

*No defects -
but re commendations*

OAH Docket 3-1300-19779-1
Governor's Tracking No. 358

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE DEPARTMENT OF EDUCATION

In the Matter of the Proposed Rules of the
Department of Education Relating to
Graduation-Required Assessment for
Diploma, Minnesota Rules, Chapter 3501

**REPORT OF THE ADMINISTRATIVE
LAW JUDGE**

Administrative Law Judge Kathleen D. Sheehy conducted a hearing concerning the above rules beginning at 10:00 a.m. on September 3, 2008, in Conference Center B, Minnesota Department of Education, 1500 West Highway 36, Roseville, Minnesota. The hearing continued until all interested persons, groups, and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.¹ The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications that the agency may have made after the proposed rules were initially published are not impermissible substantial changes.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. 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 Administrative Law Judge is employed by the Office of Administrative Hearings, an agency independent of the Department of Education.

Dirk Mattson, Director of Assessments and Testing; Sage Van Voorhis, Rulemaking Coordinator; and Kathryn Olson, Rulemaking Manager, Minnesota Department of Education, appeared at the rule hearing on behalf of the Department. Thirty-three members of the public signed the hearing register, and eight members of the public spoke at the hearing.

The Department received many written comments on the proposed rules before the hearing. After the hearing, the record remained open for seven days, until September 12, 2008, to allow interested persons and the Department an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five working days to allow interested persons and the Department the opportunity to file a written response to the comments submitted. The OAH hearing

¹ Minn. Stat. §§ 14.131 through 14.20 (2008).

record closed on September 19, 2008. All of the comments received were read and considered.

SUMMARY OF CONCLUSIONS

The Department has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable.

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

FINDINGS OF FACT

Nature of the Proposed Rules

1. This rulemaking proceeding concerns the proposed rules governing the administration and implementation of the new state high school graduation examination known as the Graduation-Required Assessment for Diploma (GRAD).

2. In 1996, the Minnesota Legislature adopted legislation establishing the Basic Skills Tests (BST) as a graduation examination in reading, mathematics and writing. Students generally took the reading and math BST in 8th grade and the writing BST in 10th grade.² That law granted the Department rulemaking authority to determine the administration and test design of the assessments.

3. In the 2006 and 2007 legislative sessions, the state legislature revised the examination requirements for students graduating from a Minnesota public high school. In 2006, the BST was eliminated and replaced with the Minnesota Comprehensive Assessments (MCAs). In 2007, the statute was further revised to establish the GRAD examination as a retest option to satisfy graduation requirements.

4. Pursuant to this legislation, Minnesota public high school students in the class of 2010 and later must score as proficient on the MCA-II assessments; if they do not, they must re-test and pass the GRAD exams (a subset of questions on the MCAs in reading and mathematics) in order to graduate. Students must also continue to take and pass a test of written composition.³

5. The Department was granted rulemaking authority to implement and administer the GRAD examination and to establish passing requirements for students in special circumstances.⁴

6. In this rulemaking proceeding, the Department is proposing revisions to Minnesota's graduation examination rules to fulfill these statutory requirements.⁵ The proposed rules revise Minnesota Rules Chapter 3501. The proposed rules describe the GRAD standards, remediation requirements; administrative procedures, and the

² Minn. Stat. § 120B.30, subd. 1(a).

³ Minn. Stat. § 120B.30, subd. 1(b). See also Ex. 10.

⁴ 2007 Minn. Laws, ch. 146, art. 2, § 36.

⁵ SONAR at 1.

manner in which students in unique circumstances may satisfy the state graduation examination requirements, as required by Minn. Stat. § 120B.30.⁶

Rulemaking Legal Standards

7. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule 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.⁷ The Department prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rule. The SONAR was supplemented by comments made by Department representatives at the public hearing and in written post-hearing submissions.

8. 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.⁸ Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.⁹ A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.¹⁰

9. 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."¹¹ An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper 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.¹²

10. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an

⁶ SONAR at 1.

⁷ *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

⁸ *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).

⁹ *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

¹⁰ *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

¹¹ *Manufactured Housing Institute*, 347 N.W.2d at 244.

¹² *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

undue delegation of authority to another entity, or whether the proposed language is not a rule.¹³

11. In this matter, the Department has proposed some revisions to the proposed rule language after the proposed rules were published in the *State Register*. Thus, the Administrative Law Judge must also determine if the new language is substantially different from that which was originally proposed.¹⁴

12. The standards to determine if new language is substantially different 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.”

13. Any substantive language that differs from the rule as published in the *State Register* has been assessed to determine whether the language is substantially different. Because some of the changes are not weighty or controversial, they are not separately set forth below. Any change that is not separately discussed below is found to be not substantially different from the rule as published in the *State Register*.

Procedural Requirements of Chapter 14

14. On July 30, 2007, the Department published a Request for Comments on the proposed rules. The Request for Comments was published at 32 S.R. 260.¹⁵

15. By letter dated July 3, 2008, the Department requested that the Office of Administrative Hearings schedule a hearing and assign an Administrative Law Judge. Along with the letter, the Department filed a proposed Dual Notice of Intent to Adopt Rules without a Public Hearing and Notice of Hearing if 25 or More Requests for Hearing are Received, a copy of the proposed rules, and a draft of the Statement of Need and Reasonableness (SONAR). The Department also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan. Under the Plan, the Department represented that it would mail a Notice of Hearing to a broad range of individuals and public and private entities, including educational associations, Minnesota superintendents, Minnesota directors of special education, and advocacy and advisory groups involved in educational issues.¹⁶

16. On July 7, 2008, the Department submitted a revised Dual Notice.

17. In a letter dated July 8, 2008, Administrative Law Judge Kathleen Sheehy approved the Department’s Dual Notice and Additional Notice Plan.

¹³ Minn. R. 1400.2100.

¹⁴ Minn. Stat. § 14.15, subd. 3 (2006).

¹⁵ Ex. 1.

¹⁶ SONAR at 5.

18. On July 18, 2008, the Department mailed a copy of the SONAR to the Legislative Reference Library as required by law,¹⁷ and mailed copies of the Dual Notice, proposed rules, and SONAR to the chairs, chief authors, and ranking minority members of designated legislative committees.¹⁸

19. On July 21, 2008, a copy of the proposed rules and Dual Notice were published in the *State Register* at 33 S.R. 161.¹⁹

20. On July 18, 2008, the Department mailed the Dual Notice to all persons and associations who had registered their names with the agency for purpose of receiving such notice and to all persons identified in the Additional Notice Plan.²⁰

21. On the day of the hearing the following documents were placed in the record:

- The Request for Comments on Possible Amendment to Rules Governing Statewide Graduation Standards, published July 30, 2007, at 32 SR 260. (Ex. 1);
- A copy of the proposed rule with Revisor's approval dated July 11, 2008 (Ex. 2);
- A copy of the SONAR (Ex. 3);
- Certificate of Mailing the SONAR to the Legislative Reference Library, with cover letter dated July 18, 2008 (Ex. 4);
- A copy of the Dual Notice and Proposed Rules as published in 33 S.R. 161 (Ex. 5).
- Certificate of Mailing the Notice of Hearing to the Rulemaking Mailing List on July 18 2008, and Certificate of Accuracy of the Mailing List, with mailing list (Ex. 6a);²¹
- Certificate of Giving Additional Notice pursuant to the Additional Notice Plan on July 18, 2008, with mailing list, and copy of letter from Administrative Law Judge Kathleen Sheehy approving Additional Notice Plan (Ex. 6b);
- Public comments received before the hearing and requests for a hearing (Ex. 7);
- Certificate of Mailing the Dual Notice and the SONAR to Legislators on July 18, 2008 (Ex. 8).

¹⁷ Ex. 4.

¹⁸ The Department sent materials to leadership of the Senate Education Committee, Senate E-12 Education Budget Division Committee, House E-12 Education Committee, and House K-12 Finance Division. See Ex. 8 and Minn. Stat. § 14.116.

¹⁹ Ex. 5.

²⁰ Exs. 6a and 6b.

²¹ The exhibit is incorrectly titled "Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan."

- Certificate of Consulting with the Commissioner of Finance in compliance with Minn. Stat. § 14.131, and the response from the Department of Finance dated July 8, 2008 (Ex. 9);
- Department's chart entitled "How the MCA-II & GRAD Work Together" (Ex. 10);
- Written comments received prior to and during the hearing (Exs. 11-13).

22. Written comments received after the hearing (Exs. 14-20, 22-26) and the Department's responses (Exs. 21 and 27) were also marked and placed in the record.

Additional Notice

23. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the Department's efforts to provide additional notice to persons who may be affected by the proposed rules. The Department submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated July 8, 2008. In addition to notifying those persons on the Department's rulemaking list, the Department represented that it would also provide notice to the following groups and individuals: Minnesota superintendents, Minnesota directors of special education, charter school directors, Minnesota directors of special education, advisory and advocacy groups, Minnesota Association of Colleges of Teacher Education, and education organizations and service cooperatives.²²

24. A copy of the proposed rules and Dual Notice was also posted on the Department's web site.²³

25. The Administrative Law Judge finds that the Department fulfilled its additional notice requirement.

Statutory Authorization

26. The Department has specific statutory authority to adopt the proposed rules. Minnesota Laws 2007, chapter 146, article 2, section 36 provides:

The commissioner of education shall adopt rules for implementing and administering the graduation-required assessment for diploma (GRAD) in reading and mathematics and in writing, consistent with Minnesota Statutes, section 120B.30, subdivision 1, and for public review of the GRAD test. The rules must specify the GRAD requirements that apply to students in unique circumstances including dual enrolled students, English language learners, foreign exchange students, home school students, open enrollment students, Minnesota postsecondary enrollment option students, shared-time students, transfer students from other states, and district-placed students and students attending school under a tuition agreement. The rules must establish the criteria for determining individualized GRAD passing scores for students with an individual

²² Ex. 6; SONAR at 5-6.

²³ Ex. 6; SONAR at 6.

education plan or a Section 504 plan and for using an alternative assessment when a student's individual education plan team decides to replace the GRAD test.

27. The Administrative Law Judge finds that the Department of Education has the statutory authority to adopt the proposed rules.

Regulatory Analysis in the SONAR

28. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

(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.

The Department lists the following as the classes of persons who will be primarily affected by the proposed rules: Minnesota students graduating from high school in the year 2010 and beyond, Minnesota school districts, Minnesota charter schools, and employers that hire Minnesota public high school graduates.²⁴ The Department states that school districts and charter schools will bear the costs associated with implementing the tests. The Department also notes that it will bear some costs in auditing the testing programs set up by the districts and charter schools, as well as reviewing out-of-state graduation tests and reports regarding test security.²⁵

According to the Department, Minnesota public high school students and students in unique situations, as well as school staff and administrators, will benefit from the proposed rule because the rule clearly delineates their rights and responsibilities regarding the GRAD requirement. The Department asserts that institutes of higher education are also potential beneficiaries of the proposed rule because the rule will result in higher and more uniform standards for Minnesota high school graduates. In addition, the Department states that employers will potentially benefit from a better educated and more prepared workforce resulting in heightened productivity and greater consistency.²⁶

(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.

The Department does not anticipate that the proposed rule amendments will increase its costs to implement and enforce the rules. The Department states that it

²⁴ SONAR at 3.

²⁵ *Id.*

²⁶ *Id.*

already has sufficient staff to provide training and support regarding the proposed rules, and that it will reallocate staff assignments and resources if necessary.²⁷

(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

The Department states that there are no less costly or less intrusive viable alternative methods by which to bring the rules into conformity with the recent changes in the statutory requirements relating to graduation examinations.²⁸

(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.

The Department states that the legislature has mandated that it adopt rules for implementing and administering the GRAD in reading, mathematics, and writing, consistent with Minnesota Statutes, section 120B.30, subdivision 1. Given this explicit rulemaking directive from the legislature, the Department does not believe that there are alternatives to the proposed rules, and it did not seriously consider alternative methods for achieving the purpose of the proposed rules.²⁹

(5) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The Department maintains that the proposed rules are "cost-neutral." According to the Department, school districts will not face increased costs associated with the rules. Instead, school districts will implement the revised rules and provide the GRAD examinations in the same manner that they have done with regard to the BST and MCAs. The Department contends that any costs created by the implementation of these proposed rules are already being borne by all entities involved. In addition, the Department states that the proposed rules do not impose restrictions or have a direct impact on the fundamental aspects of businesses or separate classes of government.

Many commenters disagreed with the Department's assertion that the proposed rules are "cost neutral." Dr. Thel Kocher, Director of Research and Evaluation for Edina Public Schools, stated that school districts will incur substantial costs as a result of the proposed rules. Dr. Kocher asserts that there will be increased state and local costs for remediation and retesting, particularly given the probable high number of students who will fail to meet the GRAD mathematics requirement on the first try. Dr. Kocher also notes that litigation in other states has required states and/or school districts to pay fines or costs for additional tutoring of children who fail graduation exams. For example,

²⁷ SONAR at 3.

²⁸ SONAR at 3.

²⁹ SONAR at 4.

Dr. Kocher states that as the result of a settlement in *Valenzuela v. O'Connell*, the California State Assembly is required to provide students who complete grade 12 without achieving a passing score on both parts of the California High School Exit Exam (CAHSEE) with two additional years of academic assistance in the material tested on the examination, at no charge to them.³⁰ He suggests that similar litigation and court-ordered remedies may result here. In addition, Dr. Kocher contends that the Department has failed to use the "real data" it has obtained, based on the operational administration of the reading GRAD and the field testing of the mathematics GRAD, to provide good estimates of the potential costs of implementation.³¹

Kirk Schneidawind, Associate Director of Governmental Relations for the Minnesota School Boards Association, also submitted a written comment challenging the claim by the Department that the proposed rules are "cost-neutral." In his comment, Mr. Schneidawind states that remediation services will be an additional cost for school districts. According to Mr. Schneidawind, school districts will be required to spend resources on implementing remediation plans that would be better used in providing direct instruction to students in the classroom.³²

Ed Waltman, Superintendent of the Mankato Area Public Schools, similarly commented that the administration and development of system to track each student individually regarding pass/fail, remediation, and retakes will be an additional administrative burden and will necessarily result in additional costs for the school districts.³³

In a written comment received after the hearing, Tim Wald, Principal of White Bear Lake Area High School – South Campus, disagreed with the Department's claim that the proposed rules are cost-neutral. Mr. Wald estimates that the staffing, data analysis, and postage costs associated with retesting and providing appropriate remediation services for the GRAD examination could be as high as \$60,000 annually for his school district.³⁴

Similarly, the Superintendent and School Board of the Roseville Area Schools (ISD 623) maintain that the proposed GRAD rules are not cost-neutral. They point out that ISD 623 saw a four-fold increase in the number of 11th graders that will need remediation when the district transitions from the BST to the GRAD in reading, and proficiency rates on the MCA-II mathematics test suggest that the increase will be even more significant when districts transition from the BST to the GRAD in mathematics. Given the significant increase in the number of students who will need remediation and the lack of any additional funding, school districts will have to pull resources from other areas in order to provide the required services.³⁵

Finally, in a written comment, Dr. Richard Spicuzza, Assistant Superintendent of Curriculum and Assessment for South Washington County Schools, states that school

³⁰ Exs. 12 and 24 with attachments.

³¹ Ex. 24.

³² Ex. 14.

³³ Ex. 16.

³⁴ Ex. 22.

³⁵ Ex. 23.

districts will incur additional costs as a result of the proposed rules. Dr. Spicuzza maintains that the increased level of rigor of the GRAD test in mathematics (initial findings indicate a 50-50 chance of passing the proficiency standard if a student was enrolled in Algebra II), combined with the delayed point of evaluation (tests given in 10th and 11th grade, as opposed to the BST administered in 8th grade) create a significantly different challenge and cost for school districts to remediate in a condensed period of time (less than 12 months vs. four years for the BST). According to Dr. Spicuzza, attention and resources will have to be diverted from public education and instruction to the management and administration of a year-long testing window.³⁶

Dr. Spicuzza also noted that re-takes of the GRAD exam are done on the computer, a method of administration that generates additional costs in equipment and personnel time (computer technicians) that were not required for the BST. Moreover, Dr. Spicuzza states that the use of computer labs for GRAD re-testing will displace students and staff from instructional settings that were initially purchased and designed for instruction, not for state-wide testing.³⁷

In its September 19, 2008, written response to the comments, the Department states that because it does not know how many students will pass the math GRAD and how many will need remediation, it cannot estimate the costs of the proposed rules. The Department states that while the proposed rules provide a mechanism for remediation, state law provides funds for that remediation. The Department cites to Minnesota Statutes § 126C.10, subd. 2a, which provides:

Extended time revenue. (a) A school district's extended time revenue is equal to the product of \$4,601 and the sum of the adjusted marginal cost pupil units of the district for each pupil in average daily membership in excess of 1.0 and less than 1.2 according to section 126C.05, subdivision 8. (b) A school district's extended time revenue may be used for extended day programs, extended week programs, summer school, and other programming authorized under the learning year.³⁸

The Department also maintains that the settlement reached in the California case, requiring California to provide two years of additional academic assistance for students who fail to pass its graduation exam (CAHSEE), does not have precedential value for Minnesota.³⁹

With respect to the claim that the proposed GRAD rules require districts to track and collect additional data on students without providing additional funding, the Department states that there are no new requirements for data tracking that were not already required for the BST. The Department maintains that everything required by the GRAD rule is currently required by the BST rule. As the BST is phased out and the GRAD is phased in, districts will continue to have ongoing tracking and record-keeping requirements.⁴⁰

³⁶ Ex. 26.

³⁷ Ex. 26.

³⁸ Ex. 27 at 3.

³⁹ Ex. 21 at 2.

⁴⁰ Ex. 21 at 2.

It seems clear that school districts will incur costs, perhaps substantial, in connection with the GRAD examination. But these costs flow from the legislature's decision to make the GRAD a requirement for graduation, not from the rule proposed by the Department. The Administrative Law Judge must assume that the legislature anticipated these costs. Under these circumstances, the Department's characterization of the potential costs as "cost neutral" does not invalidate the proposed rule. The Administrative Law Judge concludes the Department has adequately considered the costs of the rule.

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

Because the Department is statutorily required to adopt rules for implementing and administering the graduation exams to bring the rules into compliance with the statutes, the Department believes that failure to adopt the rules may result in costs to the Department associated with potential litigation over the Department's non-compliance. For example, a school district or the Department could be sued if students in unique situations are not provided access to an alternative method of satisfying the graduation exam requirement as mandated by statute.⁴¹

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

The Department states that the goal of this rulemaking process is to revise Minnesota's current BST rules to bring them into compliance with revised state requirements for the GRAD. The Department has identified no differences between these rules and existing federal regulation, and no person providing comments suggested that there are any relevant differences.

Performance Based Rules

29. The Administrative Procedure Act⁴² also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.⁴³

30. The Department states that throughout the development of the proposed rules and the SONAR, it made every effort to develop rules that will be understandable for practitioners and families, and to ensure efficient and effective administration of the

⁴¹ SONAR at 4.

⁴² Minn. Stat. § 14.131.

⁴³ Minn. Stat. § 14.002.

graduation exams. The Department maintains that it proposed the revisions to make the rules clear in purpose and intent, flexible, and not overly prescriptive.⁴⁴

Consultation with the Commissioner of Finance

31. Under Minn. Stat. § 14.131, the Agency is also 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.”

32. The Department consulted with the Department of Finance, and in a response dated July 8, 2008, the Department of Finance concluded that the proposed rule “could have some fiscal impact on local units of government” but that “it is difficult at this time to estimate the degree to which costs will be incurred.”⁴⁵

33. 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.

Compliance Costs to Small Businesses and Cities

34. Under Minn. Stat. § 14.127, the Department 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.”⁴⁶ 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.⁴⁷

35. The Department has determined that the cost of complying with the proposed rule in the first year after it takes effect will not exceed \$25,000 for any one small business or small city.⁴⁸

36. The Administrative Law Judge finds that the agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Analysis of the Proposed Rules

General

37. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. When rules are adequately supported by the SONAR or the Department’s oral or written comments, a detailed discussion of the proposed rules is unnecessary. The agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not

⁴⁴ SONAR at 5.

⁴⁵ SONAR at 5; *see also* Ex. 9.

⁴⁶ Minn. Stat. § 14.127, subd. 1.

⁴⁷ Minn. Stat. § 14.127, subd. 2.

⁴⁸ SONAR at 9.

specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Discussion of Proposed Rule

Minnesota Rules, Chapter 3501 — Graduation-Required Assessment for Diploma

3501.1020 Scope

38. This provision restates the statutory requirement that passage of the GRAD examination is required for a high school diploma in Minnesota public schools for all students enrolled in grade 8 in the 2005-2006 school year and later.

39. In its SONAR, the Department states that the provision is needed to specify which students are governed by the proposed rules. The Department also discussed the need to provide adequate notice of the new examination requirements to students. The Department cites to *Debra P. v. Turlington*⁴⁹ as the seminal case for assessing high-stakes examinations. According to the Department, the court in that case prevented the state from imposing new criteria in an examination for high school graduation without adequate notice and sufficient educational opportunities to prepare for such examinations. The court held that at least four to six years of preparation time is required in order for children to adequately prepare for a high stakes examination.⁵⁰

40. The Department maintains that this provision in the proposed rules is reasonable and consistent with the holding in *Debra P. v. Turlington* because it provides four year's notice from the time that the statute was passed by the Legislature to the 2005-2006 eighth grade students who must complete these requirements in order to graduate in 2010.⁵¹

41. Several people submitting comments questioned whether there has been sufficient notice of the GRAD test for the graduating class of 2010.

42. In a written comment, Dr. Richard Spicuzza states that the four to six years notice that was found to be appropriate in the *Debra P. v. Turlington* case was for minimal competency tests – not for high stakes tests like the GRAD test. Moreover, Dr. Spicuzza asserts that the notice is required to be provided in such a manner as to allow school districts the opportunity to organize their structures, course sequences, and instruction to be able to provide fair exposure to the testing curricula so that students have a fair chance to meet the new requirement. Dr. Spicuzza argues that with these proposed rules, the Department has failed to provide adequate notice. He further points out that the Department has yet to release the level of required competence necessary for an individual to be deemed "proficient" on the GRAD mathematics examination. In addition, current Department timelines indicate that the "standard setting" will not take place until after the spring 2009 administration of the MCA-II and GRAD. Thus, the graduating class of 2010 will have less than 12 months' notice of the definitive threshold required to be met in order to graduate from a Minnesota public school.⁵²

⁴⁹ 730 F.2d 1405 (11th Cir. 1984).

⁵⁰ SONAR at 7.

⁵¹ *Id.*

⁵² Ex. 11.

43. In another written comment, Dr. Kocher questions whether the shift to administering the GRAD exams in the spring of the 10th and 11th grades provides the students in the classes of 2010 and 2011 with sufficient notice. Dr. Kocher notes that with the BST, which was first given in the 8th grade, students have their entire high school career to make up ground in reading and mathematics and have multiple opportunities to re-take the examination. In particular, given the difficulty of the 11th grade GRAD in mathematics, Dr. Kocher is concerned that it will be extremely difficult to sufficiently support students in their 12th grade year to keep them on track for graduation.⁵³

44. In its September 12th written response, the Department states that sufficient notice of the exams has been given to the class of 2010. The Department maintains that the class of 2010 has had statutory notice of the MCA-II requirements since 2005, and the GRAD, which is a subset of the MCA-II, since 2007.⁵⁴

45. The Administrative Law Judge concludes that the comments concerning the adequacy of notice are really directed at the statute, which specifies that students who are in the 8th grade in the 2005-06 school year and later must obtain a proficient or passing score on the reading examination in grade 10 and the mathematics examination in grade 11. Whether or not this is sufficient notice to comply with constitutional requirements, this is the statutory requirement. The Department would not have the authority to implement a rule delaying the examinations to allow for additional notice. The Department has demonstrated that this rule provision is needed and reasonable.

3501.1030 Definitions

46. This section defines the terms used in parts 3501.1000 to 3501.1190.

47. In a written comment, Jacki McCormack, Senior Advocate for Arc Greater Twin Cities, stated that the terms "accommodation" and "modification" should be defined more clearly and in greater detail.⁵⁵

48. Other commenters expressed concern that the full range of accommodations currently available to students re-taking the BST will not be available to students who need to retest on the GRAD.⁵⁶ While these persons acknowledge that the computer-administered GRAD retests will have some accommodations built in, such as full audio on the mathematics GRAD, they believe that a paper and pencil accommodation will not be available except for students requiring a large print version.⁵⁷

49. In its written response, the Department stated that the definitions are modeled after the current definitions in Minnesota Rule for the BST.⁵⁸ The only difference between the proposed definition of "accommodation" and the existing definition is that the existing definition has a final sentence that states: "Among

⁵³ Ex. 12.

⁵⁴ Ex. 21 at 6.

⁵⁵ Ex. 7 at 109-110.

⁵⁶ Ex. 7 at 125, 148, 152; Exs. 12, 20 and 22.

⁵⁷ Id.

⁵⁸ Ex. 21 at 6.

accommodations is providing a student with the same test in a large print version.” “Accommodation” is defined in both the existing and proposed rule to mean:

an adjustment in a testing condition, such as the setting for or scheduling of the test, or a change in the method of administering a test. An accommodation does not compromise the security or the confidentiality of the test, does not alter the meaning of the score, or render the student’s score incomparable to the scores of those students who took the test under standard conditions.

50. Likewise, the word “modification” is defined in both the existing and proposed rule to mean “an adjustment of a test that results in changing the standard for a particular student.” The only difference is that the existing rule has an additional final sentence that states: “Among adjustments are: a modification of only part of the test, a change in test questions, and a change in the performance standard.”

51. For both definitions, the Department has chosen to delete the final sentence providing an example of the term. The deletion of these examples does not make the definitions unclear. The Administrative Law Judge concludes that the proposed definitions are needed and reasonable.

52. In another written comment, the Department was asked to consider “test blueprints” in determining whether tests taken by students in other states are equivalent to the GRAD, because other states use “blueprints” instead of “specifications.”⁵⁹

53. In response to this comment, the Department has proposed broadening the definition of “test specifications” as follows:

Subp. 13. Test specifications design. “Test specifications design” means statements of the requirements that tests must include and how tests are designed. ~~The specifications~~ These design documents define the required content, format, level of difficulty, types of items, and length of the tests.⁶⁰

54. No person objected to this change. The Administrative Law Judge finds the modification to be a technical change that does not make the rule substantially different from the rule as proposed. The Department has shown that the proposed rule is needed and reasonable.

3501.1040 GRAD Requirements

55. This subpart provides that to qualify for a high school diploma, a student must demonstrate competency in the statewide standards for reading, mathematics, and writing by fulfilling the graduation test requirement established by Minnesota Statutes §§ 120B.02 and 120B.30.

56. In its SONAR, the Department states that the provisions of this section are required by Minnesota law. Minnesota Statutes § 120B.30 provides that students

⁵⁹ Transcript at 37.

⁶⁰ Ex. 21 at 7.

enrolled in grade 8 in the 2005-2006 school year and later must pass state graduation tests in reading, mathematics and writing.⁶¹

57. In a written comment, Dr. Thel Kocher states that the GRAD requirements should include an appeal process and that the Department should provide support to economically disadvantaged students in preparing their appeals. Dr. Kocher further suggested that the Department include an alternative option for students to satisfy the examination requirement, such as the PLAN or ACT assessments.⁶²

58. Superintendent Ed Waltman also commented that the rule should include an appeal process given that the current proficiency results indicate that as many as 40 to 50 percent of students in the state will not pass the exams.⁶³

59. Other commenters, including Tim Wald, also urged the Department to add an appeal process. Mr. Wald noted that the BST rules allowed for an appeal process within each district.⁶⁴

60. In its September 12th written response, the Department states that, while state law contemplates that some students will fail the GRAD,⁶⁵ there is no provision in the statute for an appeal of any required graduation examinations. The Department asserts that it does not have rulemaking authority to override or contradict the legislative intent by promulgating a rule containing an appeal provision.⁶⁶ Likewise, with respect to the suggestion that the Department include an alternative option for students, such as an acceptable ACT result, the Department states that it was not granted rulemaking authority to adopt a rule that offers alternative options.⁶⁷

61. The Department has authority to make rules "implementing and administering" the GRAD examination consistently with Minn. Stat. § 120B.30.⁶⁸ This authority might arguably extend to adoption of an appeal provision concerning testing opportunities or other accommodations, similar to the existing rule.⁶⁹ But nothing in the statute would require such a provision, and it is clear the Department has made the policy decision to decline this process. Furthermore, the statute explicitly requires that "only the following options" shall fulfill graduation test requirements: a proficient score on the reading and mathematics MCAs or a passing score on the GRAD.⁷⁰ The Administrative Law Judge finds the proposed rule to be needed and reasonable, and agrees with the Department that it lacks the statutory authority to provide by rule for an alternative examination.

⁶¹ SONAR at 10.

⁶² Ex. 12. See *also* Exs. 20 and 22 (supporting the addition of an appeal process and use of the ACT assessment instead of the GRAD).

⁶³ Ex. 16. See *also* Exs. 19 and 20.

⁶⁴ Ex. 22. See *also* Ex. 7 at 1, 2, 3, 5-23, 26, 28-32, 34-39, 41-49, 51-54, 56-58, 60-69, 71, 73-77, 79, 81-84, 88, 90, 94-96, 98-100, 119, 122, and 126.

⁶⁵ See Minn. Stat. § 120B.31, subd. 3(a)(4).

⁶⁶ Ex. 21 at 3.

⁶⁷ Ex. 21 at 10.

⁶⁸ 2007 Minn. Laws, ch. 146, art. 2, § 36.

⁶⁹ See Minn. R. 3501.0140, subp. 2.

⁷⁰ Minn. Stat. § 120B.30, subd. 1(b).

3501.1050 Testing for Statewide GRAD Standards

62. This provision requires school districts to test for proficiency in statewide graduation standards by using the GRAD. It also prohibits districts from offering the GRAD before the grade level defined in Minnesota Statutes. Minn. Stat. § 120B.30 requires that students obtain a proficient score on the MCA in grade 10 for reading and grade 11 for mathematics or achieve a passing score on the GRAD in grade 10 for reading and grade 11 for mathematics or subsequent retests.

63. In its SONAR, the Department states that it is reasonable to begin testing at 10th and 11th grade because it provides a minimum of five testing opportunities for a student to pass the tests before graduation. The Department maintains that testing in 10th and 11th grade also allows sufficient time for remediation before graduation for those students who do not pass.⁷¹ The Department currently plans to offer a testing window once each month, and students will be allowed to participate every other month.⁷²

64. Many people submitted comments expressing concern that giving the tests in 10th and 11th grade will provide students with too few opportunities for remediation.⁷³ Some suggested that both the reading and mathematics assessments be given no later than the 10th grade to allow for more tutoring and re-testing opportunities.⁷⁴ Matthew Mohs, Director of Funded Programs for the Saint Paul Public Schools, noted that this year's 11th graders will probably not get their individual student results until the fall of 2009, leaving them with less than nine months to make up gaps in learning, re-take the exam, and meet the requirements.⁷⁵

65. In a similar comment, Superintendent Ed Waltman expressed concern that the administration of the GRAD test of reading in the spring of students' 10th grade, and the GRAD test of mathematics in the spring of students' 11th grade, leaves insufficient time for remediation. Under the BSTs, students who did not pass had their entire high school career to make up ground in reading or mathematics and multiple re-test opportunities. Under the proposed rules, students have much less time to close the gap between performance and minimum expectation.⁷⁶

66. Dr. Richard Spicuzza, noted that evaluations of the MCA-II/GRAD mathematics test indicate only a 50 percent chance of passing the proficiency standard if a student is enrolled in Algebra II. Given this level of rigor, Dr. Spicuzza questions whether students can be remediated in less than one year. Dr. Spicuzza recommends that the Department establish a hold-harmless period until it is able to provide reasonable advance notice of the level of required competence necessary for a student to be deemed proficient on the GRAD mathematics examination.⁷⁷

⁷¹ SONAR at 11.

⁷² Ex. 7 at 103.

⁷³ See Ex. 7 pp. 1-31, 34-49, 51-58, 60-71, 73-79, 81-84, 90, 94-96, 98, 100, 117, 119, 132, and 134; Exs. 12, 14, 15, 16, 13, 22, 25 and 26.

⁷⁴ Ex. 14 (Minnesota School Boards Association's comment.)

⁷⁵ Ex. 25.

⁷⁶ Ex. 16.

⁷⁷ Ex. 11.

67. A number of persons also submitted written comments expressing concern that the GRAD requirement infringes on local school district authority to determine whether a student graduates. These persons questioned how a district can require a student to undergo remediation and retesting if the student passes advanced math courses but fails the GRAD.⁷⁸ Kirk Schneidawind, for example, stated in his written comment that the proposed rules permit the state and federal government to determine whether a student earns a diploma from the local school district based on 10 to 20 questions on three different assessments. According to Mr. Schneidawind, local school boards and district administrators should have discretion in this matter.⁷⁹

67. With respect to the comments that the graduation exams should be given no later than the 10th grade and preferably earlier, the Department explains in its written response that the statute specifically requires that the mathematics test be administered in the 11th grade and the reading in the 10th grade.⁸⁰ The proposed rules cannot alter what state law currently requires.⁸¹

68. In response to concerns that there is inadequate time for remediation because the reading and mathematics GRAD tests are given in the 10th and 11th grade, the Department states that while there may be fewer years to remediate, there are now several more years for students to learn and master the material before they are tested.⁸²

69. In response to the concerns that the state is intruding on local school board authority or control, the Department states in its written response that state law requires Minnesota public school students enrolled in grade 8 before the 2005-06 school year to pass the basic skills test, and those enrolled in the 2005-06 school year and later to pass MCA-IIs or the GRAD test. However, the Department points out that while state law also requires public school students to satisfactorily complete the course credit requirements found in Minn. Stat. § 120B.024, it does not mandate a particular curriculum for any district. So in that sense, school districts do retain discretion regarding graduation requirements for their students.⁸³

70. The Administrative Law Judge finds the proposed rule to be needed and reasonable and in compliance with the governing statute.

3501.1110 Opportunities to Learn and Remediation

71. This subpart requires school districts to provide opportunities for all students to learn the GRAD requirements and subject matter, and to develop a plan for remediation for a student who, after two retest opportunities, has not passed a specific GRAD.

72. In its SONAR, the Department states that this subpart requires school districts to focus on individual student achievement of the GRAD requirements. The

⁷⁸ Ex. 7 at 1-84, 90, 94-96, 98, 100; Ex. 14.

⁷⁹ Ex. 14.

⁸⁰ See Minn. Stat. § 120B.30.

⁸¹ Ex. 21 at 3.

⁸² Ex. 21 at 7.

⁸³ Ex. 21 at 2.

Department notes that local school districts in 13 other states that require high-stakes minimum competency testing offer individual academic plans to learn the content covered by the test.⁸⁴ With respect to the GRAD mathematics examination, the Department asserts that teaching materials are readily available because the content consists of easily recognized parts of published mathematics textbooks that are used widely across the state. In addition, methods of teaching and different strategies are included in the Principles and Standards for School Mathematics published by the National Council of Teachers of Mathematics, as well as numerous other sources. As for the reading exam, the objectives encompass only reading comprehension, without delineation of the particular strategies or methods used to teach students, and the writing exam requires only essential composition skills commonly taught in district curricula.⁸⁵

73. Several people commented that the requirement to develop a remediation plan is too vague. They recommended that the Department provide more detail to clarify what standards and services it expects school districts to include in an acceptable remediation plan.⁸⁶

74. Jacki McCormack questioned whether the remediation plan would be a separate document targeted to each individual student or something that would apply to all students who failed the GRAD after two retests.⁸⁷

75. In its written response, the Department states that this section was modeled on the remediation requirement in the BST rule. The Department declines to make additional, more specific requirements of school districts because it believes the districts are in the best position to determine how to meet an individual student's needs when that student has not achieved the necessary learning objectives.⁸⁸ The Department states that while school districts must provide a remediation plan, individualized instruction is not required to be part of that plan.⁸⁹

76. The Administrative Law Judge concludes the proposed rule is not unreasonably vague. It provides sufficient notice that a remediation plan must be developed for students who have not passed an examination after two retest opportunities. The Department has established that the proposed rule is needed and reasonable.

3501.1120 Required Notification to Parents and Students

77. This provision requires school districts to provide parents and students written notice of graduation requirements and the grade in which the student will have the first opportunity to take a GRAD. Under subpart 3, the school district must provide written notice of GRAD results to parents and students no later than 60 days after a

⁸⁴ SONAR at 11-12.

⁸⁵ SONAR at 12.

⁸⁶ Ex. 7 at 101, 109, 114, and 120.

⁸⁷ Ex. 7 at 109.

⁸⁸ Ex. 21 at 7.

⁸⁹ SONAR at 12.

student takes a GRAD. After the date of receiving the test results, students must have a minimum of six weeks for remediation before the next testing opportunity.

78. Several people submitted written comments critical of the requirement that school districts notify parents and students of test results within 60 days of the test date, without a corresponding deadline for the Department to provide the test results to the districts.⁹⁰

79. For example, in a written comment, Dr. Kocher objects to the burden being placed on school districts to provide notice of GRAD results no later than 60 days after a student takes the test. Dr. Kocher states that, without knowing the timelines under which the Department is working, the 60 day written notice should be linked to when the school district receives the Individual Student Reports rather than from when the student takes the test. Dr. Kocher further recommends that the Department develop a plan to ensure that reports of alignment studies and technical manuals, including reliability, validity and fairness for each form of the GRAD be published and readily available to the public before the test results are returned to the school districts, so that the districts may report and interpret the test results fairly.⁹¹

80. In a written comment, the Minnesota School Boards Association (MSBA) questioned the need for six weeks of remediation between retesting opportunities. The MSBA believes that the amount of remediation time between tests should be left up to local school administrators, parents, and students.⁹²

81. In response to these comments, the Department has proposed the following modification to subpart 3 of Part 3501.1120:

Subp. 3. Notice of test results and remediation opportunities. The district must provide written notice to parents and the student of GRAD results no later than 60 days after ~~a student takes a GRAD~~ the district receives the results of a GRAD. After the date of receiving test results, students must have a minimum of six weeks for remediation before the next testing opportunity.⁹³

82. In its September 12, 2008, written response, the Department explained that it offers GRAD retest opportunities during the first week of every month. The Department believes that six weeks is a reasonable interval for a remediation plan to be implemented and for students to obtain relevant instruction before the next re-test opportunity.⁹⁴

83. The Department believes that a six-week interval will enhance the implementation of remediation plans. The Department is entitled to choose among policy alternatives as long as the choice made is rational. The length of the interval

⁹⁰ Ex. 7 at 61, 99, 101, 114, 120, 129, 139, 146, 150, 153, and 156; Exs. 12, 15, and 16.

⁹¹ Ex. 12.

⁹² Ex. 14.

⁹³ Ex. 12 at 8.

⁹⁴ Ex.21 at 8.

between testing opportunities is a policy decision the Department has legitimate discretion to make, and there is a rational basis for this choice.

84. The Administrative Law Judge finds the rule is needed and reasonable, and the proposed modification does not make the rule substantially different from the rule as published. The change reasonably addresses the legitimate concerns raised by those commenting.

3501.1130 Student Record Keeping

85. This provision requires the school districts to keep a record for each student that includes the GRAD test dates and results.

86. In its SONAR, the Department explains that this information will provide evidence of each test taken and will assist the school districts in evaluating each student's situation. The Department will keep the official record of the student's passing status, and the district will be responsible for keeping documentation of this official record in the student's data record.⁹⁵

87. In a written comment, Ed Waltman stated that this provision will add a significant administrative burden on school districts to track each student individually with respect to pass/fail, remediation and retakes without funding to cover the cost.⁹⁶ Other commenters also expressed concern that the proposed rules create a new unfunded mandate for school districts to track students' performance on the GRAD, remediation, and retakes for State audits.⁹⁷

88. Under subpart 2, individual student progress is required to be reported on a student record as "pass-state level" or "PS" for students who pass a GRAD under standard conditions, and "Pass-individual level" or "PI" for students who pass a GRAD with a modification established in an IEP or section 504 accommodation plan in accordance with part 3501.1190.

89. In a written comment, Daniel Stewart, Supervising Attorney for the Minnesota Disability Law Center, objected to the "Pass-individual" or "PI" notation on a student record, stating that such a notation may violate Section 504. Mr. Stewart pointed out that since only students with disabilities would receive such a notation, the notation would reveal the student's status as a person with a disability, whether the student wants to disclose this information or not.⁹⁸

90. In response to these comments, the Department has proposed the following modification to subpart 2 of Part 3501.1130:

Subp. 2. Student progress. Individual student progress must be reported on a student record as described in ~~items A and B~~ this part.

A. ~~"Pass state level" or "PS"~~ "Pass" or "P" must be noted on the record of a student who passes a GRAD under standard conditions or with an accommodation. ~~The records for students passing with an~~

⁹⁵ SONAR at 15.

⁹⁶ Ex. 16.

⁹⁷ Ex. 7 at 2, 11, 32, 33, 40, 50, 51, 55, 56, 60, 61, 67, 72, 76, 77, 85, 99, 100, 120 and 150.

⁹⁸ Ex. 7 at p. 111-112.

~~accommodation must not differ from the records of students passing the test under standard conditions.~~

B. ~~“Pass individual level” or “PI”~~ “Pass” or “P” must also be noted on the record of a student who passes a GRAD with a modification established in the IEP or section 504 accommodation plan in accordance with part 3501.1190. This notation is also used as a GRAD notation for any other modified or alternate assessment used for accountability purposes for students with disabilities. The records for students passing with an accommodation or a modification or who pass an alternate assessment must not differ from the records of students passing the test under standard conditions.⁹⁹

91. The comments concerning the cost of compliance with the rule were addressed above in the regulatory analysis. The fact that a rule may impose costs on school districts that are not expressly funded by the legislature does not invalidate the rule. The Administrative Law Judge finds the proposed rule is needed and reasonable, and the modification does not make the rule substantially different from the rule as published. The change reasonably addresses the legitimate concerns raised by those commenting.

3501.1160 Required Documentation for Program Audit

92. This provision requires school districts to maintain records necessary for program audits conducted by the Department, including remediation plans for students, the district's curriculum and instruction, notifications to parents and students, student records, the GRAD administration plan, test security procedures, the district's process for testing considerations for LEP students, documentation for students granted testing accommodations, and the assessments and performance documentation for students granted modifications.

93. In its SONAR, the Department states that local school districts are currently audited annually for compliance with state laws, and periodically for compliance with federal programs. School districts submit an annual report consisting of their curriculum review, testing results, and plans for improvement, both to their local communities and to the Department. These reports provide data to the state and allow authorities to know that the schools have been complying with report legislation.

According to the Department, the proposed rules provide assurance that assessment is being done consistently and effectively by providing accountable, results-oriented policies and procedures. Critical to the audits is the requirement that schools keep all necessary records for state review. The Department maintains that this is reasonably accomplished through an audit of local programs by the state. The requirement of documentation for these program audits provides assurance of consistent implementation of the standards throughout the state.¹⁰⁰

⁹⁹ Ex. 21 at 9.

¹⁰⁰ SONAR at 19.

94. In a written comment, Ed Waltman stated that this proposed section provides the Department with a great deal of authority to review district and school records without clear standards for each of the items to be maintained. Mr. Waltman expressed concern that the scope of any audit and the required documentation is within the discretion of the Department. Mr. Waltman also stated that this provision along with the student recordkeeping provisions of Part 3501.1130 will add a significant administrative burden on school districts without additional funding. According to Mr. Waltman, school districts will be required to develop and administer a system to track each student individually regarding the tests taken, pass/fail, remediation, and retakes.¹⁰¹

95. Other commenters expressed concern that this provision gives the Department too much discretion to review school district records without clear standards for each of the items to be maintained.¹⁰²

96. In its written response, the Department stated that the requirement for documentation in the proposed rules is identical to that in the current BST rule (Minnesota Rule 3501.0170). According to the Department, nothing is required beyond what already exists in law.¹⁰³

97. The Administrative Law Judge concludes the proposed rule is not unreasonably vague and does not give the Department excessive discretion to determine which records are necessary. The rule lists the specific types of documents that must be maintained. The Department has established that the proposed rule is needed and reasonable.

3501.1170 Passing Scores for GRAD

98. This provision echoes the statutory requirement that passing scores for the GRAD will be determined through a "standard setting process." Standard setting is a method of determining cut scores that correspond to performance levels. The Department has decided to set the standard for cut scores only after a real administration of a test. According to the Department, the standard setting process is usually implemented by a committee of educators who set scores only after discussing content standards, performance levels, the test, and expectations for students.¹⁰⁴

99. In a written comment, Bernadeia Johnson, Deputy Superintendent of the Minneapolis Public Schools, noted that if the mathematics GRAD cut score is set comparably to the most recent reading GRAD cut score, 78 percent of the students entering 12th grade in the Minneapolis Public Schools will not have passed the mathematics GRAD. Ms. Johnson further noted that the proficiency cut score on the grade 11 MCA-II mathematics examination equates to the national percentile rank of 79 on the ACT-PLAN. In other words, for a Minnesota student to be considered "proficient" in mathematics, the student must be at the 79th percentile or better nationally. Ms. Johnson maintains that such a high cut score is unreasonable and damaging, and she

¹⁰¹ Ex. 16.

¹⁰² Ex. 7 at 139, 146, 153; Ex. 16.

¹⁰³ Ex. 21 at 9.

¹⁰⁴ SONAR at 21-22.

predicts that 85% of all entering Minneapolis 12th graders will not be on track to graduate.¹⁰⁵

100. In a written comment, Michael Mohs expressed concern that the increased rigor of the examination and reduced remediation time will have a disproportionate impact on particular student groups. Mr. Mohs points out that while 82 percent of white students passed the reading GRAD, only 41 percent of African American students and 48 percent of Latino students passed on the first administration. Given the significant difficulty of the 11th grade mathematics examination, Mr. Mohs believes it is not unrealistic to predict the proficiency rates will be lower in mathematics than for reading.¹⁰⁶

101. Some commenters stated that setting the standard for cut scores only after the initial administration of the mathematics test in the spring of 2009 is not timely, particularly for the class of 2010.¹⁰⁷ Other commenters were concerned that because the MCA-II proficiency rates and GRAD pass levels were identical for the reading test, this suggests that similar results will occur with respect to the mathematics test and that too many students will fail.¹⁰⁸ Still others felt that the cut scores for the reading GRAD were set unrealistically high, resulting in a 75% passing rate for the state and a 52% passing rate for Minneapolis.¹⁰⁹

102. Some commenters expressed concern that there has not been enough time to adapt to the new testing standards for graduation. These commenters noted that when the BST was first implemented, the passing cut scores were set lower to allow time for students and districts to adapt to the new standards. These commenters suggested that the Department adopt an implementation plan that holds students harmless by gradually increasing the cut scores for passage over a number of years.¹¹⁰

103. In its written response, the Department stated that standard setting after the administration of a real test (as opposed to a mock exam) using actual performance data is common practice in large scale testing and is recommended by Minnesota's National Technical Advisory Committee.¹¹¹

104. In a written reply to the Department, Dr. Kocher stated that judgmental standard setting methods, like the Angoff, could be used immediately to set the passing score for the mathematics GRAD rather than waiting for the initial operational administration of the GRAD.¹¹² Likewise, Dr. Richard Spicuzza stated that there are other equally defensible standard setting methodologies that the Department could have selected. By waiting until after the spring of 2009 to set the standard for the mathematics GRAD, the Department is giving the class of 2010 less than 12 months' notice of the definitive threshold required to be met in order to graduate.¹¹³

¹⁰⁵ Ex. 7 at 127-130.

¹⁰⁶ Ex. 25. See also Ex. 7 at 121-122, and 143.

¹⁰⁷ Exs. 11, 13, 22, and 24.

¹⁰⁸ See Ex. 7 at 117, 121, 129 and 134; Exs. 11 and 25.

¹⁰⁹ See Ex. 7 at 129; Ex. 16.

¹¹⁰ Ex. 7 at 139; Ex. 13.

¹¹¹ Ex. 21 at 9.

¹¹² Ex. 24.

¹¹³ Ex. 26.

105. In its September 19, 2008, final response, the Department acknowledged Dr. Kocher's comments but stated that the choice of standard setting is within the administrative purview of the Department. No specific method is required by statute. The decision to set the GRAD math test cut scores only after an actual administration of the test has occurred was made on the advice of Minnesota's National Technical Advisory Committee.¹¹⁴

106. Another commenter questioned whether GRAD test scores should be normed against the population's performance on the test as a whole, similar to the manner in which ACT and SAT tests are normed.¹¹⁵

107. In its written response, the Department explained that the GRAD is a criterion-based assessment, in which the performance expectation for a student's passing score is based on set criteria and is not altered by the performance of other students.¹¹⁶ The Department adds, however, that the passing score is determined by standard setting, which is a combination of content expectations and student performance on the assessment. So in that respect, students' performance is taken into consideration. According to the Department, the passing score represents a balance of sufficient demonstrated knowledge of content and an appropriate percentage of student passing rates to reflect a realistic expectation.¹¹⁷

108. The Administrative Law Judge finds the reference to the standard-setting process in the proposed rule is consistent with the statute. The Department is not required to set the passing scores through the rulemaking process; the rule merely reflects the Department's intention to use a standard-setting process described in the statute.

109. The Department has demonstrated that the proposed rule is needed and reasonable.

3501.1180 Students in Unique Situations

110. This provision governs the graduation requirements for "students in unique situations:" dual enrolled students, English language learners, foreign exchange students, home-schooled students, open enrollment students, postsecondary enrollment students, shared-time students, transfer students, district-placed students and students attending school under a tuition agreement, and correctional facility students. In general, public school students must pass the GRAD in order to earn a diploma, and those with limited English proficiency are granted more time to learn English before being required to pass the GRAD.¹¹⁸

111. In its SONAR, the Department states that this rule part is necessary because the authorizing legislation requires the Department to adopt rules that address the graduation requirements for students in these unique situations.¹¹⁹

¹¹⁴ Ex. 27.

¹¹⁵ Transcript at 26-27.

¹¹⁶ Ex. 21 at 9.

¹¹⁷ Ex. 21 at 10.

¹¹⁸ SONAR at 23.

¹¹⁹ SONAR at 23.

112. Several commenters stated that the four-year exemption for English Language Learners (ELL) is not enough for those students to become sufficiently proficient in English so as to remove language as a significant obstacle to learning.¹²⁰ Most recommended a five to seven year exemption.¹²¹ Ed Waltman pointed out that ELL performance on assessments is much lower than their non-ELL peers statewide. For example, only 28 percent of the state ELL population passed the recent reading GRAD compared to 78 percent of the non-ELL population. And in the MCA-II mathematics test, only 3.32 percent of ELL high school juniors statewide scored proficient compared to 35.12 percent of the non-ELL population.¹²²

113. Another commenter questioned whether the Department intended to exempt all ELL students from the GRAD since most Minnesota students now enroll in a new school in grade 9.

114. In its written response, the Department stated that the exemption for ELL students under the BST rules is three years. The proposed GRAD rule expands the time to four years.

115. In response to the above comments, the Department has proposed the following amendment:

Subp. 2. English language learners (ELL). English language learners (ELL) who are public school students and are designated in the Minnesota Automated Reporting Student System (MARSS) as Limited English Proficiency (LEP) are not required to pass the GRAD for up to four years from their date of enrollment in any school in which the primary language of instruction is English. An ELL student who enrolls in grade 9 or above at or after the start of the academic year in any Minnesota school and who completes if they complete the course work and any other state and district requirements to graduate within a four-year period is not required to pass the GRAD.¹²³

116. The Administrative Law Judge finds the rule is needed and reasonable and the proposed modification does not make the rule substantially different from the rule as published. The change reasonably addresses the legitimate concerns raised by those commenting.

117. Many people who submitted comments also objected to the requirement in subpart 8 of this provision that local school districts obtain a copy of the test specifications for transfer students and requested that the Department assume this responsibility.¹²⁴

118. In response to these comments, the Department proposed the following amendment to the proposed rules:

¹²⁰ See Ex. 7 at 137.

¹²¹ Ex. 7 at 1, 41, 55, 61, 100, 118, 121, 128, 137, 141, 145, and 149; and Ex. 16.

¹²² Ex. 7 at 117-118; and Ex. 16.

¹²³ Ex. 21 at 10.

¹²⁴ Ex. 12. See also, Ex. 16 and Ex. 7 at 61, 88, 101, 114, 119, 127, 141, 144, 148, 152, and 156.

Subp. 8. Transfer students who passed a graduation exam in another state. A district may submit a passing score report for a transfer student and a copy of the test specifications to the department will request test specifications from the other state for review. As graduation exams from other states are submitted received, the department will maintain a list of states with acceptable substitute graduation exams. The department will seek reciprocity for the GRAD in other states when it accepts their assessments.¹²⁵

119. The Administrative Law Judge finds the proposed rule is needed and reasonable and the modification does not make the rule substantially different from the rule as published. The change reasonably addresses the legitimate concerns raised by those commenting. The Administrative Law Judge suggests, however, that the reference to requesting "test specifications" be changed to "test design" documents, to be consistent with the change made in the definitions section above at Part 3501.1030, subp. 13. This change would be needed and reasonable and would not make the rule substantially different from the rule as published.

3501.1190 Students with Individualized Education Program Plans or Section 504 Accommodation Plans

120. Under the proposed rule, IEP and Section 504 teams must identify for each subject area of the GRAD whether a student with a disability is expected to achieve the statewide standard with or without accommodations or whether the student is expected to achieve the statewide standard at an individually modified level of difficulty. In addition, modifications must be made at the time transition goals and objectives are adopted (under Minnesota law, at age 14 or grade 9); and accommodations to standard testing conditions must be made through the IEP or Section 504 team process and must be identified in the plan documents.¹²⁶

121. In a written comment, Daniel Stewart objected to the "Pass-individual" or "PI" notation on a student record. In addition to his earlier concern that the PI notation may violated Section 504 by revealing a student's status as a person with a disability, Mr. Stewart expressed concern that the proposed rule does not indicate any standards or conditions that the IEP team or Section 504 team may use in its determination of whether a student should proceed under the PI standard. Without standards for guidance, Mr. Stewart believes students with disabilities may be placed on the PI standard for improper reasons.¹²⁷

122. In response to these comments, the Department has proposed the following modification to subpart 1 of Part 3501.1190:

Subpart 1. Considerations for students with IEPs or section 504 accommodation plans. The individualized education program or section

¹²⁵ Ex. 21 at 11.

¹²⁶ SONAR at 27-28.

¹²⁷ Ex. 7 at p. 111-112.

504 accommodation plan for a student with a disability must identify one of the following decisions for each subject area of the GRAD:

- A. the student is expected to achieve the statewide standard with or without testing accommodations, resulting in a PS Pass or P notation on the record when achieving a passing score; or
- B. the student is expected to achieve the statewide standard at an individually modified level of difficulty, resulting in a P Pass or P notation on the record when achieving the modified level. A Minnesota alternate assessment must be used when an IEP team chooses to replace the GRAD. Adoption of modifications for a student must occur concurrently with the adoption of transition goals and objectives as required by Minnesota Statutes, section 125A.08, paragraph (a), clause (1).¹²⁸

123. The Administrative Law Judge finds the proposed modification does not make the rule substantially different from the rule as published. Nor is the proposed rule unreasonably vague because it provides inadequate guidance to IEP or Section 504 teams as to when a modification to the level of difficulty should be made. IEP and Section 504 teams are required to make those decisions on an individualized basis, with reference to the student's educational needs. The Department cannot make these decisions by rule.

124. After reading and considering all of the comments in the record, the Administrative Law Judge concludes that most of the comments express legitimate concerns and valid policy criticisms of the GRAD requirement contained in Minn. Stat. § 120B.30, the reasonableness of which is not at issue in this proceeding. The Department has shown that there is a need for the proposed rules implementing these statutory requirements and that the proposed rules are rationally related to the end sought to be achieved.

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

CONCLUSIONS

1. The Department gave proper notice of the hearing in this matter.
2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The Department has demonstrated its statutory authority to adopt the proposed rule and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).
4. The Department has documented the need for and reasonableness of its proposed rule with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).

¹²⁸ Ex. 21 at 11.

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

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rule be adopted.

Dated: October 20, 2008.


KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

The Department must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Department makes changes in the rules, 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.

After adopting the final version of the rules, the Department must submit this version to the Revisor of Statutes for a review as to its 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 the same and file them with the Secretary of State. When the final rules 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.