day treatment or similar program for educational reasons, and federal law requires that, “[i]f placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.”³⁰⁹

224. Although the language of the proposed rules is not defective, the Department may, if it wishes, add language similar to that requested by Ms. Goetz to make it clear that the rule “does not affect the ability of an IEP team to decide that a particular student needs a day treatment program in order to learn and take steps to bring about that placement at no cost to parents.” If the Department elects to make such a modification, it would not result in a rule that is substantially different from the rule as originally proposed.

Subpart 1a – Responsibility for provision of education services

225. Subpart 1a of the proposed rules adds new language that directs those reading the rules to the various statutes that govern responsibility for services (Minn. Stat. §§ 125A.15, 125A.51, and 125A.515) depending upon whether the children placed for care and treatment are children with disabilities or regular education students. The Department indicated that the inclusion of this subpart in the proposed rules will enable districts and facilities to reference the appropriate statutory requirements for a particular care and treatment situation and make a proper assignment of responsibility.³¹⁰ The Minnesota School Board Association questioned the need for this rule in light of the Department’s admission that the statutory provisions are controlling, and asserted that the rule is unnecessarily duplicative of state law.³¹¹

226. The language of subpart 1a is not a rule in the traditional sense because it primarily refers the reader to controlling sections of statute. However, it is likely that its inclusion in the proposed rules will be of assistance to regulated parties and help them locate and apply the statutes that allocate responsibility for the provision of education services in care and treatment settings. Accordingly,

³⁰⁹ 34 C.F.R. §300.104; see also 20 U.S.C. § 1412(a)(10)(B).

³¹⁰ SONAR at 126.

³¹¹ Hearing Transcript at 153; Comments of Minn. School Boards Assoc. at 6-7 (Dec. 24, 2007).

the Administrative Law Judge concludes that subpart 1a does not rise to the level of a defect in the context of these proposed rules.

Subpart 2 – Education programs for students and children with disabilities and regular education students placed in short-term programs for care and treatment

Subpart 3 – Education programs for children with disabilities and regular education students placed in long-term programs for care and treatment

227. Subparts 2 and 3 of the existing rules require, among other things, that instruction be provided to a pupil or student placed for care and treatment in a short-term placement (i.e., one that is anticipated to last less than 31 school days) "immediately after the pupil or student is enrolled in the education program." Subpart 3 of the existing rules includes a similar requirement for pupils and regular education students placed for care and treatment in a long-term program (one that is anticipated to last for more than 30 school days). The proposed rules would amend subparts 2 and 3 of the existing rules to require that children with disabilities and regular education students placed for care and treatment must receive education services "without delay" after they enter the facility or program, "unless medical or other treatment considerations, as determined by the medical or treatment provider, do not allow for the prompt delivery of education services, in which case education services should begin as soon as possible."

228. Randall Arnold commented that the proposed rules are not consistent with Minn. Stat. § 125A.515 and lacked clarity. For example, he pointed out that the distinction made in the proposed rules basing minimum education services upon predicted length of placement has no basis in the statute.³¹² Members of the Special Education Advisory Panel noted that they were not in agreement that the proposed rule changes provided the necessary alignment between the statute and rule and increased clarity in the area of care and treatment.³¹³

229. The Department explained in the SONAR that this change was being made to eliminate the vague references in the existing rules requiring that education services be provided after "enrollment in the education program" and provide a clearer timeframe to avoid delay in the provision of education services. The Department also indicated that the proposed rules will allow flexibility in the event that some children who enter care and treatment may be unable to participate in instruction because of the nature of their unique situations.³¹⁴

³¹² Letter from Randall Arnold (Dec. 3, 2007).

³¹³ Letter from Kim Riesgraf, Linda Bonney, Pam Taylor, and David Olson (Nov. 5, 2007).

³¹⁴ SONAR at 126-127.

230. Due to conflicting statements made by the Department in the SONAR and in its post-hearing comments, it is unclear whether the proposed care and treatment rule is intended to apply to *all* care and treatment placements, including those involving DHS- and DOC-licensed facilities, or only to those that do not involve facilities licensed by the DHS and DOC. The Department repeatedly stated in the SONAR that the rule was intended to cover all such placements in any setting:

Section 125A.515 extends protections and services only to children in licensed residential facilities, but care and treatment is a much broader category than that. This rule governs provision of education services for children placed in care and treatment *in all cases*.³¹⁵

* * *

Subpart 1 of the rule has been "redrafted slightly in order to emphasize that *all* children and students in kindergarten through grade 12 who are placed *in any setting* for care and treatment must receive education services pursuant to this rule."³¹⁶

* * *

[B]y clearly applying this standard [subpart 1(A)] to *all* children and students, the proposed rule is more consistent and fair.³¹⁷

* * *

[E]ducation programs run by the Department of Corrections are now governed in the first instance, *if not exclusively*, by Minn. Stat. § 125A.515.³¹⁸

* * *

The intent of the legislation, as stated in Minn. Stat. § 125.515, subd. 10, is that *all* children placed for care and treatment receive education services under that statute, this rule, *or both*. In order to ensure that this requirement is clear, the rule [in subpart 2(B)] describes the types of care and treatment situations that exist and are covered by the rule. During the rulemaking process, the Department considered a variety of approaches to drafting this section [subpart 1, item B] of the rule in order to best ensure that *any* child or student legitimately placed for care and treatment *in any setting* will receive education services pursuant to this rule. . . . The Department tried cutting back this list to remove those facilities that are covered *in the first instance* by Minn. Stat. § 125A.515, but the Department does not

³¹⁵ SONAR at 119 (emphasis added).

³¹⁶ SONAR at 120 (emphasis added).

³¹⁷ SONAR at 121 (emphasis added).

³¹⁸ SONAR at 123 (emphasis added).

believe it is effective to include an incomplete list of care and treatment facilities in the rule, even though *some of those facilities are also—and even primarily—covered by the statute*. Rather, the Department believes that the list should be as accurate and complete as possible to ensure that *all* children and students placed for care and treatment are covered by the rule, *even if they are also covered by the statute*. A more complete list also provides better guidance to districts and facilities about the types of facilities that are considered care and treatment placements for purposes of this rule.³¹⁹

* * *

[The addition of the “catch-all” category] is the best way to ensure that *all* children placed for care and treatment, even if it [sic] the placement is in a facility not specifically enumerated in (1) to (8), receive the education services to which they are entitled.³²⁰

231. In contrast, the Department’s post-hearing comments suggested that at least subparts 2, 3, and 5 of the proposed rules were not intended to apply to DHS- and DOC-licensed facilities covered by the statute, but only to other types of care and treatment placements:

Subparts 2 and 3 differ from statutory requirements found in Minn. Stat. §125A.515 *that apply to other care and treatment placement situations than those governed by the rule* (the statute requires education services to begin within three business days after entry into the licensed residential care and treatment facility); however, that difference existed before this clarifying change was made to the rule. Furthermore, the difference between statute and rule is important, because *the types of care and treatment placements governed by the statute and by this rule are qualitatively different*, so the time frame in which education services must begin in order to ensure appropriate access to education during care and treatment must accommodate those differences. The *approved, licensed education programs governed by the statute* typically have adequate time in which to enroll students into their programs. Conversely, the *many care and treatment settings addressed by the rule* can include very short-term placements, where a child’s or student’s access to education services and ability to learn, could be compromised if education services do not begin immediately upon placement.³²¹

* * *

³¹⁹ SONAR at 123-124 (emphasis added).

³²⁰ SONAR at 124 (emphasis added).

³²¹ MDE’s Dec. 31, 2007, Submission at 40 (emphasis added).

As pointed out by the comment [made by Randall Arnold with respect to subpart 5], the standard for minimum educational services set out in this Subpart differs from the standard set out in Minn. Stat. § 125A.515, subd. 7. However, *the statute and rule apply to different types of care and treatment settings*. The approved education programs provided in licensed settings governed by the statute generally have the capacity, resources, and placement situations to adequately provide full-day education services. The care and treatment settings governed by the rule are much more diverse, may involve very medically fragile children and students, or may involve only one or a few children. These varied care and treatment settings may not have the same capacity to facilitate education services, so the rule is drafted to promote full-day services but also establishes minimum requirements for those situations where full-day services simply cannot be provided.³²²

232. In order to assess whether subparts 2 and 3 are defective, it is essential to know the intended scope of the rule. If the proposed rule is intended to extend to education services provided to children placed in DHS- and DOC-licensed facilities, the direction in the proposed rule that education services be provided "without delay" would conflict with the mandate in Minn. Stat. § 125A.515 that education services be provided in such facilities beginning within three business days. If the proposed rule is only intended to apply to education services provided in facilities *other than* DHS- and DOC-licensed facilities, the proposed modification is needed and reasonable to ensure that education services are provided without delay in such facilities, with exceptions in appropriate situations.³²³

233. Because of the conflicting statements in the SONAR and the Department's post-hearing comments regarding the types of care and treatment facilities that are intended to be covered by the proposed rule, the Administrative Law Judge concludes that subparts 2 and 3 of the proposed rule are impermissibly vague. This is a defect in the proposed rule. To correct this defect, the Department must add language clarifying the facilities to which the rule is intended to apply. If, in fact, the Department intends to have the rule apply to DOC- and DHS-licensed facilities, it must also add language to the rule requiring that education services be provided beginning within three business

³²² MDE's Dec. 31, 2007, Submission at 41-42 (emphasis added).

³²³ The Department has provided a rational explanation for its decision to use the phrase "without delay" with respect to facilities not licensed by the DHS or DOC rather than applying the three-business-day requirement set forth in the statute for DHS- and DOC-licensed facilities. The Legislature did not require that the Department's rules impose requirements on other facilities that are identical to those required for DHS- and DOC-licensed facilities; the statute merely states that students placed at home or in facilities not licensed by the DOC or DHS are entitled to regular and special education services "consistent with this section or Minnesota Rules, part 3525.2325." See Minn. Stat. § 125A.515, subd. 10. A fair reading of this language supports the view that the Legislature intended to afford the Department some discretion in fashioning rules relating to other types of facilities.

days after the student enters the care and treatment facility, in accordance with Minn. Stat. § 125A.515, subd. 4.

234. Kim Buechel Mesun, Assistant General Counsel of the Minneapolis Public Schools, urged the Department to revise subpart 3, item A, to specify that, consistent with federal rules, amendments to IEPs can be made without the necessity of having a full IEP team meeting.³²⁴ No substantive changes were proposed by the Department to that item as part of this rulemaking proceeding, nor is the suggested modification necessary to meet the legislative directive for the Department to amend the rules to conform with Minn. Stat. § 125A.515. The Department is urged to consider this comment in conjunction with future rulemaking with respect to this provision.

Subpart 4 – When a student or child with a disability leaves the facility

235. Subpart 4 of the current rules requires that the providing district must provide an exit report to the home school, receiving facility, parent, and any appropriate social service agency for any student who has received an evaluation or special education services for 15 or more school days. The rule states that the exit report must summarize the regular education or special education evaluation or service information and, for special education students, provide a summary of current levels of performance, progress, and any modifications made in the IEP or services. The proposed rules made only minimal changes to portions of subpart 4, replacing the word "pupil" with "child with a disability."

236. Randall Arnold of the St. Cloud Area School District objected to subpart 4 as inconsistent with Minn. Stat. § 125A.515 and lacking in clarity. The Department responded in its post-hearing comments that it "did not propose changes to the Subpart because it was not affected by 2006 changes to the care and treatment statute, nor is it confusing or controversial in the field. Furthermore, the existing rule language is not substantially different from the statutory language found in Minn. Stat. § 125A.515, subd. 6."³²⁵

237. As noted above, it is unclear whether this rule is intended to apply to placements in DHS- and DOC- licensed facilities as well as other types of facilities. However, in this instance, there is no significant difference between the requirements set forth in the rule regarding the content and dissemination of the exit report and those set forth in Minn. Stat. § 125A.515, subd. 6.³²⁶ Accordingly,

³²⁴ Letter from Kim Buechel Mesun (Dec. 21, 2007).

³²⁵ MDE's Dec. 31, 2007, Submission at 40.

³²⁶ That statutory provision requires that the exit report summarize "the regular education, special education, evaluation, educational progress, and service information" and be sent to "the resident district and the next providing district if different, the parent or legal guardian, and any appropriate social service agency. For students with disabilities, this report must include the student's IEP."

the Administrative Law Judge concludes that this portion of the proposed rule has been shown to be needed and reasonable.

Subpart 5 – Minimum service required

238. Subpart 5 generally requires that the team predict how long a child with a disability or a regular education student must be placed for care and treatment. If the team predicts that the placement will last for more than 170 school days, the rule indicates that the district must make available “the instruction necessary for the student or child with a disability to make progress in the appropriate grade level,” “preferably a normal school day in accordance with the IEP,” “an average of at least two hours a day of one-to-one instruction,” or “a minimum of individualized instruction for one-half of the normal school day if it is justified in the IEP . . . or student’s education plan that none of these options are appropriate.” If the team predicts that the placement will last for less than 171 school days, the rule requires the district to make available at a minimum “either small group instruction for one-half of the normal school day or at least an average of one hour a day of one-to-one instruction.”

239. The proposed rules made only minimal changes to portions of subpart 5, replacing the word “pupil” with “child with a disability” and updating a reference to a federal rule. Randall Arnold recommended that subpart 5 be further modified to delete the reference to the length of time a child is predicted to be placed for care and treatment. He pointed out that the applicable statutory provisions do not make any distinction based upon the length of a placement.³²⁷

240. As noted above, the Department asserted in the SONAR that the proposed rules apply to *all* children placed in *any* setting for care and treatment, but contended in its post-hearing responses that subpart 5 of the rule and Minn. Stat. § 125A.515 apply to different types of care and treatment settings. The Department further indicated in its post-hearing comments that subpart 5 properly recognizes that facilities not licensed by the DHS and DOC might lack the capacity to provide full-day services.³²⁸

241. If subpart 5 is intended to apply to DHS- and DOC- licensed facilities, the minimum services required by the rule would conflict with the minimum educational services required by Minn. Stat. § 125A.515, subd. 7, for children placed in such facilities.³²⁹

³²⁷ Hearing Transcript at 271-272.

³²⁸ MDE’s Dec. 31, 2007, Submission at 41-42.

³²⁹ That statutory provision states that the providing district is responsible at a minimum for “the education necessary, including summer school services, for a student who is not performing at grade level” and “a school day, of the same length as the school day of the providing district, unless the unique needs of the student . . . requires an alteration in the length of the school day.” In addition, the statute does not make any distinction in the types of educational services to be provided based upon the length of the student’s predicted stay in the facility.

242. Because of the conflicting statements in the SONAR and the Department's post-hearing comments regarding the types of care and treatment facilities that are intended to be covered by the proposed rule, the Administrative Law Judge concludes that subpart 5 is impermissibly vague. This is a defect in the proposed rule. To correct this defect, the Department must add language clarifying which types of placements will be governed by the rule. If, in fact, the Department intends to have the rule apply to education services provided in DOC- and DHS-licensed facilities, it must also add language to the proposed rule requiring that the minimum education services to be provided in such facilities satisfy the requirements of Minn. Stat. § 125A.515, subd. 4.

Subpart 7 – Placement of students and children with a disability and regular education students; aid for special education

243. The Minneapolis Public Schools suggested that the language of this portion of the proposed rules be clarified by referring specifically to subdivision 9 of Minn. Stat. § 125A.515, since that is the only provision that applies to special education reimbursement.³³⁰ The Department did not modify the rule in response to this suggestion. Although the reference to the entire statute contained in the proposed rule does not render the rule unreasonable, the Department may, if it wishes, add the clarification suggested by Ms. Mesun without bringing about a substantial change.

244. The Administrative Law Judge concludes that the proposed care and treatment rule, with the modifications required by the Administrative Law Judge to correct the defects, has been shown to be needed and reasonable to ensure the appropriate provision of educational services to children placed for care and treatment. The modifications required by the Administrative Law Judge will serve to clarify the scope of the rule and ensure that it is consistent with relevant statutory provisions. The modifications will not cause the rule to be substantially different than the rule as originally proposed.

Proposed Rule 3525.2720 – Criteria Upon Reevaluation

245. The proposed rules would add a new rule part to Chapter 3525 relating to criteria to be used upon reevaluation. The new language would state, "Upon reevaluation, a child who continues to have a disability as provided by Code of Federal Regulations, title 34, section 300.8, and continues to demonstrate a need for special education and related services is eligible for special education and related services."

246. The MDLC, PACER Center, Arc Greater Twin Cities, Arc Northland, the Autism Society of Minnesota, Jody Manning, Connie and Jerry Hesse, Vava Guthrie, Carolyn Anderson, and Andrea Bakken expressed support for the proposed rule and asserted that it was in keeping with federal law, which does

³³⁰ Letter from Kim Buechel Mesun (Dec. 21, 2007).

not mandate that a student meet eligibility criteria at the time of reevaluation. Ms. Manning noted that reevaluation practices have been inconsistent from one district to another in Minnesota and encouraged adoption of the proposed rule because she believes it will clarify the standards and lead to consistency. She pointed out that children may move in and out of the special education system throughout their school years because they initially meet criteria for special education but, after an appropriate IEP is written and their needs are met, they no longer meet the initial criteria. She contended that such children often experience a downward spiral or develop acting-out behaviors. She asserted that, after a lapse in special education services, these students often fail and become once again eligible for special education services in the same category or in a new category, such as EBD. Ms. Manning testified that this "roller coaster ride" in and out of special education can negatively affect a student's self-esteem and ability to make academic progress. Ms. Bakken stated that requiring a child already receiving special education to "meet those same rules every three years doesn't allow a child to show improvement in one area and still receive services they may desperately need to be successful in another."³³¹

247. The MDLC asserted that the proposed rules will provide clarity and guidance in this area. It contended that the proposed rules and an earlier policy memorandum written by the Department on this subject are consistent with information contained in a letter issued by the federal Office of Special Education Programs (OSEP) in 1999. In that letter, OSEP responded to an inquiry from Congressman Roy Blunt forwarding concerns he had received from Missouri school administrators regarding the increased paperwork requirements associated with implementation of the discipline provisions contained in the 1997 amendments to the IDEA. In its response, OSEP noted that IDEA '97 contained a number of provisions that reduced unnecessary paperwork and directed resources to teaching and learning. For example, OSEP stated that the 1997 amendments to the IDEA permitted initial evaluations and re-evaluations to be based on existing evaluation data and reports, and did "not requir[e] that eligibility be re-established through additional assessments when a triennial evaluation is conducted if the group reviewing the data agrees that the child continues to be a child with a disability."³³²

248. Gary Lewis, Director of Student Services with the Northfield Public Schools (ISD 659), submitted comments and testimony in opposition to this portion of the rule on behalf of the Minnesota Administrators for Special Education (MASE). MASE questioned the validity of and need for the rule and asserted that the proposed rule reflects a renewed effort by the Department to give the force of law to its earlier pronouncements regarding criteria to be applied upon reevaluation, contrary to the Court of Appeals' decision in *In re Chisago*

³³¹ Hearing Transcript at 209-212; Public Ex. 6; Letters from Andrea Bakken (Dec. 20, 2007); MDLC (December 21, 2007); Jody Manning (Dec. 19, 2007); Paula Goldberg (Jan. 11, 2008); Carolyn Anderson (Dec. 3, 2007).

³³² Letter from MDLC (Dec. 21, 2007), *citing* Letter to Blunt, OSEP 1999, available at www.pattan.net/files/OSEP/Blunt.pdf.

*Lakes School District and J.D.*³³³ In the view of MASE, the proposed rule will have the effect of requiring that individuals who are initially found eligible for special education will remain permanently eligible, except in exceptional circumstances. It further argued that, under the proposed rule, it would be difficult if not impossible to deny students services through the age of 21 even if they have met all requirements to graduate with a regular diploma. MASE emphasized that neither state nor federal law refers to "initial" eligibility criteria, and the Department's current rules merely state that eligibility for special education is based upon meeting the specified criteria. MASE also asserted that the proposed rule is impermissibly vague because it does not define any standard for how a continuing need is to be determined and is inconsistent with proposed rule 3525.2550 (relating to evaluation report and timeline). Finally, MASE contended that the proposed rule would significantly increase costs to local districts.³³⁴

249. Many other individuals and organizations also objected to this provision of the proposed rules. For example, the Minnesota School Boards Association asserted that the proposed rules create confusion regarding which standard—federal or state—will govern eligibility determinations in reevaluations, and urged that, at a minimum, the proposed rule be amended to clarify that the federal standard also applies to Minnesota's state eligibility criteria.³³⁵ Mary Ruprecht, Director of Special Education for the Rum River Special Education Cooperative, and representatives from the Rochester Public Schools also objected to the failure of the proposed rules to define any standard for how a continuing need is to be determined and asserted that even a non-significant or trivial need would make a student eligible for continued special education services.³³⁶ Ronald Ruhnke, School Psychologist for the Washington County Schools, and Don Schuld, Assistant Superintendent for the Stillwater Area Public Schools, stated that the proposed rules merely require a vague showing of "need" for special education and fail to establish criteria for reevaluation. They asserted that students would never be dismissed from services and could be held back from receiving adult services from other agencies.³³⁷

250. John Currie, the Superintendent of ISD 196, Mary Kreger, the Director of Special Education in ISD 196, and many others in ISD 196 opposed the proposed rule as going beyond compliance with the federal rules. Mary Jelinek, principal of Thomas Lake Elementary School in ISD 196, commented that the proposed rule "would make it difficult to exit a student from special education and it is always our goal that special education programming be an

³³³ 2005 WL 1270947 (Minn. App. 2005).

³³⁴ Hearing Transcript at 199-206; Public Ex. 8; Letter from Gary Lewis (Dec. 19, 2007).

³³⁵ Comments of Minn. School Boards Assoc. (Dec. 24, 2007).

³³⁶ Letters from Colette Sweeney (Nov. 29, 2007); Judith Daul (Nov. 28, 2007); Cory McIntyre and Sharon Alexander (Nov. 26, 2007); Mary Alcot (Nov. 26, 2007); Kay Tessum (Nov. 26, 2007); Susanne Griffin-Ziebart (Jan. 6, 2008); Mary Ruprecht (Nov. 21, 2007).

³³⁷ Letter from Ronald Ruhnke (Dec. 3, 2007); Letter from Don Schuld (Nov. 21, 2007).

intervention, not a permanent state."³³⁸ In addition, Dr. Antoinette Johns, Director of Special Education for the Northeast Metropolitan 916 Intermediate School District, and Denny Ulmer, Executive Director of Bemidji Regional Interdistrict Council ISD 998 Special Education Cooperative, raised concerns about the expansion of services and costs and urged that the rule not be adopted.³³⁹ Other opposition comments echoed concerns regarding the vague language of the proposed rule and commented that it would make it difficult, if not impossible, to ever dismiss a student from special education.³⁴⁰

251. In the SONAR, the MDE asserts that the proposed rule is necessary because "there is a current controversy throughout the state as to what criteria must be used to determine eligibility for special education and related services when reevaluating a child," which it contends has led to "the unequal application of the law and to some litigation." The Department noted that "[l]eaving the standard ambiguous is likely to lead to more litigation and a lack of uniformity in access to special education." It further indicated that "[t]he Department's longstanding position has been that if a child who is receiving special education services continues to have a disability and demonstrates a continuing need for such services upon reevaluation, that child continues to qualify for special education services."³⁴¹

252. The Department stated that it redrafted the proposed rule to mirror the federal requirements, which it interprets to encompass a two-pronged test for eligibility under IDEA. The MDE explained in the SONAR:

Federal law states that during a review of existing evaluation data, the IEP team must determine "whether the child is a child with a disability, as defined in section 300.8, and the educational needs of the child; or [i]n the case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of a child." 34 C.F.R. § 300.305(a)(2)(i) (emphasis added). Federal law does not require that children meet initial state eligibility criteria during reevaluation to remain eligible for special education and services. The regulations clearly state that the IEP team must determine whether a child has a disability as defined by section 300.8 and that during reevaluation whether the child continues to have such a disability. [sic] Therefore, as long as a child continues to meet the federal definition of "child with a disability," which is a more permissive standard than state initial criteria, and the child

³³⁸ Letter from Mary Jelinek (November 28, 2007).

³³⁹ Letter from Antoinette Johns (Dec. 21, 2007); Denny Ulmer (Nov. 21, 2007).

³⁴⁰ See e.g., Letters from Cara Quinn (Jan. 8, 2008), Norma Altmann-Bergseth (Jan. 9, 2008); Marcy Matson (Jan. 11, 2008); Sandy Kitzman (Jan. 11, 2008); Roxanne Nauman (Nov. 26, 2007); Elisabeth Lodge Rogers (Nov. 28, 2007); Julia Gerak (Nov. 27, 2007); Kimberly Gibbons (Dec. 17, 2007); John Currie (Nov. 26, 2007); Mary Kreger (Nov. 26, 2007).

³⁴¹ SONAR at 141.

continues to have a need for special instruction and services, that child continues to be eligible for special education.³⁴²

253. In *In re Chisago Lakes School District and J.D.*,³⁴³ an unpublished decision issued in 2005, the Minnesota Court of Appeals considered the issue of whether it was error to apply the initial eligibility criteria in determining that a child was no longer eligible for special education services at the time of a three-year reevaluation. The school district in that case had concluded after the reevaluation that the student no longer met the criteria established in the rules for EBD, SLD, or ASD. The parents disagreed and contended that the student still needed an IEP for SLD and ASD. The district requested a due process hearing to consider the issue. An Administrative Law Judge determined after the hearing that the district had demonstrated by a preponderance of the evidence that the student no longer met the eligibility criteria in any area of disability, and that the district should be permitted to terminate special education services for the student. The parents appealed the decision to the Court of Appeals, arguing (among other things) that the state criteria for determining a student's continued eligibility for special education services differ substantially from the state's criteria for initial eligibility, and that it was error to apply the initial eligibility criteria to the student at the time of reevaluation. The parents relied upon a letter and a manual from the Department as a basis for their assertion that a student need not demonstrate the level of severity upon reevaluation that is required to establish initial eligibility for receiving special education services. The Court of Appeals ruled that the Department's interpretation as set forth in the letter and manual was not binding on the Court because it had not been promulgated as a rule. The Court of Appeals noted that there was little guidance regarding specific criteria applicable upon reevaluation and the Department's policy as described in the letter and manual was merely persuasive and not controlling. The Court ultimately determined that the Administrative Law Judge had not erred as a matter of law by applying the criteria provided in the Department's rules for eligibility in the categories of ASD and SLD and affirmed the ALJ's conclusion that the student no longer met the established criteria for SLD and ASD.

254. In its post-hearing comments, the Department asserted that many districts already applied the standard set forth in the proposed rule, while others do not. It indicated that the resulting disparity between school districts in Minnesota was a "significant factor leading Department to propose this rule amendment" The MDE further characterized the proposed rule as a "restatement of federal law that already applies to all Minnesota districts."³⁴⁴ The MDE contended that the comments provided by the MDLC and parents support its view that there is a lack of uniformity in the field regarding criteria for reevaluation and the Department needs to promulgate the rule to protect the rights of all Minnesota children to receive FAPE. The Department pointed out

³⁴² SONAR at 141-142 (emphasis in original), *citing* 34 C.F.R. § 300.305(a)(2)(i).

³⁴³ 2005 WL 1270947 (Minn. App. 2005).

³⁴⁴ MDE's Dec. 31, 2007, Submission at 8.

that, as an unpublished opinion of the Court of Appeals, the decision in *In re Chisago Lakes School District* is not precedential,³⁴⁵ and asserted that the Court of Appeals did not, in any event, hold that the Department's interpretation of federal and state statutes was incorrect, but merely that the Department's position, which was not in the form of a promulgated rule, had no controlling effect. The MDE stated that, although it "believes that its interpretation of federal law is merely a plain text reading of the Code of Federal Regulations," it decided to promulgate this rule in light of the *Chisago Lakes* opinion and the uneven application of the law across the state. The Department reiterated the explanation of the proposed rules contained in the SONAR and indicated that the concern that the proposed rules will result in increased costs and children never being able to exit from special education services is mistaken because the standard set forth in the proposed rule "is currently the standard applied by the majority of the districts in Minnesota." Finally, the Department provided the following additional explanation of its intent:

Disabilities seldom disappear. That a child has a disability is the most stable operative fact in determining whether they qualify for special education. The more fluid variable is whether the child needs special education as a result of that disability. All of Minnesota's criteria rules have this need standard imbedded in them. When reevaluating a child, the fact that the child is currently receiving services that to some degree reduce the need for the services must be taken into account when determining whether the child continues to be someone who requires services because of their disability. From a logical perspective, the proposed rule makes sense since as a student improves academically, the discrepancy should be smaller. Not every child with a disability needs or receives special education. Some receive no service at all. Some receive services under a 504 plan. The purpose of this rule is to make clear that upon reevaluation the impact of a service that a child is receiving must be taken into account when establishing whether they continue to meet criteria.³⁴⁶

255. The Administrative Law Judge agrees that the proposed rule is not prohibited by or contradictory to the decision in *In re Chisago Lakes School District*. As discussed above, the student in that case had argued, based on a letter and manual from the MDE, that a student diagnosed with a disability need not demonstrate the level of severity at the time of reevaluation that is required to establish initial eligibility for receiving special education services. Because MDE's interpretation of reevaluation criteria was more specific than the criteria in the federal and state statutes, but had not been promulgated as an agency rule, the MDE interpretation was found only to have persuasive authority, not

³⁴⁵ See Minn. Stat. § 480A.08, subd. 3(c).

³⁴⁶ MDE's Dec. 31, 2007, Submission at 36-37.

controlling effect.³⁴⁷ Accordingly, nothing in the Court of Appeals' decision prohibits the MDE from now adopting a rule setting forth its interpretation of the criteria to be applied upon reevaluation.

256. The Department's position that it is not necessary for the student to meet initial eligibility criteria to continue to receive services is tenable because federal law generally leaves it to the states to determine eligibility criteria for special education and related services. The proposed rule language, however, is impermissibly vague. As noted above, the language of the proposed rule provides: "Upon reevaluation, a child who continues to have a disability as provided by Code of Federal Regulations, title 34, section 300.8, and continues to demonstrate a need for special education and related services is eligible for special education and related services." Section 300.8 of the federal regulations merely identifies the various types of disabilities recognized under the IDEA; it does not spell out any categorical eligibility requirements to apply to determine if a child "continues to have a disability." In fact, section 300.8 (which is included in the initial definitional sections of 34 C.F.R. Part 300) includes only the following: a general statement that the phrase "child with a disability" means a child evaluated in accordance with *other* sections of the federal rules (34 C.F.R. §§ 300.304 through 300.311) as having one of the listed disabilities and needing special education and related services, with certain exceptions;³⁴⁸ a provision stating that the phrase "child with a disability" includes children aged three through nine who are experiencing developmental delays "as defined by the State and as measured by appropriate diagnostic instruments and procedures" in one or more of the areas identified in the regulation and who need special education and related services;³⁴⁹ and definitions of the broad disability terms used in the rule.³⁵⁰ The additional federal rules referenced in section 300.8 relating to evaluation procedures impose some standards regarding the nature of the evaluation procedures to be used by states receiving federal funds under the IDEA, but generally leave it to the states to determine the precise criteria under

³⁴⁷ 2005 WL 1270947 at *4.

³⁴⁸ 34 C.F.R. § 300.8(a). The disabilities listed in § 300.8(a) are mental retardation, hearing impairment (including deafness), speech or language impairment, visual impairment (including blindness), serious emotional disturbance, orthopedic impairment, autism, traumatic brain injury, other health impairment, specific learning disability, deaf-blindness, and multiple disabilities. The exceptions, which are set forth in (a)(2), hinge upon application of state standards. For example, the federal rule states that a child does not fall within the definition of a "child with a disability" under this part "if it is determined, through an *appropriate evaluation* under sections 300.304 through 300.311, that a child has one of the disabilities identified . . . but only needs a related service and not special education." However, if "the related service required by the child is considered special education rather than a related service *under State standards*," the child would be determined to be a "child with a disability." (Emphasis added.)

³⁴⁹ 34 C.F.R. § 300.8(b).

³⁵⁰ 34 C.F.R. § 300.8(c) (containing definitions of "autism," "deaf-blindness," "deafness," "emotional disturbance," "hearing impairment," "mental retardation," "multiple disabilities," "orthopedic impairment," "other health impairment," "speech or language impairment," "traumatic brain injury," and "visual impairment").

which special education and related services are to be provided within the state.³⁵¹

257. The reference in the proposed rule to section 300.8 does not provide any standard for determining whether a student continues to be a child with a disability who continues to demonstrate a need for special education. Because the categories of disabilities set forth in section 300.8 are further defined in state statutes and rules, it is likely that the application of the broad categories set forth in section 300.8 during a reevaluation would lead to further confusion in the field rather than providing the clarity sought by the Department. This vagueness rises to the level of a defect in this portion of the proposed rules. To correct this defect, the Department could substitute language designed to ensure that, if a child with a disability no longer meets the Minnesota eligibility criteria at the time of reevaluation, but a lapse in service would likely cause the child to regress and once again meet the Minnesota eligibility criteria, the child shall continue to receive special education and related services. It is possible that language of this nature would not render the rule substantially different from the rule as originally proposed, although it would of course be necessary to review the specific language selected by the Department to make this assessment. In the alternative, the Department could withdraw proposed rule part 3525.2720 and initiate another rulemaking proceeding in which it seeks to establish specific, less stringent criteria to be used at the time of reevaluation.

Proposed Rule 3525.2810 – Development of Individualized Education Program Plan

258. This portion of the proposed rules strikes current rule language that the Department determined to be duplicative of federal rules but retains language that the Department determined to be clearer than the federal requirements or pertinent state statutes. Marcy Pohlman and the Upper Midwest Branch of the International Dyslexia Association expressed concern that the Department's proposal to repeal much of part 3525.2810 would lead to confusion for parents and providers.³⁵² Arc, the MDLC, the Autism Society, and PACER expressed a preference that part 3525.2810 be retained in its entirety.³⁵³ The Department indicated in the SONAR that it has retained in the proposed rules the parts of the existing rule that are not duplicated in federal law or spelled out explicitly by state statute. It indicated that the proposed rules eliminate language duplicative of federal law, whether or not it is verbatim, to address school districts' concerns that otherwise two standards are created, which can lead to confusion and increased litigation.³⁵⁴

³⁵¹ See 34 C.F.R. §§ 300.304-300.311.

³⁵² Letter from C. Wilson Anderson, Jr. (Dec. 24, 2007);

³⁵³ SONAR at 147. The same groups also want to retain rule part 2710 (relating to evaluations and reevaluations) which Department proposes to repeal as part of this rulemaking proceeding because it "is parallel to, but not exactly the same as the requirements of federal law." *Id.*

³⁵⁴ SONAR at 147.

259. PACER, the Coalition for Children with Disabilities, and numerous parents and parent advocates, including Barb Ziemke, Carolyn Anderson, Marcy Pohlman, Vava Guthrie, Erin, Andrei and Maxi Zolotukhin-Ridgway, John Tibbetts, Kim Kang, and Gail Hoffmann, supported the retention of short-term objectives because they provide accountability, let parents and schools know what steps are needed for a child to accomplish goals, guide the team in a focused approach, and help parents and teachers determine if the child is making progress. Ms. Anderson further expressed support for retention of the description of the IEP progress reports in the proposed rules and noted that this portion of the rules adds clarity that is lacking in the federal rules.³⁵⁵

260. Julia Gerak, Mary Ruprecht, Elisabeth Lodge Rogers, educators and administrators from the Rochester and Stillwater Area Public Schools, and others asserted that the proposed rules do not provide adequate guidance to differentiate between expectations for middle school students transitioning to high school and expectations for high school students transitioning to post secondary education and training, employment, and independent living.

261. Arc Twin Cities, the Stillwater Area Public Schools, Julia Gerak, and others suggested that the proposed rules include exit criteria and exit procedures, and set forth a process to identify when a student with disabilities has met requirements for graduation. They indicated that a draft rule encompassing these matters was previously circulated among members of the stakeholder groups.³⁵⁶ Because this subject was not encompassed within the Notice of Hearing or the proposed rules involved in this proceeding, it would be a substantial change for the Department to attempt to add additional rule provisions on this topic at the present time. The Department is urged to take these comments into consideration in formulating future rule revisions.

262. The Department has demonstrated that the modifications made to this portion of the proposed rules are needed and reasonable to provide appropriate guidance on the development of IEPs. The proposed rules appropriately strike current rule language that is merely duplicative of federal law, and properly retain provisions that either differ from federal requirements or provide clearer interpretations of those requirements. As discussed more fully below, the Department's decision to retain the requirement that transition planning be commenced by ninth grade or the age of 14 is required by state law. Retention of the language relating to progress reports and measurable annual goals (including benchmarks or short-term objectives) has been shown to be needed and reasonable to provide more specificity about the timing and content

³⁵⁵ Letters from Mary Powell (Dec. 20, 2007); Barb Ziemke (Dec. 3, 2007); Carolyn Anderson (Dec. 3, 2007); Gail Hoffmann.

³⁵⁶ Letters from Colette Sweeney (Nov. 29, 2007); Judith Daul (Nov. 28, 2007); Cory McIntyre and Sharon Alexander (Nov. 26, 2007); Mary Alcot (Nov. 26, 2007); Kay Tessum (Nov. 26, 2007); and Susanne Griffin-Ziebart (Jan. 6, 2008); Don Schuld (Nov. 21, 2007); Jacki McCormack (Dec. 21, 2007); Julia Gerak (Nov. 27, 2007).

of progress reports and the manner in which goals and objectives are to be developed and used.

263. However, the proposed rule provides incomplete cross-references to the federal regulations where the corresponding IEP requirements can be found. Subpart 1 of the proposed rule merely indicates that an IEP is a written statement for each child that is "developed, reviewed, and revised in a meeting in accordance with Code of Federal Regulations, title 34, section 300.320." The cited federal regulation specifies that an IEP is a written statement for each child that is developed, reviewed, and revised in a meeting "in accordance with Secs. 300.320 through 300.324."³⁵⁷ Sections 300.321, 300.322, 300.323, and 300.324 of the federal regulations contain provisions relating to the IEP team, parent participation, when IEPs must be in effect, and the development, review, and revision of the IEP. Because the Department has not demonstrated the need for or reasonableness of referring only to 34 C.F.R. § 300.320 in the proposed rules, the failure of the proposed rules to mention these additional federal regulations constitutes a defect in the proposed rules. To correct this defect, subpart 1 of the proposed rules must be revised to refer to 34 C.F.R. §§ 300.320 through 300.324. This modification will serve to clarify the proposed rule and does not result in a substantial change.

Proposed Rule 3525.2900 – Transition Planning

264. The proposed rules seek to update the language of the existing rule to be consistent with federal rules that require transition assessments and planning to be related to training, education, employment, and, where appropriate, independent living skills. The rules as proposed would also require the district to invite the child to attend any transition planning meeting or take steps to ensure that the child's preferences and interests are considered, as required by federal rules.³⁵⁸ In addition, the proposed rules incorporate federal requirements that, beginning not later than one year before the child reaches the age of majority, the IEP include a statement that the child has been informed that the parents rights will transfer to the child when he or she reaches the age of majority.³⁵⁹ While federal law requires that transition planning begin no later than when the child turns 16,³⁶⁰ Minnesota law requires such planning to begin in ninth grade or by age 14.³⁶¹ Accordingly, the Department did not recommend any change in the language of the proposed rule relating to the need for the IEP plan to address the child's needs for transition by grade 9 or age 14.³⁶²

265. PACER, Matthew Fink, Kim Kang, Susan Shimota, Barb Ziemke, Renelle Nelson, Marcy Pohlman, and Carolyn Anderson supported the proposed

³⁵⁷ 34 C.F.R. § 300.320(a) (emphasis added).

³⁵⁸ 34 CFR § 300.321(b).

³⁵⁹ 34 CFR § 300.320(c).

³⁶⁰ 34 CFR § 300.320(b).

³⁶¹ Minn. Stat. § 125A.08(a)(1).

³⁶² SONAR at 148.

rules' continued directive that transition service needs must be considered starting at the age of 14. They contended that keeping the age of transition at 14 helps ensure that students with disabilities have sufficient time to learn transition and academic skills.³⁶³ Mary Powell, Director of the Autism Society, expressed support for the language of the proposed rules indicating that school districts "must take steps to ensure that the child's preferences and interests are considered" with respect to transition planning.³⁶⁴ Arc Twin Cities suggested that the word "where appropriate" be eliminated from the proposed rules.³⁶⁵

266. This portion of the proposed rules has been shown to be needed and reasonable to ensure consistency with federal requirements. The Department's decision to retain the requirement that transition planning commence by ninth grade or the age of 14 is required by state law and is not contrary to federal requirements that transition planning begin by age 16.

Proposed Rule 3525.3700 – Conciliation Conference

267. This section of the proposed rules merely incorporates the definition of conciliation conference contained in Minn. Rules 3525.0210, subp. 8, in the operational rule relating to conciliation conferences. Kim Buechel Mesun, Assistant General Counsel of the Minneapolis Public Schools, suggested that new language be added to this rule indicating that, if a parent decides not to attend a conciliation conference, it will be considered a refusal to conciliate the dispute.³⁶⁶ The MDE declined to make the suggested substantive change in the rules.³⁶⁷

268. The proposed rules are not rendered defective by their failure to address the additional substantive area recommended by the Minneapolis Public Schools. Incorporation of such language would result in a rule that is substantially different from the rules as originally proposed. The Department is encouraged to consider the suggestion in future rulemaking.

Proposed Rule 3525.3900 – Initiating a Due Process Hearing

269. Subpart 1 of this section of the proposed rules indicates in part that a due process hearing request "must allege a violation that occurred not more than two years before the date the parent or district knew or should have known about the action that provides the basis for the due process hearing complaint, unless the district specifically misrepresented that it had resolved the alleged violation or if the district withheld information required to be given to the parent."

³⁶³ Hearing Transcript at 60-61, 117-119, 129, 159-160, 172-173, 174-175, 176-178, 225-226, 263; Public Exs. 6, 9, 10; Letters from Kim Kang (Dec. 4, 2007); John Tibbetts (Dec. 5, 2007); Susan Shimota (Dec. 3, 2007); Paula Goldberg (Jan. 11, 2008); Barb Ziemke (Dec. 3, 2007); Carolyn Anderson (Dec. 3, 2007).

³⁶⁴ Hearing Transcript at 185-186.

³⁶⁵ Letter from Jacki McCormack (Dec. 21, 2007).

³⁶⁶ Letter from Kim Buechel Mesun (Dec. 21, 2007).

³⁶⁷ SONAR at 152; MDE's Dec. 31, 2007, Submission at 42.

The Department indicated in its SONAR that these amendments "incorporate language about the federal time limit on due process hearing requests and the exceptions to bring the rules into compliance with 34 C.F.R. § 300.507 (a)(2) and 34 C.F.R. § 300.511(f). This additional language makes the federal requirement clear, keeps hearing requests relevant to recent educational issues and prevents resources from being expended on outdated requests."³⁶⁸

270. Peter Martin, on behalf of the Minnesota School Board Association, pointed out that the language contained in subpart 1 of the proposed rules is not identical to the language of the cited federal rules and arguably creates a new, broader statute of limitations. He recommended that the language of the proposed rule be revised to precisely mirror the federal language.³⁶⁹

271. The IDEA includes the following provision relating to the statute of limitations that applies to requests for due process hearings:

(C) Timeline for requesting hearing.--A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows.

(D) Exceptions to the timeline.--The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was *required under this part* to be provided to the parent.³⁷⁰

272. The federal regulation adopted under the IDEA with respect to the statute of limitations varies only slightly from the statutory language:

(e) Timeline for requesting a hearing. A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for

³⁶⁸ SONAR at 152-153.

³⁶⁹ Hearing Transcript at 151-152; Comments of Minn. School Boards Assoc. (Dec. 24, 2007).

³⁷⁰ 20 U.S.C. § 1415(f)(3)(C)-(D) (emphasis added).

requesting such a due process hearing under this part, in the time allowed by that State law.

(f) Exceptions to the timeline. The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to—

(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or

(2) The LEA's withholding of information from the parent that was *required under this part* to be provided to the parent.³⁷¹

273. The Administrative Law Judge agrees that the language of the Department's proposed rules is arguably broader than that of the IDEA and the federal regulation because it does not include the qualifying language set forth in italics above. As a result, the proposed rules could be interpreted to mean that the withholding by the local education agency of *any* information required by *any* law would fall within the exception. The Department has not supported with an affirmative presentation of fact the need or reasonableness of setting forth a broader or different statute of limitations than that required by federal law; indeed, the only justification offered by the Department with respect to this amendment was to "incorporate" language about the federal time limits and exceptions. This constitutes a defect in the proposed rules. To remedy this defect, the Administrative Law Judge recommends that the Department revise the proposed rule to mirror the language of the federal rule, as set forth above. This modification will not result in a rule that is substantially different than the rule as originally proposed. With the required modification, this part of the proposed rule has been shown to be needed, reasonable, and consistent with statutory authority.

Proposed Rule 3525.4110 - Prehearing Conference

274. Among other things, the proposed rules add a new Item E to this part of the existing rules. As proposed, item E states:

If the district has not resolved the due process complaint to the satisfaction of the parent during the resolution period, the due process hearing may occur. If the district fails to hold the resolution meeting under part 3525.3900 within 15 days of receiving notice of the parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of the hearing officer to begin the due process hearing timeline.

³⁷¹ 34 C.F.R. § 300.511(e) and (f) (emphasis added).

In the SONAR, the Department indicated that item E was being added to "align the rules with current federal law," citing 34 C.F.R. § 300.510(b)(5).

275. The Minnesota School Boards Association pointed out that the language contained in item E incorporates some, but not all, of the language contained in the corresponding federal regulation. While urging overall that the Minnesota rules not be duplicative of a federal law, the Association indicated that any attempt to follow federal language should accurately reflect the entire federal requirement.³⁷²

276. The federal rule relating to the resolution period includes the following language:

(b)(1) If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under Sec. 300.515 begins at the expiration of this 30-day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(4) If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in Sec. 300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

(5) If the LEA fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.³⁷³

277. The proposed rules fail to mention the points set forth in subitems (3) and (4) of 34 C.F.R. § 510(b). This omission could be interpreted as reflecting the Department's intent that those aspects of federal law not be applied

³⁷² Hearing Transcript at 150-151; Comments of Minn. School Boards Assoc. (Dec. 24, 2007).
³⁷³ 30 C.F.R. § 300.510(b).

in Minnesota. The Department has not demonstrated the need for or reasonableness of an approach that incorporates some but not all of the federal requirements relating to resolution sessions. This constitutes a defect in the proposed rules. To correct this defect, the Administrative Law Judge recommends that language from 34 C.F.R. § 510(b)(3) and (4) be included in the proposed rules. This modification will not result in a rule that is substantially different than the rule as originally proposed. With the required modification, this part of the proposed rule has been shown to be needed, reasonable, and consistent with statutory authority.

Proposed Rule 3525.4700 – Enforcement and Appeals

278. The proposed rules would modify the language of the existing rule to indicate that the parent or district "may seek review of the hearing officer's decision in the Minnesota Court of Appeals within 60 calendar days or in the federal District Court within 90 calendar days of the decision." In the SONAR, the Department indicated that this modification was intended to reflect the timeline set forth in 34 CFR § 300.516, which expressly provides for a 90-day appeal period to federal court. The MDE acknowledged in its SONAR that some of those attending stakeholder meetings argued that having two timelines for appeal would be confusing for districts and parents. However, the Department elected to include language in the proposed rules clarifying the timelines because it believed that would provide additional guidance to parents and districts, as opposed to the language contained in the current rule that merely states that appeals to federal court would have to be taken within a timeline "consistent with federal law."³⁷⁴

279. The pertinent provisions of the federal regulations indicate that any aggrieved party has the right to bring a civil action in any state court of competent jurisdiction or in the federal district court without regard to the amount in controversy. The federal rules state that the party bringing the action "shall have 90 days from the date of the decision of the hearing officer . . . to file a civil action, or, if the state has an explicit time limitation for bringing civil actions under part B of the Act, in the time allowed by that state law."³⁷⁵ The relevant Minnesota statute specifies, "The parent or district may seek review of the hearing officer's decision in the Minnesota Court of Appeals or in the federal district court, consistent with federal law. A party must appeal to the Minnesota Court of Appeals within 60 days of receiving the hearing officer's decision."³⁷⁶

280. The Minnesota School Boards Association asserted that there is no reason to have one statute of limitations for state appeals and one for federal appeals, and stated that having two standards is confusing to those using the

³⁷⁴ SONAR at 161.

³⁷⁵ 34 C.F.R. § 300.516.

³⁷⁶ Minn. Stat. §125A.091, subd. 24.

due process hearing system. The Association suggested that no rule be adopted and efforts instead be made to revise Minn. Stat. § 125A.091, subd. 24.

281. The Administrative Law Judge concludes that the Department has demonstrated that it is needed and reasonable to modify the rules to clarify the time requirements that apply to federal and state appeals. Based on current state and federal law, it is appropriate that the proposed rules set forth differing federal and state timelines. The Department is not required to wait to amend the rules until after legislative amendments are made to Minn. Stat. § 125A.091.

282. The rules as proposed would strike current language indicating that aggrieved parties must seek review within 60 calendar days "of *receiving the hearing officer's decision*" and instead simply specify that review must be sought within 60 calendar days "*of the decision.*" The language contained in the proposed rules thereby implies that it is the date that the decision is *issued* that starts the running of the 60-calendar-day period, rather than the date that the party *received* that decision. As noted above, Minn. Stat. §125A .091, subd. 24, explicitly states that an appeal must be filed with the Minnesota Court of Appeals within 60 days of *receiving* the decision. Therefore, the language of the proposed rules is defective because it is contrary to the governing statute. To correct this defect, the Administrative Law Judge suggests that the last sentence of part 3525.4700 be modified to state as follows: "The parent or district may seek review of the hearing officer's decision in the Minnesota Court of Appeals within 60 calendar days of receiving the decision or in the federal District Court within 90 calendar days of the date of the decision." This modification will ensure that the rule is consistent with both state and federal requirements. This modification will not render the rule as finally proposed substantially different from the rule as originally proposed.

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

CONCLUSIONS

1. The Minnesota Department of Education (MDE) gave proper notice in this matter.
2. The MDE has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The MDE 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), except as noted in Findings 22, 27, 144, 217, and 282.
4. The MDE has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the

meaning of Minn. Stat. §§ 14.14, subd. 4; and 14.50 (iii), except as noted in Findings 105, 200, 233, 242, 257, 263, 273, and 277.

5. The additions and amendments to the proposed rules suggested by the MDE after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.05, subd. 2, and 14.15, subd. 3.

6. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 3 and 4, as noted in Findings 27, 105, 144, 200, 217, 233, 242, 257, 263, 273, 277, and 282.

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

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

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules, as modified, be adopted, except where otherwise noted above.

Dated: March 6, 2008.

Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Recorded: Court Reported; Transcript Prepared by
Kirby A. Kennedy & Associates (one volume).