

February 9, 2023

VIA EMAIL ONLY

Gina Stauss Fast- Executive Director
Jenna Bohl- Licensing Division Manager
Tami Thein- Executive Assistant
Minnesota Board of Cosmetologist Examiners
1000 University Ave W Ste 100
Saint Paul, MN 55104
gina.fast@state.mn.us
jenna.bohl@state.mn.us
tami.thein@state.mn.us

Re: *In the Matter of the Proposed Revisions of Minnesota Rules Chapter 2105 and 2110, Governing Schools, Instructors and School Managers Revisor's ID 4456*
OAH 65-9013-36457; Revisor R-4456

Dear Executive Assistant Thein:

Enclosed please find the Report of the Chief Administrative Law Judge in the above-entitled matter and the Report of Administrative Law Judge Ann C. O'Reilly. The Board may resubmit the rule to the Chief Administrative Law Judge for review after changing it, or may request that the Chief Administrative Law Judge reconsider the disapproval.

If the Board chooses to resubmit the rule to the Chief Administrative Law Judge for review after changing it, or request reconsideration, the Board must file the documents required by Minn. R. 1400.2240, subps. 4 and 5.

If you have any questions regarding this matter, please contact William Moore at (651) 361-7893, william.t.moore@state.mn.us or via facsimile at (651) 539-0310.

Sincerely,



NICHOLE HELMUELLER
Legal Assistant

Enclosure

cc: Office of the Revisor of Statutes
Legislative Coordinating Commission

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the
Board of Cosmetologist Examiners
Relating to Education, Licensing, and
Practice of Cosmetology, Minnesota
Rules Chapter 2110

**ORDER OF THE CHIEF
ADMINISTRATIVE LAW JUDGE
ON REVIEW OF RULES**

This matter came before the Chief Administrative Law Judge pursuant to the provisions of Minn. Stat. § 14.15, subds. 3, 4 (2022), and Minn. R. 1400.2240, subp. 4 (2021). These authorities require that the Chief Administrative Law Judge review an Administrative Law Judge's findings that a proposed agency rule is defective and should not be approved.

The proposed rules concern the Board of Cosmetologist Examiners' (Board) rules governing cosmetology schools, instructors, practitioners, and school managers. The proposed rules address student records, school curriculum, school and clinic operations, instructor ratios, high school cosmetology programs, practitioner licensing requirements, and other regulations for schools training cosmetologists and other licensed professionals in the beauty industry.

Following a rulemaking hearing, Administrative Law Judge Ann C. O'Reilly disapproved portions of the proposed rules in a Report dated January 30, 2023.¹

Based upon a review of the record in this proceeding and for reasons explained in the attached Memorandum,

The Chief Administrative Law Judge **concurs** with the **disapproval** of proposed Rules:

- 2110.0510
- 2110.0520
- 2110.0525
- 2110.0530
- 2110.0580, item E
- 2110.0590

¹ Report of the Administrative Law Judge (Report) (Jan. 30, 2023).

The Chief Administrative Law Judges **disagrees** with the **approval** of proposed Rules 2110.0650 and 2110.0705, subpart 2.

The Chief Administrative Law Judge **disagrees** with the **disapproval** of proposed Rule 2110.0590 to the extent the Report of the Administrative Law Judge concludes that the Rule fails to identify the testing providers for the practical skills tests required for licensure.

The Chief Administrative Law Judge **disagrees** with the **approval** of proposed Rule 2100.0510, items B and E, to the extent the Report of the Administrative Law Judge concludes that the inconsistent phrases used to describe categories of practical instruction and clinical service exercises are not impermissibly vague.

Therefore, the Chief Administrative Law Judge issues the following:

ORDER

1. Proposed Minnesota Rule Parts 2110.0510, 2110.0520, 2110.0525, 2110.0530, 2110.0580E, 2110.0590, 2110.0650, and 2110.0705, subpart 2, are **DISAPPROVED** for the reasons identified in the Chief Administrative Law Judge's Memorandum below.

2. In all other respects, the findings in the Report of the Administrative Law Judge dated January 30, 2023, are **APPROVED**.

The changes or actions necessary for approval of the disapproved rules are identified in the Memorandum below. If the Board elects not to correct the defects associated with the proposed rules, the Board must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2022).

If the Board chooses to make changes to correct the defects, it must submit to the Chief Administrative Law Judge a copy of the rules as originally published in the State Register, the order adopting the rules, and the rule showing the Board's changes. The Chief Administrative Law Judge will then determine whether the defect has been corrected and whether the modifications to the rules make them substantially different than originally proposed.

Dated: February 9, 2023



JENNY STARR
Chief Administrative Law Judge

MEMORANDUM

I. Legal Authority to Adopt Rules

When undertaking a review of proposed rules, the Administrative Law Judge must assess whether the proposed rules comport with applicable legal standards. Those standards include prohibitions on grants of undue discretion to government officials, and on proposed rules that are unduly vague and cannot take effect upon their own terms.² “A rule, like a statute, is void for vagueness if it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited or fails to provide sufficient standards for enforcement.”³ Further, the Administrative Law Judge must assess whether the agency proposing rules made a sufficient “affirmative presentation of facts establishing the need for and reasonableness of the proposed rule and fulfill[ed] any relevant substantive or procedural requirements imposed on the agency by law or rule.”⁴

II. Disapproved Proposed Rules

The following table identifies the disapproved rules, why the rule is defective, and how the defect could be cured.

Proposed rule is disapproved	because;	and can be cured by;
2110.0510 2110.0520 2110.0525 2110.0530 2110.0580, item E	(a) fails to articulate, by rule, the experiential requirements for licensure; ⁵ and (b) fails to make an affirmative presentation of facts to support the need and reasonableness for the required number of exercises or hours of experiential learning. ⁶	(a) identifying the exact number of exercises and hours required, and (b) making an affirmative presentation of facts, from the rulemaking record, articulating the Board’s reasoning, assumptions, and policy judgments for identifying the number of exercises and hours it is requiring.

² Minn. R. 1400.2100 (2021); see also Minn. R. 1400.2300, subp. 3 (2021).

³ *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985), citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).

⁴ Minn. Stat. § 14.14, subd. 2 (2022).

⁵ Minn. Stat. § 155A.27, subd. 2 (2022) (requiring that the board determines the qualifications for licensing in each classification by rule, including both educational and experiential prerequisites).

⁶ *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238 (Minn. 1984) (describing the affirmative presentation needed connecting the proposed rule requirement to the policy chosen by the agency).

Proposed rule is disapproved	because;	and can be cured by;
2110.0510, items B and E	(a) phrases used to describe categories of practical instruction and phrases used to describe categories of clinical service exercises are inconsistent and vague. ⁷ For example, item B uses the phrase, “basic esthiology, including facials, and body treatments.” Item E, however, separately uses the word “facials” and the phrase “body treatments.”	(a) Using consistent phrases to express the same instructional topics
2110.0590	(b) is unduly vague, because it fails to inform what conduct is required for compliance, ⁸ (c) conflicts with the licensure requirements under Minn. R. 2105.0145, ⁹ (d) fails to establish the need and reasonableness of subpart C with respect to the identified number of hours required for a student to sit for the practice skills test. ¹⁰	(b) defining “initial licensure training,” (c) resolving the conflict between the three types of tests required in Rule 2105.0145 and the practical skills test required by Rule 2110.0590, (d) making an affirmative presentation of facts, from the rulemaking record, articulating the Board’s reasoning, assumptions, and policy judgements for the identified number of hours required for a student to sit for the practice skills test.

⁷ Minn. R. 1400.2100, subp. G (requiring the rule, by its own terms, have the force and effect of law).

⁸ *Id.*; *In re N.P.*, 361 N.W. 2d 386, 394 (Minn. 1985), *citing Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99 (1972).

⁹ Minn. R. 1400.2100, subp. G (requiring the rule, by its own terms, have the force and effect of law).

¹⁰ Minn. R. 1400.2100, subp. B (requiring a demonstration of the need and reasonableness of the rule).

Proposed rule is disapproved	because;	and can be cured by;
2110.0650	(a) fails to establish the need and reasonableness for authorizing schools to establish their own refund policies. ¹¹	(a) making an affirmative presentation of facts supporting the need and reasonableness for authorizing schools to establish their own refund policies.
2100.0705, subpart 2	(a) is unduly vague because it lacks sufficient standards for enforcement. ¹²	(a) clarifying whether a foreign transfer student who does not pass the practical skills test must complete a skills course.

With respect to proposed Rule 2110.0590, the Report of the Administrative Law Judge concludes that there are no provisions in the proposed rule to approve the provider of the practical skills tests.¹³ The modified proposed rule, however, identifies that the “practical skills test must be administered . . . by an instructor licensed in the subject of the test section that the instructor is administering.”¹⁴ An instructor is defined as someone who holds “active operator or managers’ license” and is employed by a licensed school instructor.¹⁵ Thus, while proposed Minn. R. 2110.0590 is disapproved for the defects identified above, the Chief Administrative Law Judge does not adopt the Report of the Administrative Law Judge on this point.

¹¹ *Id.*
¹² Minn. R. 1400.2100, subp. G (requiring the rule, by its own terms, have the force and effect of law).
¹³ Report Finding 285.
¹⁴ Modified proposed Minn. R. 2110.0590, item A. See Report Finding 279.
¹⁵ Minn. Stat. § 155A.23, subd. 11 (2022).

III. Recommended Modifications

The Report of the Administrative Law Judge makes recommendations to further improve the rule. The Chief Administrative Law Judge agrees with the recommendations summarized in the following table:

Proposed rule	could be improved by;
2110.0010, subpart 12a	<p>making the following change:</p> <p>Course completion certificate” means a notarized <u>document in the form</u> provided by the board that a student must use to obtain a license in Minnesota. A course completion certificate must include a student's program completion information, including the number of clinical service exercises required by the board that the student has completed and the <u>passing</u> results of the practical skills test.¹⁶</p>
2110.0310, subpart 1, item R(2)(a)	removing the first “required” to avoid redundancy.
2110.0520,	<p>making the following change to item A:</p> <p>Esthetician training must consist of <u>at least</u> 600 hours of <u>instruction and training</u> and include training as described in this part.</p> <p>making the following change to item B:</p> <p>. . . and instruction in related theory and sciences <u>instruction</u>.</p> <p>making the following change to item D:</p> <p>. . . theoretical theory <u>theory</u> and safety instruction . . .</p>

¹⁶ Underline indicates recommended insertions. Strikethrough indicates recommended deletions.

Proposed rule	could be improved by;
2110.0525	<p>making the following change to item D:</p> <p style="padding-left: 40px;">. . . at least 150 hours of theoretical <u>theory</u> instruction . . .</p> <p>making the following change to item E:</p> <p style="padding-left: 40px;">A school must provide a student with <u>theory</u> theoretical and safety instruction . . .</p>
2110.530	<p>making the following change to item A:</p> <p style="padding-left: 40px;">Nail technician training must consist of <u>at least</u> 350 hours of <u>instruction and training</u> and include training as described in this part.</p> <p>making the following change to item B:</p> <p style="padding-left: 40px;">. . . and instruction in related theory and sciences <u>instruction</u>.</p> <p>making the following change to item D:</p> <p style="padding-left: 40px;">. . . theoretical <u>theory</u> and safety instruction</p>
2110.0580	<p>making the following change:</p> <p style="padding-left: 40px;">Eyelash technician training must consist of a curriculum of 14 hours, including items B and C.</p> <p style="padding-left: 40px;">B. Eyelash technician training must include 8 hours of preclinical theoretical instruction. . . .</p> <p style="padding-left: 40px;">C. Eyelash technician training must include 6 hours of clinical <u>practical</u> instruction in the practical application of eyelash extensions, including client consultation, design, cleansing the eye area, applying eyelash extension, and removing eyelash extensions. <u>Clinical Practical</u> instruction must not begin until the student has completed all of the theoretical <u>theory</u> instruction hours.</p>

J. S.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the
Board of Cosmetologist Examiners
Relating to Education, Licensing, and
Practice of Cosmetology, Minnesota Rules
Chapter 2110

**REPORT OF
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Ann C. O'Reilly for a rulemaking hearing on December 12, 2022. The public hearing was held online via interactive video conference and telephone connection using WebEx technology.

The Board of Cosmetologist Examiners (Board) proposes to amend Minnesota Rule chapter 2110, the rules governing cosmetology schools, instructors, practitioners, and school managers. The proposed rules address student records, school curriculum, school and clinic operations, instructor ratios, high school cosmetology programs, practitioner licensing requirements, and other regulations for schools training cosmetologists and other licensed professionals in the beauty industry.

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act (APA).¹ The purpose of this process is to ensure that state agencies meet all requirements established by law for adopting rules.

The hearing process permits agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss, and critique the proposed rules.

The hearing was open to all members of the public who wished to attend. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules. Five members of the public made statements or asked questions during the hearing.² Fifty-four individuals submitted written comments during the prehearing comment period³ and four individuals submitted written comments after the hearing.⁴

¹ See Minn. Stat. §§ 14.131-.20 (2022).

² See Hearing Transcript (Hearing Tr.).

³ Written comments from Lara Kelley were signed by 33 individuals, commenting on 26 separate rule parts. See Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

⁴ See eComments PDF Reports (Nov. 4, 2022 and Dec. 19, 2022); Written Comments from Lee McGrath, Institute for Justice, were received on December 20, 2022, and, although untimely, have been included in the hearing record.

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for five business days, until December 19, 2022, to permit interested persons and the Board to submit written comments. Following the initial comment period, the hearing record was open an additional five business days to permit interested parties and the Board an opportunity to reply to earlier-submitted comments.⁵ The hearing record closed on December 27, 2022.

Due to the number and complexity of the comments received, the Chief Administrative Law Judge extended the due date for the Administrative Law Judge's Report to January 30, 2023.⁶

SUMMARY OF CONCLUSIONS

The Board has complied with all procedural requirements of rule and law. The Board also has the legal authority to adopt the proposed rules. The Board has established that the approved rules are needed, reasonable, and not substantially different from those noticed in the *State Register*. The Administrative Law Judge **APPROVES** the proposed rules, as written or modified by the Board in response to comments, with the exception of the following rules, which are **DISAPPROVED**:

- 2110.0510
- 2110.0520
- 2110.0525
- 2110.0530
- 2110.0580
- 2110.0590

In certain rules, the Administrative Law Judge has made technical recommendations for modifications to improve clarity or consistency. These suggestions are not defects and would not result in substantially different rules. The Board can accept or reject these recommendations.

The Administrative Law Judge **APPROVES** the repeal of the following rules:

- 2110.0010, subps. 14, 15
- 2110.0100 (in its entirety)
- 2110.0320, subps. 9, 11, 12
- 2110.0330, subps. 3, 4, 5
- 2110.0390, subp. 3a
- 2110.0410, subp. 2
- 2110.0710 (in its entirety)

⁵ See Minn. Stat. § 14.15, subd. 1.

⁶ Order Extending Deadline (Jan. 26, 2023).

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

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. Minnesota law declares “that the health and safety of the people of the state are served by the licensing of the practice of cosmetology because of infection control and the use of chemicals, implements, apparatus, and other appliances requiring special skills and education.”⁷ To this end, the Legislature found that “the public would best be served by vesting these responsibilities in the Board of Cosmetologist Examiners.”⁸

2. Consequently, the Board is the regulatory agency charged with the licensing and regulation of cosmetologists, estheticians, advanced practice estheticians, nail technicians, eyelash technicians, salon managers, salons, instructors, school managers, and cosmetology schools in Minnesota.⁹

3. There are currently approximately 33,000 practitioners, 5,200 salons, and 38 schools licensed by the Board.¹⁰

4. The Board is comprised of seven members appointed by the Governor, as well as a small staff.¹¹

5. The rules for cosmetology schools and licensing training program requirements in Minnesota Rule chapter 2110 have not been updated in decades and are thus necessary to reflect current practices in the industry, clarify procedures, and remove unnecessary, conflicting, burdensome, or confusing requirements.¹²

6. To this end, the Board proposes to amend 28 rule parts, repeal two rules in their entirety (Rules 2110.0100 and 2110.0710) and promulgate four new rules.¹³

II. Rulemaking Authority

7. The Board’s authority to adopt rules is set forth in various provisions of Minnesota Statute chapter 155A (2022), the cosmetology statutes.

8. Minn. Stat. § 155A.26 generally states that the Board “may develop and adopt rules according to chapter 14 that the [B]oard considers necessary to carry out sections 155A.21 to 155A.36.”

⁷ Minn. Stat. § 155A.21 (2022).

⁸ *Id.*

⁹ Exhibit (Ex.). D at 5 (SONAR).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 6.

9. Minn. Stat. § 155A.27 provides that licensing for cosmetologists, estheticians, nail technicians, eyelash technicians, advanced practice estheticians, managers, and instructors:

shall be determined by the board and established by rule, and shall include educational and experiential prerequisites. The rules shall require a demonstrated knowledge of procedures necessary to protect the health and safety of the practitioner and the consumer of cosmetology services, including but not limited to infection control, use of implements, apparatuses and other appliances, and the use of chemicals.

10. Minn. Stat. § 155A.30, subd. 2, authorizes the Board, by rule, “to establish minimum standards of course content and length specific to the educational preparation prerequisites to testing and licensing as cosmetologist, esthetician, and nail technician.”

11. Minn. Stat. § 155A.30, subd. 3(8), authorizes the Board to establish, by rule, financial guarantees to assure the protection of the public.

12. Minn. Stat. § 155A.30, subd. 6(c), authorizes the Board to establish rules and forms related to the application for renewal of licenses.

13. Given the legislative authority to adopt rules needed and reasonable to accomplish the purposes of Minnesota Statute chapter 155A, the Administrative Law Judge finds that the Board has the legal authority to adopt the proposed rules.

III. Procedural Requirements of Minnesota Statute Chapter 14 and Minnesota Rules Chapter 1400

A. Request for Comments

14. Minn. Stat. § 14.101 (2022) requires that an agency, at least 60 days prior to the publication of a notice of intent to adopt rules or a notice of hearing, solicit comments from the public on the subject matter of a proposed rulemaking. Such notice must be published in the *State Register*.¹⁴

15. On October 11, 2021, the Board published in the *State Register* a Request for Comments seeking comments on the proposed changes to Minnesota Rule Part 2110.¹⁵

16. The Request for Comments was published at least 60 days prior to the publication of the Notice of Intent to Adopt Rules, as discussed below.

17. Approximately 18 people submitted comments on the proposed rule changes.¹⁶

¹⁴ Minn. Stat. § 14.101.

¹⁵ Ex. A1 (Request for Comments).

¹⁶ Ex. A2 (Request for Comments, Comments Received).

18. The Administrative Law Judge finds that the Board complied with the requirements set forth in Minn. Stat. § 14.101.

B. Publication of Notice of Hearing

19. Minn. Stat. § 14.14, subd. 1a, and Minn. R. 1400.2080, subp. 6 (2021), require that an agency publish in the *State Register* a notice of hearing at least 30 days prior to the date of hearing and at least 30 days prior to the end of the comment period.

20. An agency may request approval of its Dual Notice of Intent to Adopt Rules and Notice of Hearing (Dual Notice) by an administrative law judge prior to service.¹⁷

21. The Board requested approval of its Dual Notice on September 2, 2022; and submitted a revised Dual Notice for approval on September 8, 2022.¹⁸

22. On September 9, 2022, the Administrative Law Judge approved the Board's revised Dual Notice for form and substance.¹⁹

23. The Dual Notice (as revised) was published in the *State Register* on September 26, 2022.²⁰ The Notice of Hearing informed the public that the hearing would take place via WebEx on December 12, 2022; that the initial comment period closed five working days after the hearing date (but could be extended up to 20 calendar days by the Administrative Law Judge); and that a five-working-day rebuttal period followed the close of the comment period.²¹ The Notice of Hearing was published more than 30 days prior to the hearing date and the end of the comment period (end of comment period was November 4, 2022).²²

24. The Dual Notice identified the date and time of the hearing in this matter.²³ The hearing was conducted on WebEx. The Dual Notice informed the public how to access the WebEx hearing via an internet accessible device (computer, smartphone, or tablet) or by telephone.²⁴

25. The Notice of Hearing contained all information required in Minn. Stat. §§ 14.14, .22, and Minn. R. 1400.2080.

¹⁷ Minn. R. 1400.2080 (2021); Minn. Stat. § 14.22 (2022).

¹⁸ Letter requesting review and approval of Dual Notice and Additional Notice Plan (Sept. 2, 2022); Letter requesting review and approval of Revised Dual Notice (Sept. 8, 2022).

¹⁹ Order on Request for Review and Approval of Additional Notice Plan and Dual Notice (Sept. 9, 2022).

²⁰ Ex. F2 (Dual Notice as published in *State Register*).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

C. Notice Requirements

1. Notice to Official Rulemaking List

26. Minn. Stat. § 14.14, subd. 1a, requires that each agency maintain a list of all persons who have registered with the agency for the purpose of receiving notice of rule proceedings.

27. On September 21, 2022, the Board emailed all persons and entities on its official rulemaking list.²⁵ The email contained hyperlinks to copies of the Dual Notice, proposed rules, and Statement of Need and Reasonableness.²⁶ The Board also certified the accuracy of its rulemaking mailing list.²⁷

28. The Dual Notice advised that the initial comment period would expire on November 4, 2022.²⁸

29. Minn. Stat. § 14.14, subd. 1a, requires that agencies give notice of intent to adopt rules by U.S. mail or electronic mail to all persons on its official rulemaking list at least 30 days before the date of hearing.

30. Minn. R. 1400.2080, subp. 6, provides that a notice of hearing or notice of intent to adopt rules must be mailed at least 33 days before the end of the comment period or the date of the hearing.

31. There were at least 33 days between the date of service of the Dual Notice on the rulemaking list (September 21, 2022) and the end of the comment period (November 4, 2022).

32. The Administrative Law Judge concludes that the Board fulfilled the notice requirements set forth in Minn. Stat. § 14.14 and Minn. R. 1400.2080, subp. 6.

2. Additional Notice

33. Minn. Stat. § 14.14, subd. 1a(a), requires that an agency make reasonable efforts to notify persons or classes of persons who may be significantly affected by the rule being proposed by giving notice of its intent to adopt rules. Such notice may be made in newsletters, newspapers, or other publications, or through other means of communication.²⁹ This notice is referred to as “additional notice” and is detailed by an agency in its Additional Notice Plan.

²⁵ Ex. G-1 (Certificate of Mailing Dual Notice of Hearing on Rulemaking List); Ex. F1 (email to rulemaking list).

²⁶ *Id.*

²⁷ Exs. G-2 (Certificate of Accuracy of Mailing List).

²⁸ Ex. F1 (email to rulemaking list); Ex. F2 (Dual Notice as contained as a hyperlink in the email to rulemaking list).

²⁹ Minn. Stat. § 14.14, subd. 1a(a).

34. Minn. Stat. §§ 14.131, .23 (2022) require that an agency include in its Statement of Need and Reasonableness (SONAR) a description of its efforts to provide additional notice. Alternatively, the agency must detail why additional notification efforts were not made.³⁰

35. An agency may request approval of its Additional Notice Plan by an administrative law judge prior to service.³¹

36. The Board requested approval of its Additional Notice Plan on September 2, 2022.³²

37. On September 9, 2022, the Administrative Law Judge approved the Board's Additional Notice Plan, with certain additional requirements.³³ The Judge required that the Board's Additional Notice Plan be revised to: (a) provide email notice to the 5,200 salons licensed by the Board; and (b) provide email or mailed notice to all of the 38 schools licensed by the Board.³⁴

38. The Board revised its draft SONAR to reflect its revised Additional Notice Plan.³⁵ The Board provided notice according to the approved revised Additional Notice Plan, by serving, on September 21, 2022, a copy of, or hyperlink to, the Dual Notice, SONAR and proposed rules on the individuals, organizations, schools, salons, licensees, associations, and governmental agencies identified in the Additional Notice Plan contained in the final SONAR.³⁶ Hyperlinks to the Dual Notice, SONAR, and proposed rules were:

- Emailed to every Board licensee with an email address on file with the Board (approximately 32,340 licensees);
- Emailed to every Board-licensed salon with an email address on file with the Board (approximately 5,148 salons);
- Emailed or mailed to all 38 cosmetology schools licensed by the Board;
- Posted on the Board's website and Facebook page;
- Available in hardcopy form to all visitors at the Board office;

³⁰ Minn. Stat. §§ 14.131, .23.

³¹ Minn. R. 1400.2060, subp. 3 (2021).

³² Letter requesting review and approval of Dual Notice and Additional Notice Plan (Sept. 2, 2022).

³³ Order on Request for Review and Approval of Additional Notice Plan and Dual Notice (Sept. 9, 2022).

³⁴ *Id.*

³⁵ See Ex. D at 44.

³⁶ Ex. H (Certificate of Mailing Dual Notice pursuant to Additional Notice Plan).

- Emailed to the Sale and Spa Professional Association, the Beauty Certified Education Association, and the Minnesota Office of Higher Education.³⁷

39. The Administrative Law Judge finds that the Board complied with the Additional Notice Plan set forth in its SONAR and fulfilled the additional notice requirements set forth in Minn. Stat. §§ 14.14, subd. 1a(a), .131, .23.

3. Notice to Legislators

40. Minn. Stat. § 14.116 (2022) requires the agency to send a copy of the Dual Notice and the SONAR to certain legislators and the Legislative Coordinating Commission at the time it serves its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.³⁸

41. On September 21, 2022, the Board emailed a copy of the Dual Notice, SONAR, and proposed rules to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the proposed rules,³⁹ and to the Legislative Coordinating Commission, in compliance with Minn. Stat. § 14.116.⁴⁰

42. The Administrative Law Judge concludes that the Board fulfilled its responsibilities under Minn. Stat. § 14.116.

4. Notice to the Legislative Reference Library

43. Minn. Stat. §§ 14.23, .131 and Minn. R. 1400.2070, subp. 3 (2021), require the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is served.

44. On September 21, 2022, the Board mailed a copy of the SONAR to the Legislative Reference Library.⁴¹

45. The Administrative Law Judge concludes that the Board fulfilled its responsibilities under Minn. Stat. §§ 14.23, .131.

5. Notice of Impact on Farming Operations

46. Minn. Stat. § 14.111 (2022) imposes additional notice requirements when the proposed rules affect farming operations.

³⁷ *Id.*

³⁸ Minn. Stat. § 14.116.

³⁹ Emails were sent to Sen. Mary Kiffmeyer; Sen. James Carlson, Rep. Michael Nelson, and Rep. James Nash. See Ex. K2.

⁴⁰ Exs. K2 (Certificate of Sending Notice and SONAR to Legislators and Legislative Coordinating Commission, along with a copy of the email sent).

⁴¹ Ex. E (letter to Legislative Reference Library).

47. The proposed rules do not impact farming operations. Therefore, no additional notice is required.⁴²

48. The Administrative Law Judge concludes that the Board fulfilled its responsibilities under Minn. Stat. § 14.111.

D. Rule Hearing

49. A remote hearing was held on December 12, 2022.⁴³ The hearing was conducted by videoconferencing and telephone using WebEx technology. Members of the public who did not have access to the internet were able to call into the hearing and participate through audio.

50. At the hearing, the Board submitted copies of the following documents, as required by Minn. R. 1400.2220 (2021):

- Ex. A the Board's Request for Comments as published in the *State Register* on November 4, 2019;
- Ex. B Petition for Rulemaking (omitted as not applicable);
- Ex. C1 the proposed rules dated August 29, 2022;
- Ex. C2 Revisor's Certificate of Approval;
- Ex. D the SONAR, dated September 13, 2022;
- Ex. E a copy of the transmittal letter of the SONAR to the Legislative Reference Library on September 21, 2022;
- Ex. F1 the email sent on September 21, 2022, to Additional Notice list;
- Ex. F2 the Dual Notice as published in the *State Register* on September 26, 2022;
- Ex. G1 Certificate of Mailing the Dual Notice;
- Ex. G2 Certificate of Accuracy of the Mailing List;
- Ex. H the Certificate of Giving Additional Notice (September 21, 2022);
- Ex. I written comments received on or before November 4, 2022;

⁴² Ex. D at 44 (SONAR).

⁴³ See Hearing Tr.

- Ex. J Omitted by Board as inapplicable;
- Ex. K-1 Board Resolution Authorizing Rulemaking;
- Ex. K-2 Certificate of Notice to Legislators dated September 21, 2022;
- Ex. K-3 Letter to Minnesota Management and Budget dated September 21, 2022.
- Ex. L Board response to pre-hearing comments; and
- Ex. M Copy of the Proposed Rules as “approved” by the Board (dated September 26, 2022).

51. The Board’s witness at the public hearing was Jill Freudenwald, Board Chief of Staff. Also available at the hearing to answer questions by the public were: Gina Fast, Board Executive Director, Nora Wakefield, Board Member and School Liaison; and Board members Ronda Besel, Marcie Smith-Fields, and Mahogany Plautz.

52. Ms. Freudenwald offered the Board’s exhibits and explained the background of the Board, the Board’s legal authority to promulgate rules, the need for the rulemaking, and the reasonableness of the proposed rules.⁴⁴

53. The hearing was open to the public. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules. The Administrative Law Judge left the initial post-hearing comment period open until December 19, 2022, and the rebuttal period ended on December 27, 2022.⁴⁵

54. Five members of the public made statements or asked questions during the hearing.⁴⁶ Fifty-four written comments were received during the pre-hearing comment period ending November 4, 2022.⁴⁷ Four comments were received at the close of the post-hearing comment period (ending December 19, 2022).⁴⁸

55. The Board filed Responses to Prehearing Comments as Exhibit L.⁴⁹ The Responses included numerous modifications to the proposed rules.⁵⁰

56. The Board filed Preliminary Responses to Hearing Comments in eComments on December 16, 2022, and Rebuttal Responses on December 22, 2022,

⁴⁴ Hearing. Tr. at 23-31.

⁴⁵ Administrative Law Judge’s PowerPoint Presentation at Rule Hearing on file and of record at the Off. of Admin. Hearings.

⁴⁶ See Hearing Tr.

⁴⁷ Ex. I (pre-hearing comments).

⁴⁸ See eComments PDF Report (Dec. 19, 2022). One comment from Lobbyist Lee McGrath was filed on Dec. 20, 2022 but has been accepted into the hearing record.

⁴⁹ Board Responses to Prehearing Comments (Ex. L).

⁵⁰ *Id.*

both of which included additional modifications to the rules. The hearing record closed on December 27, 2022, the deadline to file rebuttal comments.

57. At the request of the Administrative Law Judge, on January 19, 2023, the Board filed Exhibit N, a summary of modifications to the proposed rule made by the Board after publication of the rule.

IV. Statutory Requirements for the SONAR

A. Regulatory Factors

58. The Administrative Procedure Act requires an agency adopting rules to address eight factors in its SONAR.⁵¹ Those factors are:

- (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 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;
- (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; and

⁵¹ Minn. Stat. § 14.131.

- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule and reasonableness of each difference.⁵²

1. Classes of Persons Affected, Benefitted, or Bearing Costs of the Proposed Rule

59. In the SONAR, the Board describes the classes of persons who will likely be affected by the proposed rules, including the classes of persons that will bear the costs of the proposed rules and the classes that will benefit from the proposed rules.⁵³

60. The Board explained that the classes of person affected or benefitted by the proposed rules include cosmetology schools, instructors, school managers, applicants for school licenses, students who are applying to attend or attending cosmetology schools, and clients who receive cosmetology services from students.⁵⁴

61. With respect to the persons or entities that will bear the costs of the proposed rule, the SONAR identifies licensed cosmetology schools.⁵⁵ Although not identified in the SONAR, students will also bear costs of the new regulations as they relate to new requirements for training and licensing.

2. Probable Costs to the Board and Other Agencies for Implementation and Enforcement and Effect on State Revenues

62. The SONAR next analyzes the probable costs to the Board and to other agencies in implementing and enforcing the proposed rule changes, as well as what effect the proposed rules may have on state revenues.⁵⁶

63. The Board estimates that there will be minimal costs to the agency as a result of the proposed rules.⁵⁷ These costs will be related to licensing software and staff time for implementation.⁵⁸ There is no anticipated effect on state revenue as the rules should not impact the number of new applicants for licensure or renewal.⁵⁹

3. Less Costly or Less Intrusive Methods for Achieving the Purpose of the Proposed Rule

64. The SONAR is required to evaluate whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule changes.⁶⁰

⁵² *Id.*

⁵³ Ex. D at 42 (SONAR).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 42.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Minn. Stat. § 14.131(3).

65. The SONAR notes that, where the Board found current rules to be unnecessary, those rules were repealed or removed.⁶¹ According to the Board, “[i]n most instances, there were no other methods found which would achieve the purpose of the rule draft or rule change.”⁶² When alternatives were considered, the Board asserts that it chose the least costly and least intrusive option.⁶³ The SONAR does not identify the rules for which the Board considered alternative methods or what alternative methods were considered.

66. Ultimately, the Board concluded that there are no less costly or less intrusive alternatives for achieving the purposes of the proposed rules.⁶⁴

4. Description of Alternative Methods for Achieving the Purpose of the Proposed Rule Considered by the Board and Why Alternatives Were Rejected

67. By law, the SONAR must describe alternative methods for achieving the purposes of the proposed rule that were considered by the agency and why the alternatives were rejected.⁶⁵

68. For this factor, the Board merely states:

When an alternative method for achieving the purpose of the proposed rule was seriously considered by the Board, the reasons the alternative methods were rejected in favor of the proposed rule are discussed in the rule-by-rule analysis.⁶⁶

69. The SONAR does not address alternative methods in its rule-by-rule analysis.

5. Probable Costs of Complying with Proposed Rules, Including the Portion of the Total Costs Borne by Identifiable Categories of Affected Parties

70. The SONAR is required to identify the probable costs for complying with the proposed rules, as well as the costs that will be borne by identifiable categories of affected parties.⁶⁷

71. The SONAR addresses this factor by stating that the costs of the proposed rules will fall solely on cosmetology schools.⁶⁸ The SONAR vaguely addresses these costs in the rule-by-rule analysis. Overall, the Board engaged in a superficial cost analysis

⁶¹ Ex. D at 42 (SONAR).

⁶² *Id.* at 42.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Minn. Stat. § 14.131(4).

⁶⁶ Ex. D. at 43 (SONAR).

⁶⁷ Minn. Stat. § 14.131(5).

⁶⁸ Ex. D at 43 (SONAR).

and concluded that the added costs to schools will be “minimal.” The Board did not analyze the probable costs to students and licensees related to the new licensing and training requirements for each of the five practice areas in cosmetology. Because the Board is not including the clinical service exercise requirements in its rules, neither schools nor students/licensees could estimate the costs that they will bear as a result of the rules. This material defect is addressed with respect to Rules 2110.0510, .0520, .0525, .0530, and .0580, which have been disapproved, below.

72. In its review of the proposed rules, Minnesota Management and Budget (MMB) concluded:

The proposed rule changes would not have any material impact on local units of government. The impact, and any costs, of the rule changes would be borne by the Board itself and by cosmetology schools. These costs [to the Board], which would be minimal, would be in the form of staff time required to implement and abide by the amended rules. There are no anticipated changes to state revenue, as the changes are not anticipated to cause any changes in the number of licensure applications.⁶⁹

73. While MMB addresses the costs to the State and the Board, it does not identify the costs that will be borne by cosmetology schools, students, and prospective licensees.⁷⁰

74. With respect to the approved rules, the Administrative Law Judge concludes that the Board has undertaken a basic assessment of the probable costs of complying with the proposed rules for cosmetology schools in its SONAR. With respect to disapproved Rules 2110.0510, .0520, .0525, .0530, and .0580, the Board may present additional cost analyses should it modify the disapproved rules and re-submit them for approval after modification to correct defects.

6. Probable Costs or Consequences of not Adopting the Proposed Rules, Including Costs Borne by Individual Categories of Affected Parties

75. In the SONAR, the Board is required to evaluate the probable costs or consequences of not adopting the proposed rule changes, and identify the costs borne by individual categories of affected parties if the proposed rules are not adopted.⁷¹

76. The SONAR states:

The consequences of not adopting the proposed rules includes the continuation of unnecessary requirements for schools, which may result in increased costs in opening new schools and delays for new students seeking to enroll. In addition, lack of clarity in a few specific rule citations

⁶⁹ Ex. K-3 (MMB letter).

⁷⁰ *Id.*

⁷¹ Minn. Stat. § 14.131(6).

will continue to leave licensees and applicants confused about requirements.⁷²

77. While vague and lacking detail, the Board's explanation is acceptable, given the scope of the rule changes.

7. Assessment of Differences Between Proposed Rules and Existing Federal Regulations

78. The law requires that the Board assess the differences between the proposed rules and existing federal regulations.⁷³

79. The SONAR states that there are no existing federal regulations specific to the practice of cosmetology.⁷⁴ Therefore, the Board asserts that this factor is inapplicable to its analysis.⁷⁵

80. The Administrative Law Judge concludes that there is no evidence in the record that the proposed rules would conflict with any federal regulations.

8. Cumulative Effect of the Rule with Other Federal and State Regulations

81. The SONAR is required to assesses the cumulative effect of the proposed rule changes with other federal and state regulations related to the specific purpose of the proposed rules.⁷⁶

82. The SONAR states that cosmetology is not regulated by federal law and that the Board is the only state authority regulating the practice. Therefore, the Board asserts that this factor is not relevant in its analysis.

83. The Administrative Law Judge notes that the rules, as originally proposed, conflicted with Minnesota law relating to the training requirements for eyelash technicians. (See discussion below related to proposed Rule 2110.0580.) When confronted with this conflict, the Board modified the proposed rule to comply with Minnesota statutes, thereby remedying the conflict.

84. The Board is alerted to conflicts that will exist between Minnesota Rule chapters 2105 and 2110, once these rules are implemented. These conflicts are addressed by the Administrative Law Judge below in the rule-by-rule analysis.

⁷² Ex. D at 43 (SONAR).

⁷³ Minn. Stat. § 14.131(7).

⁷⁴ Ex. D. at 43 (SONAR).

⁷⁵ *Id.*

⁷⁶ Minn. Stat. § 14.131(8).

B. Performance-Based Regulation

85. The Administrative Procedure Act requires an agency to describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems.⁷⁷ 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.⁷⁸

86. The SONAR states that, by clarifying procedures and processes, the proposed rule amendments will "help applicants and licensees to comply with requirements designed to protect the health and safety of the public."⁷⁹ The Board notes that certain rules, particularly those related to student record requirements, are necessarily prescriptive to protect the student's investment in the education and training.⁸⁰ Other rules, however, are designed to provide more flexibility to licensees and applicants.⁸¹

87. The Administrative Law Judge finds that the Board adequately addresses the requirement of performance-based regulations in its rulemaking.

C. Consultation with the Commissioner of Minnesota Management and Budget

88. Minn. Stat. § 14.131 requires that agencies consult with the Commissioner of Minnesota Management and Budget (MMB) to help evaluate the fiscal impact and fiscal benefits of the proposed rule on local units of government.

89. At some point in the rulemaking process, the Board sent MMB a copy of the proposed rules and the draft SONAR for review and analysis under Minn. Stat. § 14.131.⁸²

90. On August 12, 2022, MMB issued a Memorandum analyzing the fiscal impacts and benefits of the proposed rules on local units of government.⁸³ MMB concluded:

The proposed rule changes would not have any material impact on local units of government. The impact, and any costs, of the rule changes would be borne by the Board itself and by cosmetology schools. These costs [to the Board], which would be minimal, would be in the form of staff time required to implement and abide by the amended rules. There are no

⁷⁷ Minn. Stat. §§ 14.002, .131 (2022).

⁷⁸ Minn. Stat. § 14.002.

⁷⁹ Ex. D. at 44-45 (SONAR).

⁸⁰ *Id.* at 45.

⁸¹ *Id.*

⁸² *Id.*; Ex. K-3 (MMB letter).

⁸³ Ex. K-3 (MMB letter).

anticipated changes to state revenue, as the changes are not anticipated to cause any changes in the number of licensure applications.⁸⁴

91. The Administrative Law Judge finds that the Board fulfilled its legal requirements to consult with the MMB under Minn. Stat. § 14.131.

D. Summary of Requirements Set Forth in Minn. Stat. § 14.131

92. The Administrative Law Judge finds that the Board 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, and the fiscal impact on units of local government.

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

93. Minn. Stat. § 14.127 (2022) requires the Board to “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.” The Board 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.⁸⁵

94. The Board determined that the cost of complying with the proposed rule changes will not exceed \$25,000 for any business or any statutory or home rule charter city in the first year after the rule takes effect.⁸⁶ The SONAR does not identify or detail any of the costs that cosmetology schools will incur as a result of the proposed rules, but states that it will be “minimal.” Because the Board has not identified the clinical service exercises that it will require for each of the five practice specialties, the costs to schools has not been fully evaluated to determine if any school will incur more than \$25,000 in costs.

95. There is no evidence in the record that any city will incur expenses as a result of the proposed rule.

96. Except for the disapproved rules below,⁸⁷ the Administrative Law Judge finds that the Board has made the determinations required by Minn. Stat. § 14.127 and approves those determinations with respect to the approved rules.

F. Adoption or Amendment of Local Ordinances

97. Under Minn. Stat. § 14.128 (2022), the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close

⁸⁴ *Id.*

⁸⁵ Minn. Stat. § 14.127, subs. 1, 2.

⁸⁶ Ex. D at 45 (SONAR).

⁸⁷ See discussions in Parts 2110.0510, .0520, .0525, .0530, and .0580, below.

of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.⁸⁸

98. The Board concluded that no local government would need to adopt or amend an ordinance or other regulation to comply with the proposed rules.⁸⁹

99. There is no evidence in the record that any local ordinance or regulation will be impacted.

100. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.

V. Public Comments

101. Fifty-four individuals submitted written comments during the prehearing comment period, most of which were signed by a group of approximately 34 people, including the comment drafter (Lara Kelley).⁹⁰ These comments challenged 26 of the 28 proposed rules.⁹¹

102. Five members of the public made statements or asked questions during the hearing.⁹²

103. Four written comments were received after the hearing.⁹³

104. The Board made modifications to the rules on December 7, 16, and 22, 2022.⁹⁴

105. Nearly every rule was challenged by commenters. Comments received and modifications made by the Board are detailed in the rule-by-rule analysis below.

VI. Rulemaking Legal Standards

106. Under the Minnesota Administrative Procedure Act and associated rules, an agency proposing to adopt rules must: (1) establish its statutory authority to adopt the proposed rules; (2) show that it has fulfilled all relevant legal and procedural requirements; and (3) demonstrate the need for and reasonableness of each portion of the proposed rules with an affirmative presentation of facts.⁹⁵

⁸⁸ Minn. Stat. § 14.128, subd. 1.

⁸⁹ Ex. D at 45 (SONAR).

⁹⁰ See Ex. I (eComments PDF Reports (Nov. 4, 2022)).

⁹¹ *Id.*

⁹² See Hearing Tr.

⁹³ See eComments PDF Report (Dec. 19, 2022). A written comment from Lee McGrath, Institute for Justice, was received on December 20, 2022, and, although untimely, has been included in the hearing record.

⁹⁴ Ex. L (Board's Responses to Prehearing Comments); Board's Preliminary Responses to Hearing Comments; Board Rebuttal Responses.

⁹⁵ Minn. Stat. §§ 14.05, subd. 1; .14, subd. 2 (2022); Minn. R. 1400.2100 (2021).

107. Pursuant to Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,⁹⁶ “legislative facts” (namely, general and well-established principles that are not related to the specifics of a particular case, but that guide the development of law and policy),⁹⁷ and the agency’s interpretation of related statutes.⁹⁸

108. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”⁹⁹ By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”¹⁰⁰

109. An important corollary to these standards is that, when proposing new rules, an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.¹⁰¹ Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.¹⁰²

110. A rule must be disapproved if it:

- was not adopted in compliance with procedural requirements of Minn. Stat. ch. 14 and Minn. R. part 1400 (unless the administrative law judge decides that the error is harmless error under Minn. Stat. §§ 14.15, subd. 5 or 14.26, subd. 3(d));
- is not rationally related to the agency’s objective or the record does not demonstrate the need for or reasonableness of the rule;
- is substantially different than the proposed rule, and the agency did not follow the procedures of Minn. R. 1400.2110;
- exceeds, conflicts or does not comply with, or grants the agency discretion beyond that which is allowed by law, its enabling statutes or other applicable law;

⁹⁶ See *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

⁹⁷ Compare generally, *U.S. v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

⁹⁸ See *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

⁹⁹ *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

¹⁰⁰ See *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

¹⁰¹ *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

¹⁰² *Minn. Chamber of Commerce*, 469 N.W.2d at 103.

- is unconstitutional or illegal;
- improperly delegates the agency's powers to another agency, person or group;
- is not a "rule" as defined in Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; or
- is subject to Minn. Stat. § 14.25, subd. 2, and the notice that hearing requests have been withdrawn and written response to it show that the withdrawal is not consistent with Minn. Stat. § 14.001(2), (4) and (5).¹⁰³

111. Because the Board made changes to the proposed rules after the date the rules were originally published in the *State Register*, it is necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.¹⁰⁴

112. During the response and rebuttal period, the Board detailed revisions it would make to the proposed rules in response to the stakeholder feedback received during the hearing and comment period. On December 12, 16, and 22, 2022, the Board filed responses and modifications to the proposed rules.¹⁰⁵

113. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2 (2022). The statute specifies that a modification does not make a proposed rule substantially different if:

- (1) 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;
- (2) the differences are a logical outgrowth of the contents of the notice of hearing, and the comments submitted in response to the notice; and
- (3) the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.¹⁰⁶

¹⁰³ Minn. R. 1400.2100.

¹⁰⁴ Minn. R. 1400.2110.

¹⁰⁵ See Ex. L (Board Response to Prehearing Comments), Board Preliminary Responses to Hearing Comments (Dec. 16, 2022), Board Rebuttal Responses to Comments (Dec. 22, 2022), and Ex. N (Board Summary of Modifications to Rules).

¹⁰⁶ Minn. Stat. § 14.05, subd. 2.

114. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider whether:

- (1) persons who will be affected by the rule should have understood that the rulemaking proceeding could affect their interests;
- (2) the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the hearing notice; and
- (3) the effects of the rule differ from the effects of the proposed rule contained in the hearing notice.¹⁰⁷

VII. Rule-by-Rule Analysis

115. This Report will not address rules that received no public comment or had no modifications by the Board after publication. Unopposed rules were reviewed and determined to be adequately supported by the SONAR. The discussion that follows below focuses on those portions of the proposed rules as to which commentators asserted a genuine dispute as to the language used in the rules, practical issues with implementation of the rules, rule defects, or other legal issues.

116. The Administrative Law Judge finds that the Board has demonstrated by an affirmative presentation of facts the need for, and reasonableness of, all rule provisions that are not specifically addressed in this Report.

117. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by law and that there are no other defects that would bar the adoption of those rules.

A. Part 2110.0010: Definitions

118. The proposed amendments to Rule 2110.0010 set forth five new definitions to be used in interpreting the rules: “course completion certificate,” “introductory service skills,”¹⁰⁸ “practical instruction,” “preclinical instruction,” and “theory instruction.”¹⁰⁹

119. Several comments assert that these definitions are overly burdensome, unclear, and redundant, but did not provide further elaboration.¹¹⁰

¹⁰⁷ See Minn. Stat. § 14.05, subd. 2.

¹⁰⁸ Commenter Alva McMillan questioned why mannequin use is included as part of the introductory service skills portion of the training when mannequins cannot be used on the practical skills test. Comments of Alva McMillan (Hearing Tr. at 132-142). The Board responded that mannequins offer a safe way for students to learn in the early portion of training. Board Preliminary Responses to Hearing Comments at 5 (Dec. 16, 2022). This is a reasonable explanation.

¹⁰⁹ The proposed rules do not include a definition for “clinical service exercises.” This is a term that would be helpful to define in the rules, should the Board modify the rules and resubmit them for final approval.

¹¹⁰ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

120. The Administrative Law Judge carefully reviewed the definitions and finds that the definitions of “introductory service skills” (Subpart 17f); “practical instruction” (Subpart 18d); “preclinical instruction” (Subpart 18e); and “theory instruction” (Subpart 19a) are needed and reasonable, assist in the interpretation and understanding of the rules, and are **APPROVED**.

121. Unlike the other definitions, the definition of “course completion certificate” (Subpart 12a), requires some discussion as it relates to several rules disapproved below.

122. As originally proposed, Subpart 12a defines “course completion certificate” as:

“Course completion certificate” means a notarized form that a student must use to obtain a license in Minnesota. A course completion certificate must include a student’s program completion information, including *the number of clinical service exercises* that the student has completed *and the results of the practical skills test*.¹¹¹

123. In its Response to Prehearing Comments, the Board modified Subpart 12a, as follows:¹¹²

“Course completion certificate” means a notarized form provided by the board that a student must use to obtain a license in Minnesota. A course completion certificate must include a student’s program completion information, including the number of clinical service exercises required by the board that the student has completed and the results of the practical skills test.

124. Commenter Lara Kelley and a group of 33 commenters joining her submissions, assert that the definition of “course completion certificate” is “troubling, confusing, irregular, overly-burdensome, and unclear.”¹¹³ These commenters believe that there will need to be different course completion certifications for each of the five practice areas licensed under Board rules: cosmetology, nail technology, estheticians, advanced practice estheticians, and eyelash technicians. This is because each practice area under the proposed rules has its own hourly training and clinical service exercise requirements.¹¹⁴ Therefore, Ms. Kelley argues, the Board will need a separate course completion certificate form for each of the five license types to accurately reflect the hours and clinical service exercises required by the Board for that practice area in proposed rules.

125. By way of explanation, the proposed rules require completion of “clinical service exercises” (or hands-on skills training) in specific topical areas for each practice

¹¹¹ Proposed Rule 2110.0010, subp. 12a (emphasis added).

¹¹² Ex. L at 9 (Board Responses to Prehearing Comments).

¹¹³ Comments of Lara Kelley (joined both others) (Nov. 4, 2022).

¹¹⁴ *Id.*

type.¹¹⁵ However, the proposed rules do not prescribe *the number* of clinical service exercises required for each study topic or the corresponding *number of hours* for those exercises that will be required for licensure. Ms. Kelley asserts that this information will only be available to students, applicants, and schools when the Board decides to update its course completion certificate form, which, she assumes, will list the number of clinical service exercises required for each subject area.

126. Working under this assumption, Ms. Kelley suggests that the Board maintain the course completion certificate on the Board's website for easy access by students and schools, because, without such forms from the Board, neither schools nor students will be able to discern how many clinical service exercises are required in each topic area for each program type, as they are not articulated in the proposed rules.¹¹⁶

127. Under the proposed rules, there are different training hours and course topic requirements for each license area. Each program requires "clinical service exercises" in different categories. The proposed rules, however, do not identify how many hours of clinical service exercises are required for each topic, leaving the schools, students, and prospective students without any knowledge of the Board's requirements for licensure.

128. Currently, to obtain a license for any of the five programs, an applicant must submit to the Board: (1) an application; (2) passing test scores on three *written* exams; and a course completion certificate documenting completion of the education and training required for each program.¹¹⁷ The course completion certificate is the document that the Board uses to ensure that all necessary training and education have been completed by the applicant, as set forth in the rules.

129. The proposed rules (Rules 2110.0510, .0520, .0525, .0530, .0580, .0590) make two important changes to licensure requirements for the five fields of practice: (1) a requirement that a certain number of "clinical service exercises" be completed in the categories identified in the proposed rules for each field of practice; and (2) that a "practical skills test" be taken and reported to the Board. Currently, the licensure rules do not explicitly require any practical skills tests as a requirement of licensure – just three written tests.¹¹⁸ Nonetheless, the existing Rule 2110.0545 requires that schools conduct board-approved "skills tests" to graduate a student from the program.

130. The proposed rules make it clearer that the hands-on practical skills test is a requirement of licensure (not just part of the school curriculum) and that a certain number of clinical service exercises will be required for licensure -- despite the fact that

¹¹⁵ See proposed Rules 2110.0510, .0520, .0525, .0530, .0580.

¹¹⁶ *Id.*

¹¹⁷ Minn. R. 2105.0145 (2021) (Notably, this rule misstates the required training hours for eyelash technicians as 38 hours, which only requires 14 hours of total training. See 2016 Minn. Laws Ch. 127, § 8. Accordingly, Rule 2105.0145 is defective and unenforceable, as being contrary to state statute.) The Advanced Practice Esthetician program has slightly different application requirements than the other four practice areas. See Minn. R. 2105.0145, subp. 1a.

¹¹⁸ Minn. R. 2105.0145.

the Board has removed the number of required clinical service exercises from the amended rules.

131. The Board intends the course completion certificate to provide the Board with certification that the applicant has complied with all the education and training required for licensure. However, rather than identify in the rules the number and hours of clinical service exercises needed for licensure in each field, the Board plans to have the course completion certificate identify this information for schools and license applicants.

132. To understand this issue, it is important to have some historical background. Before 2015, the Board licensed individuals in only three practice areas: cosmetology, esthology, and nail technology.¹¹⁹ In 2015 and 2017, respectively, two new practices were added for licensure: advanced practice esthetician and eyelash technology.¹²⁰ With the creation of these two new licenses, the Board needed to identify what clinical service exercises the Board would require to ensure that applicants for licenses were sufficiently trained and qualified.¹²¹ (Clinical exercises are essentially hands-on training in specific skill areas, such as hair coloring, hair styling, etc.)

133. To determine what the clinical service exercise requirements should be for the two new license areas, the Board created a Practical Skills Task Force (Task Force), consisting of 15 school instructors and subject matter experts.¹²² As part of its work, the Task Force also reviewed the clinical exercise requirements set forth in the existing rules for the existing practice areas (cosmetology, esthetician, and nail technology).¹²³ The Task Force determined that clinical exercise requirements were not only needed for the two new practice areas, but that new clinical exercise requirements were needed for the three existing practice areas due to outdated requirements and advances in the industry.¹²⁴

134. It is unclear in the SONAR whether the Task Force ever submitted exact clinical service exercise requirement recommendations to the Board for any of the five practice areas. These recommendations are also currently unknown to the public. The Board's plan is articulated in the SONAR as follows:

Per direction from the Board, the cosmetology clinical service exercises recommended by the Task Force will be approved *once the rules have been amended to remove the number and specific types of clinical service exercises and replace it with a list of topics to be covered* that better reflect the current industry. The Board will also approve the number of clinical service exercises in each category.¹²⁵

¹¹⁹ Ex. D at 23 (SONAR) (emphasis added).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

135. In other words, the Board has proceeded with this rulemaking to: (1) amend the rules so that only the general categories or “topics” for the required clinical service exercises are identified for each practice area; and (2) remove the hours and clinical exercise number requirements (i.e., “quotas”) from the rules. The Board, instead, intends to develop these licensure requirements separately (outside of rulemaking) based upon the Task Force recommendations. It is unclear in the record how these license requirements will be conveyed to schools, applicants, students, or prospective students other than through the course completion certificate.

136. Currently, there is no document available to the public or the Administrative Law Judge that contains the clinical service exercise quotas that will be required by the Board for licensure in any practice area. The Board intends to develop these important licensing requirements *after* the rulemaking proceeding (see discussion with respect to proposed Rule 2110.0510 below).¹²⁶

137. As set forth below, the Administrative Law Judge has disapproved the rules that fail to specify the number and hours of clinical service exercises required for licensure in each practice area (proposed Rules 2110.0510, .0520, .0525, .0530, .0580). If the Board modifies the disapproved rules and inserts the required number and/or hours of clinical service exercises for each topic in each practice area, then the definition of “course completion certificate” will correspond to the rules.

138. As written, the general definition of course completion certificate is sufficiently clear and needed for the rules, once the number and hours of clinical service exercises are added to the rules for each practice area. The definition, as modified, can encompass the various course completion certificate forms that the Board may develop for each practice area based upon the clinical service exercise requirements to be determined by the Board. Accordingly, proposed Rule 2110.0010, subpart 12a, is **APPROVED**.

139. The Administrative Law Judge does make one technical suggestion for clarity that the Board can accept or reject. This modification will not result in a substantially different rule from that originally proposed. The recommended modification is as follows:

“Course completion certificate” means a notarized document in the form provided by the board that a student must use to obtain a license in Minnesota. A course completion certificate must include a student’s program completion information, including the number of clinical service exercises required by the board that the student has completed and the passing results of the practical skills test.

140. Finally, based upon Ms. Kelley’s helpful suggestion for schools and students, the Administrative Law Judge recommends that the Board prepare separate course completion certificate forms for each license type so that the documents accurately reflect the individualized licensure requirements contained in the Board rules

¹²⁶ Ex. L at 9 (Board Responses to Prehearing Comments).

for each specialty. Such forms should be readily available to the public on the Board's website.

B. Part 2110.0125: Inspections

141. The amendment to Part 2110.0125 addresses the inspection of items, tools, or pieces of equipment on school premises that the school or student may use for "regulated services." As originally proposed, the amendment states:

B. An item, a tool, or a piece of equipment on school premises that the school or a student may use for regulated services is subject to inspection, even if the school or student does not intend to use the item, tool, or piece of equipment for services regulated by the board or if a student or school staff person intends to use the item for personal use.

142. A group of commenters asserted that the amendment is overly burdensome on schools, students, and instructors.¹²⁷ These commenters explained that a student may bring in a personal item for their own use (such as a nail file) that they do not intend to use in their clinical exercises. Yet, under the proposed amendment, this item would be subject to inspection by the Board.¹²⁸

143. In its response to prehearing comments, the Board modified Rule 2110.0125 entirely, as follows:¹²⁹

~~Subpart 1—Protocol.~~

~~A.— Each school is subject to inspection at any time the board deems it necessary to affirm compliance. All school staff, including the owner, designated school manager (DSM), instructors, and unlicensed support staff must cooperate with the inspection. The school must allow a board inspector to inspect the school on the inspector's arrival at the school.~~

~~B.— An item, a tool, or a piece of equipment on school premises that the school or a student may use for regulated services is subject to inspection, even if the school or student does not intend to use the item, tool, or piece of equipment for services regulated by the board or if a student or school staff person intends to use the item for personal use.~~

~~C.— Board inspectors must carry board-issued photo identification.~~

¹²⁷ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

¹²⁸ *Id.*

¹²⁹ Ex. L at 2-3 (Board Responses to Prehearing Comments).

Subpart 1. Protocol. Each school is subject to inspection at any time the board deems it necessary to affirm compliance.

A. Schools must allow a board inspector, in the exercise of official duties, to inspect the school on the inspector's arrival at the salon.

B. A school owner and designated school manager must have access to all school space, including leased space within the school, and must provide access to all school spaces to a board inspector.

C. All school staff, including the owner, designated school manager, other licensees, and unlicensed support staff, must cooperate with the inspection.

D. Board inspectors must carry board-issued photo identification and produce it upon request.

144. The Board explains that its revision of the rule was to mirror the language of chapter 2105 and bring the two chapters into “alignment.”¹³⁰

145. The modifications to Part 2110.0125 are reasonable and responsive to the public comment received, correcting any defects in the originally proposed rule. The modifications do not render the rule substantially different and are within the scope of the matter announced in the Notice of Hearing. Accordingly, the Rule 2110.0125, as modified, is **APPROVED**.

C. Part 2110.0310: School Licensure

146. Proposed amendments to Rule 2110.0310 address the process for school licensure.

147. A couple commenters noted that the school’s physical address should be required on Subpart 1, Item A to ensure the information provided is complete and accurate.¹³¹ The Board agreed and modified the rule part according, as follows:

A. the school name and the legal name of the school and the school's owners, and the school's physical address, telephone number, e-mail address, and website;

¹³⁰ Ex. L at 2-3 (Board Responses to Pre-Hearing Comments).

¹³¹ Comments of Susan Brinkhaus, Executive Director of the Salon Spa Professional Association (Nov. 1, 2022); Comments of Katherine Martin (Nov. 3, 2022).

148. The Board also modified Subpart 1, Item R(2)(b), to correct typographical errors as follows:¹³²

(b) the hours devoted to each training topic, designating hours as preclinical ~~theory~~ instruction, theory instruction, practical instruction, ~~or~~ and instruction on unregulated services; and

149. The Administrative Law Judge notes a typographical error in Subpart 1, Item R(2)(a). The word “required” is included twice. The Judge suggests that the first “required” be removed to avoid redundancy. This is not a defect and is simply a technical suggestion.

150. Several commenters asserted that Subpart 1, Item P, is overly burdensome, redundant, and “out of scope of safety and sanitation” requirements.¹³³

151. The Board explained that schools are required to provide “student kits” containing supplies needed for the program.¹³⁴ The Administrative Law Judge finds that the Board has established that this requirement is needed and reasonable.

152. Several commenters asserted that Subpart 1, Item U, was overly burdensome and redundant of other requirements on schools.¹³⁵ They suggested leaving the language from the current rule in place.¹³⁶

153. The Board responded that it is important for schools to have accurate records to maintain student hours and clinical service exercises so that students will have the information they need to apply for licensure.¹³⁷

154. Students pay a significant amount in tuition and should be able to expect schools to accurately report their hours and exercises to the Board for licensure. The Board has established the need and reasonableness of Subpart 1, Item U.

155. The Board modified Subpart 1, Item U, to correct a typographical error, as follows:¹³⁸

U. a written description of the process that the school ~~may~~ uses to record and certify student hours and completed clinical service exercises in compliance with parts 2110.0400 and 2110.0680.

156. The modifications to Subpart 1, Items A, R, and U, are needed and reasonable and do not render the rule substantially different.

¹³² Ex. N (Summary of Board Modifications).

¹³³ Comments of Lara Kelley (signed by others) (Nov. 4, 2022).

¹³⁴ Ex. L at 4 (Board Response to Prehearing Comments).

¹³⁵ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

¹³⁶ *Id.*

¹³⁷ Ex. L at 4 (Board Response to Prehearing Comments).

¹³⁸ Ex. N (Summary of Board Modifications).

157. In sum, the Board has established the need and reasonableness of the amendments and modifications to Rule 2110.0310. The modifications do not render the rule substantially different than the rule originally published. Thus, Rule 2110.0310, as modified, is **APPROVED**.

D. Part 2110.0320: Maintaining a School License

158. The proposed amendments to Rule 2110.0320 involve the requirements for maintaining a school license, including changes to school name, changes of the designated school manager, changes to curriculum, location for trainings, displaying a license, a mandatory insurance and surety bond.

159. The proposed changes to Rule 2110.0320, Subpart 10, Item B, require that a licensed school that is offering a new program or changing its curriculum provide certain information to the Board for approval, including (among other things) the curriculum, schedule, instructors, textbooks, and supplies needed by students.

160. Some commenters assert that this requirement is overly burdensome and redundant. These commenters note that some schools are licensed or accredited by other entities (such as the National Accrediting Commission of Career Arts and Sciences and the Department of Education) and are required to provide the same or similar information to those entities.¹³⁹

161. The Board responded that, although some schools may be licensed or accredited by other entities, the Board continues to have a legal obligation to ensure that the curriculum of the school meets the Board's requirements.¹⁴⁰ The only way for the Board to ensure that a school's curriculum meets the Board's licensing standards to prepare students for practice is to review the new programs or curriculum changes.¹⁴¹

162. The Board did, however, modify Subpart 10, Item B(2)(b), for consistency and clarity, as follows:¹⁴²

(b) the hours devoted to each training topic, designating ~~which~~ hours ~~are~~ preclinical ~~theory~~—instruction, theory instruction, practical instruction, ~~or~~ and instruction on unregulated services; and

163. The Board has established that the amendments and modifications to Rule 2110.0320, Subpart 10, Item B, are needed and reasonable, and the rule is **APPROVED**.

¹³⁹ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

¹⁴⁰ Ex. L at 4-5 (Board Response to Prehearing Comments).

¹⁴¹ *Id.* at 5.

¹⁴² Ex. N (Summary of Board Modifications).

164. Several commenters suggested that Subpart 15 be modified to remove the bonding requirement because some schools are required to obtain surety bonds by other licensing entities.¹⁴³

165. The Board responded that Minn. Stat. § 155A.30, subd.5(8), requires that an applicant for school licensure file with the Board a continuous corporate surety bond.¹⁴⁴ Therefore, the Board cannot waive that requirement. However, the Board agreed to modify its proposed rule part to remove the reference to surety bonds, as it is already required by statute. The Board modified Subpart 15 as follows:

Subp. 15. ~~Insurance and surety bond.~~ A school must maintain a current certificate of insurance of professional liability insurance of at least \$150,000 for each policy year, and must maintain a current Certificate of Workers' Compensation Insurance, ~~and must maintain a corporate surety bond of \$10,000 running to the board.~~

166. The Board has established that Subpart 15 is needed and reasonable, and the modification does not render the rule substantially different from originally proposed. Therefore, Subpart 15 is **APPROVED**.

167. One commenter objected to Subpart 17, which addresses emergency disruptions to school instruction.¹⁴⁵ This new subpart requires a school to notify the Board within five days if there is a disruption in scheduled instruction due to an emergency, including snowstorms, loss of power, lack of hot water, or a natural disaster. The commenters asserted that this requirement was unreasonable because school closures due to weather in Minnesota can be quite frequent.¹⁴⁶

168. The Board responded that it often receives many calls when a school is suddenly closed for an emergency and it must respond to those students who have questions or concerns, especially if the closure is for several days.¹⁴⁷ The Board agreed to modify the subpart, however, to remove the word snowstorm, as follows:¹⁴⁸

An emergency is an event that closes the school, such as a ~~snowstorm~~, loss of power, lack of hot water, or natural disaster.

169. The Board has established that Subpart 17 is needed and reasonable, and that the modification is reasonable, is not substantially different, and is responsive to commenter's concerns. Therefore, Subpart 17 is **APPROVED**.

170. In sum, the Board has established the need and reasonableness of its amendments and modifications to Rule 2110.0320. The modifications do not render the

¹⁴³ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

¹⁴⁴ Ex. L at 5 (Board Response to Prehearing Comments).

¹⁴⁵ Comments of Lara Kelley (joined by others) (Nov. 4, 2022) (Hearing Tr. at 31-75, 100-127, 177-190).

¹⁴⁶ *Id.*

¹⁴⁷ Ex. L at 6 (Board Response to Prehearing Comments); Ex. D at 15 (SONAR).

¹⁴⁸ Ex. L at 6 (Board Response to Prehearing Comments).

rule substantially different from that originally published. As a result, proposed Rule 2110.0320, as modified, is **APPROVED**.

E. Part 2110.0330: School License Renewal

171. The proposed amendments to Rule 2110.0330 involve school license renewal requirements. Subpart 2a, Item H, of the rule requires schools, with their application for licensee renewal, to submit their advertisements used to solicit students, as well as the school's enrollment contract, refund policy, student handbook, and templates used to record student record requirements.

172. Some commenters assert that this requirement is time-consuming, overly burdensome, and redundant of requirements from other entities that license or accredit some of the schools.¹⁴⁹

173. The Board responded that, although some schools are licensed or accredited by other agencies (in addition to the Board), the Board maintains an interest in reviewing these documents to ensure compliance with Board requirements and the protection of students.¹⁵⁰

174. The Board has established that Subpart 2(a)(H) is needed and reasonable. Accordingly, the proposed amendments to Rule 2110.0330 are **APPROVED**.

F. Part 2110.0390: Physical Requirements

175. The amendments to Rule 2110.0390 address the physical requirements of schools. Subpart E of the rule requires that all students and instructors in a school have access to one or more sinks and disinfecting areas. Subpart F of the rule requires that each classroom have a sink or be equipped with a hand sanitizer dispenser.

176. Some commenters objected to Subparts E and F, claiming that the rules were overly burdensome, lack clarity, and would require some schools to incur costs to install sinks and trench water lines.¹⁵¹

177. The Board responded that Subpart E only requires a school to have one sink and Subpart F allows schools to use hand sanitizers in lieu of sinks in classrooms. Given the narrow scope of the requirements, they should not impose any significant burden or cost on schools.¹⁵² The Administrative Law Judge agrees.

178. The Board has established that the amendments to Rule 2110.0390 are needed and reasonable and the rule is, therefore, **APPROVED**.

¹⁴⁹ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

¹⁵⁰ Ex. L at 6 (Board Response to Prehearing Comments).

¹⁵¹ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

¹⁵² Ex. L at 6-7 (Board Response to Prehearing Comments).

G. Part 2110.0400: Fixtures, Furniture, Equipment

179. The amendments to Rule 2110.0400 deal with what a school must provide with respect to physical spaces. It includes a classroom or clinic floor with necessary workspace and equipment, a time clock or electronic timekeeping system to record student hours, locker space, and other housekeeping matters.

180. After publication, the Board modified Item B of the rule to include a word for clarity, as follows:¹⁵³

B. utilize an electronic time clock or electronic timekeeping system to accurately record student attendance hours in accordance with part 2110.0680;

181. This modification provides clarity and does not result in a substantial change to the rule. Consequently, the amendments and modification to Rule 2110.0400 are **APPROVED**.

H. Part 2110.0410: Supplies and Materials

182. The proposed amendments to Rule 2110.0410 address the supplies and materials that schools must provide to students. Subpart 3, Item B, of the rule requires that schools provide students with all instructional materials, including all textbooks, as well as access to Minnesota Rule chapters 2105, 2110 and Minnesota Statutes chapter 155A (licensing rules and statutes).

183. A group of commenters assert that this provision is unclear and conflicts with the Board's statement that it does not approve or require the use of any particular textbooks.¹⁵⁴ Commenter Lara Kelley asserts that because the Board does not approve or require particular textbooks,¹⁵⁵ schools will not know what exact skills the Board will be testing in its various required tests for licensure.¹⁵⁶

184. The commenters are misreading the clear language of the subpart. The subpart is clear and unambiguous that schools must provide the materials and supplies to students – it says nothing about the Board approving or requiring the use of particular textbooks. The rule that required schools to obtain approval for textbook changes is being repealed (Minn. R. 2110.0320, subp.11).

185. In support of the repeal, the Board explained that it will still be approving school curriculum but will not be approving or suggesting specific textbooks. The Board noted that its written testing vendor maintains a list of textbooks uses to create the written

¹⁵³ Ex. N (Summary of Board Modifications).

¹⁵⁴ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

¹⁵⁵ See repeal of Minn. R. 2110.0320, subp. 11 (2021).

¹⁵⁶ Lara Kelley (Hearing Tr. at 31-75, 100-127, 177-190).

exams and schools can look to that list to identify textbooks that will prepare students for those exams.¹⁵⁷

186. The Board has established the need and reasonableness of proposed Rule 2110.0410, and the rule is, therefore, **APPROVED**.

I. Part 2110.0500: Curriculum Approval and Content

187. The proposed amendments to Rule 2110.0500 requires Board approval of licensed school curriculum and addresses fieldtrips and extracurricular activities offered by schools.

188. Subpart 2 of the rule as originally proposed read:

Subp. 2. Field trips and extracurricular activities. Schools may offer field trips and extracurricular activities related to the ~~course~~ curriculum for industry educational purposes when students are accompanied by instructors, ~~for a maximum of one percent of the total training hours required for cosmetologists, estheticians, or nail technicians. Eyelash technician courses must not include field trips.~~ Effective September 1, 2024, field trips do not count toward instruction hours.

189. Commenters¹⁵⁸ question whether this subpart is contrary to Minn. Stat. § 155A.30, subd. 11, which states:

. . . Instruction must be given within a licensed school building. Online instruction is permitted for board-approved theory-based classes. Practice-based classes must not be given online.

190. The Administrative Law Judge finds that Subpart 2 is not contrary to the statute.

191. Another commenter questioned whether “field trip” and “extracurricular activities” were interchangeable to mean all events occurring off-campus. She also questioned why the Board included an effective date of September 1, 2024.¹⁵⁹

192. In response to the comment, the Board modified Subpart 2, as follows:¹⁶⁰

Subp. 2. ~~Field trips and extracurricular a~~Activities. Schools may offer ~~field trips and extracurricular~~ activities related to the curriculum for industry educational purposes when students are accompanied by instructors. ~~Effective September 1, 2024, field trips do not count toward instruction hours.~~

¹⁵⁷ Board Preliminary Responses to Hearing Comments at 3 (Dec. 16, 2022).

¹⁵⁸ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

¹⁵⁹ Comments of Jennifer Walther (Dec. 16, 2022).

¹⁶⁰ Board Rebuttal Response to Post-Hearing Comments (Dec. 22, 2022).

193. The Board explained that the language was changed to better align with Minn. Stat. § 155A.30, subd. 11, and to provide more clarity.¹⁶¹ This modification is reasonable and does not render the rule substantially different from the rule as originally published.

194. The Board has established the need and reasonableness of the rule. Accordingly, the proposed amendments and modification to Rule 2110.0500 are **APPROVED**.

J. Part 2110.0505: Instructor Training

195. Proposed Rule 2110.0505 sets forth a requirement that instructors have at least 45 hours of theory training and include seven specific topics.

196. Some commenters assert that the instructor training required by the Board is too minimal to produce quality teachers and does not include enough “classroom management.”¹⁶² While other commenters assert that the training requirement is “overly burdensome” and lacks clarity.¹⁶³ These commenters note that it is already difficult for schools to find good, quality instructors without this additional training requirement.¹⁶⁴ They propose that instructors only be required to be licensed by the state in their field.¹⁶⁵

197. The Board responded to the comments by explaining that some amount of training is necessary to ensure school instructors are effective teachers.¹⁶⁶ Until 2016, the Board required 38 hours of training for instructors.¹⁶⁷ That was repealed because there was no national standard for cosmetology instructor training.¹⁶⁸ After some research, the Board determined that the majority of states in America require more than 38 hours of instructor training and some states require as much as 500 hours.¹⁶⁹ The Board selected 45 hours as a compromise between returning to 38 hours (which some practitioners thought was too minimal) to more than 45 hours.¹⁷⁰

198. Commenter Nino Altobelli suggested that instructor training also include instruction on administering the practical skills tests now expressly required for licensure under the proposed rules. This is important, given the changes to proposed

¹⁶¹ *Id.*

¹⁶² Comments of Barbara Baruth (Oct. 31, 2022); Kay Nguyen (Nov. 1, 2022); Cayla Jones (Oct. 31, 2022); Kristin Bossuyt (Nov. 1, 2022); Craig Holtz (Nov. 2, 2022); Lynn Schuster (Nov. 1, 2022); Holly Marie Yonker-Stoviak (Oct. 28, 2022); Raven Appert (Nov. 1, 2022); Kalli Blackwell (Nov. 4, 2022); Susan Chapple (Nov. 4, 2022); Tavi Vo (Nov. 4, 2022); Jean Vo (Nov. 4, 2022).

¹⁶³ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Ex. L at 6-7 (Board Response to Prehearing Comments).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

Rules 2110.0590 and 2110.0010, subpart 12a, which make practical skills testing a part of the official licensing requirement.¹⁷¹

199. The Board agreed and modified Item A of the rule on December 16, 2022, as follows:¹⁷²

- A. Instructor training must consist of at least 45 hours of theory training and must address the following topics:
 - (1) lesson planning and development;
 - (2) pedagogy and teaching methodologies;
 - (3) classroom and clinic-floor management;
 - (4) student evaluation and assessment;
 - (5) social equity and cultural responsiveness;
 - (6) remote learning strategies; and
 - (7) administration of the practical skills test; and
 - ~~(7)~~ Minnesota statutes and rules.

200. The modification is directly responsive to the comment and is a needed and reasonable change. The modification does not render the rule substantially different from the rule originally published.

201. The Board has established the need and reasonableness of the rule and the modification. Accordingly, Rule 2110.0505, as modified, is **APPROVED**.

K. Part 2110.0510: Cosmetologist Training

202. The proposed amendments to Rule 2110.0510 involve the training required for an individual to become licensed in Minnesota as a cosmetologist. While the number of total training hours required for licensure has not changed, the Board has made some substantial changes to the rule in its proposed amendments.

203. Under the proposed rule, to become licensed as a cosmetologist, an individual must have completed 1,550 hours of instruction, including all training required in Parts; 2110.0520 (esthetician training), 2110.0530 (nail technician training), and 2110.0580 (eyelash technician). (See Item A in the proposed rule).

204. The 1,550 hours of instruction must include: (1) an initial 420 hours of preclinical training in nine topical areas (see Item C); and (2) the remaining 1,130 hours

¹⁷¹ Comments of Nino Altobelli (Hearing Tr. at 143-169).

¹⁷² Board Preliminary Responses to Hearing Comments at 6 (Dec. 16, 2022).

must consist of practical instruction and student practice in 13 topical areas (see Item B). As part of the 1,130 hours of practical instruction and student practice, the individual must complete “clinical service exercises” in 12 “categories” of instruction, including: hair styling; hair cutting; chemical texture services; color services; body treatments; eyebrow and eyelash services; makeup; hair removal; manicuring, pedicuring, and artificial nail applications; eyelash extensions; and blood exposure incidents (see Item E).

205. The current Rule 2110.0510 sets forth the hours and number of clinical service exercises required in each category. In amending the rule, the Board removed the hours and number of clinical service exercises required for licensure. While the hours and number of required exercises were removed from the proposed rule, completion of a certain number of clinical service exercises in each topic remains a requirement for licensure.¹⁷³ (See definition of “course completion certificate” in proposed Rule 2110.0010, subpart 12a, above.)

206. A majority of commenters noted that, because the rule does not state the number or hours of clinical service exercises required for each category, schools and students are without knowledge of what the Board is going to require for licensure and they have, thus, been unable to evaluate how these changes will impact them.¹⁷⁴ Commenter Lara Kelley noted that the Board is already imposing clinical service exercise requirements in its current course completion certificate form, which are different from the hours and number of exercises prescribed in the current rule.¹⁷⁵ She asserts that it has been her experience that the Board has imposed new requirements on schools and licensees without amending the rules, properly notifying stakeholders, or seeking input from those impacted.¹⁷⁶

207. Commenter Alva McMillan urged the Board to include minimal hourly and number requirements for clinical service exercises in the rules because students and schools need to know this information for licensure and the public needs to be assured that the Board is imposing minimum practice experience requirements for licensees. Without these minimum requirements in the rules, Ms. McMillan fears that schools will determine their own “quotas” for clinical service exercises in each category, and some students may end up unprepared for licensure.¹⁷⁷

208. In the SONAR, the Board explained that it convened a Practical Skills Task Force to recommend the clinical service exercise requirements for licensure in all

¹⁷³ See proposed Rule 2110.0010, subp. 12a, and Rule 2105.0145.

¹⁷⁴ Comments of Susan Brinkhaus (Nov. 2, 2022); Andria LaBuhn (Nov. 4, 2022); Katherine Martin (Nov. 4, 2022); Barbara Baruth (Oct. 31, 2022; Dec. 13, 2022); Cayla Jones (Oct. 31, 2022); Craig Holtz (Nov. 2, 2022); Lynn Schuster (Nov. 1, 2022) (Hearing Tr. at 80-99, 169-173); Raven Appert (Nov. 1, 2022); Lara Kelley (Nov. 4, 2022) (Hearing Tr. at 31-75, 100-127, 177-190); Kalli Blackwell (Nov. 4, 2022); Carol Bengtson (Nov. 4, 2022); Judith Garcia (Nov. 4, 2022); Jennifer Walther (Dec. 19, 2022); Alva McMillan (Hearing Tr. at 132-142); Nino Altobelli (Hearing Tr. at 142-168).

¹⁷⁵ Comments of Lara Kelley (joined by others) (Nov. 4, 2022) (Dec. 14, 2022) (Hearing Tr. at 31-75, 100-127, 177-190).

¹⁷⁶ *Id.*

¹⁷⁷ Comments of Alva McMillan (Hearing Tr. at 132-142).

five fields of practice, and that the Board intends to adopt these requirements *after* the rule is approved.¹⁷⁸ The SONAR states:¹⁷⁹

Per direction from the Board, the cosmetology clinical service exercises recommended by the Task Force will be approved once the rules have been amended to remove the number and specific types of clinical service exercises and replace it with a list of topics to be covered that better reflect the current industry. The Board will also approve the number of clinical service exercises in each category.

. . . The list of clinical service exercises will be updated as needed as services in the field change. There may be an initial cost to schools if the school intends to acquire different products or equipment to keep abreast of new technology, but the Task Force anticipated costs to be minimal.

209. The Board did not identify what the costs to stakeholders may be because the Board has not yet determined what clinical service exercise requirements the Board will adopt. While a Task Force gave recommendations for the clinical service exercise requirements for each classification of licensure, the Board has not provided this information to the public or made it part of the rulemaking proceeding.

210. The existing licensing rule, Minn. R. 2105.0145 (a different chapter than is addressed here), requires that applicants for licensure provide a course completion certificate to document the completion of all required “curriculum” and training hours.

211. However, as part of the rule amendments in this action, the Board defines “course completion certificate” as follows:¹⁸⁰

Course completion certificate" means a notarized form provided by the board that a student must use to obtain a license in Minnesota. A course completion certificate must include a student's program completion information, *including the number of clinical service exercises required by the board* that the student has completed and the results of the practical skills test.

212. After publication of the rules, the Board modified the definition of “course completion certificate” to make clear to stakeholders that a certain number and type of clinical service exercises are a requirement of licensure.¹⁸¹

213. The Board explained in the SONAR that it will list the number, hours, and types of clinical service exercises that the Board will require for licensure in the course completion certificate form(s) that the Board intends to provide to schools and license applicants at a later date. In other words, the Board intends to provide this information to

¹⁷⁸ Ex. D at 23 (SONAR).

¹⁷⁹ *Id.*

¹⁸⁰ Ex. N (Summary of Board Modifications) (emphasis added).

¹⁸¹ Ex. L at 9 (Board Responses to Prehearing Comments).

stakeholders in the certificate form, as opposed to providing this important information in the rule itself. The rationale for this decision is that the requirements have yet to be determined and will likely change from time to time.¹⁸²

214. In defense of its decision to remove the clinical service exercise numbers from the amended rule, the Board argues that Minn. § 14.03, subd. 3(a)(3) (2022), does not require this information to be in the rules because it is part of school “curriculum” specifically excluded from rulemaking.¹⁸³ The Board writes:

Per Minn. Stat. § 14.03, subdivision 3(a)(3), the curriculum adopted by an agency to implement a statute or rule permitting or mandating minimum education requirements for persons regulated by an agency is not subject to the rulemaking procedures of the Minnesota Administrative Procedure Act, provided the topic areas to be covered are specified in statute or rule. Per Minn. Stat. § 155A.27, subdivision 2, the Board is permitted to set qualifications for licensing, including educational prerequisites, such as clinical service exercises. Accordingly, such curriculum requirements need not be stated in the rule, because the Board has specified the topic areas to be covered in the rule. Cosmetology services change at a fast pace and educational requirements must be updated when services in the field change.¹⁸⁴

215. While it is true that the Board is authorized by law to establish the curriculum for cosmetology schools, the Board is incorrect that the clinical service exercise number and hour requirements are merely “curriculum” exempt from rulemaking.

216. Minn. Stat. § 14.03, subd. 3(a), excludes from rulemaking certain types of agency internal documents, such as:

- (1) rules concerning only the internal management of the agency *that do not directly affect the rights of or procedures available to the public*;
- (2) an application deadline on a form and instructions for the use of a form *to the extent they do not impose substantive requirements* not otherwise contained in statute or rule
- (3) “the curriculum adopted by an agency to implement a statute or rule permitting or mandating minimum educational requirements for persons regulated by an agency, provided the topic areas to be covered by the minimum educational requirements are specified in statute or rule”; and
- (4) procedures for sharing data among government agencies, provided these procedures are consistent with the Minnesota Government

¹⁸² Ex. D at 23 (SONAR); Ex. L at 9 (Responses to Prehearing Comments).

¹⁸³ Board Preliminary Responses to Hearing Comments.

¹⁸⁴ Board Preliminary Responses to Hearing Comments at 9 (Dec. 16, 2022).

Data Practices Act.¹⁸⁵

217. These exceptions are meant to exempt non-substantive internal agency procedures from rulemaking – not substantive legal requirements.

218. While the topics of clinical service exercises are part of a school curriculum that the Board is statutorily authorized to determine, the number of exercises and hours required for those exercises are part of the licensing requirements that the Board is establishing in this rule and in Minn. R. 2105.0145. Thus, they are not simply curriculum – they are licensing regulations that schools, students, and licensure applicants need to know and have prior notice of in a rule.

219. A course completion certificate is a requirement for licensure under Rule 2105.0145 (not subject to this rulemaking). The Board’s definition of course completion certificate in proposed Rule 2110.0010, subpart 12a (part of this rulemaking), specifically states that “*the number of clinical service exercises required by the board*” must be documented on the certificate to obtain a license.¹⁸⁶ Indeed, after receiving prehearing comments, the Board modified the definition of “course completion certificate,” to make clear that the number of “clinical service exercises are tied to licensure.”¹⁸⁷

220. Accordingly, the number of clinical service exercises required for licensure is a substantive legal requirement that students, prospective students, schools, and license applicants need to know in the rules, not in internal Board policies. Otherwise, the Board would be subject to claims that these requirements are unpromulgated rules.

221. Students select schools and pay high tuitions on the promise that the school they select will provide them with the training hours and practical exercises needed for licensure immediately after completing the program. If licensing requirements are withheld from these stakeholders and changed at the whim of the Board, students, schools, and prospective licensees will be adversely affected. This is a critical notice and due process issue, not a curriculum issue.

222. The law is clear on this point. Minn. Stat. § 155A.27, subd. 2, expressly states that “*Qualifications for licensing in each classification shall be determined by the board and established by rule and shall include educational and experiential prerequisites. . . .*”¹⁸⁸ In its enabling statute, the legislature has directed the Board to articulate, by rule, the experiential requirements for licensure. Thus, the number and hours of clinical service exercises are experiential prerequisites that must be set forth in the rule.

223. Moreover, contrary to the Board’s conclusory statement in its SONAR about the costs related to changes in the clinical service exercise requirements, this rule will likely have real and substantial costs to schools and students that have not been able to

¹⁸⁵ Emphasis added.

¹⁸⁶ Emphasis added.

¹⁸⁷ Board Preliminary Responses to Hearing Comments at 9 (Dec. 16, 2022).

¹⁸⁸ Emphasis added.

be evaluated in this rulemaking proceeding because the Board has withheld this information from stakeholders. Schools will likely need to modify their curriculum, possibly obtain new equipment and supplies, perhaps implement new textbooks, and might have to hire new instructors. Current students may need to obtain new or additional training. These costs are real and significant and have not been properly addressed in the SONAR or by stakeholders because this important licensing requirement has yet to be adopted or even articulated by the Board. Therefore, commenters could not argue during the hearing process how these changes will affect them. This presents a defect in the rule.

224. In short, because the number and hours of clinical service exercises are requirements of licensure, they are not simply curriculum that can be excluded from rulemaking. Instead, they must, by law, be included in the rules. Consequently, Rule 2110.0510 is **DISAPPROVED**.

225. The Board can easily remedy the defect by modifying the rule to include the “quotas” or number and hours required for the various categories of clinical service exercises. Such a modification may or may not be a substantial change, as that term is defined in Minn. Stat. 14.05, subd. 2. That issue can be evaluated if the Board modifies and resubmits the rule for review.

226. Commenters also expressed other concerns with the proposed amendments to Rule 2110.0510. These commenters questioned why the required 1,130 hours of practical instruction and student practice included skills that are not regulated by law (meaning, services that do not require a cosmetology license).¹⁸⁹ These “unregulated” services included shampooing, scalp and hair conditioning, hair styling, and makeup.¹⁹⁰

227. The commenters note that under Minn. Stat. § 155A.27, subd. 9, hair styling and makeup do not require licensure. Therefore, they question why students must pay to receive instruction in these services. The commenters urge the Board to remove unregulated services from the curriculum required for cosmetology training and focus on the skills that do require licensure.¹⁹¹

228. Commenter Lara Kelley had a slightly different take on this argument. She asserts that the Board only has authority to regulate services that require a license.¹⁹² Ms. Kelley claims that the Board does not have legal authority to require training for licensure in types of services that do not require a license.¹⁹³

229. The Board responded that certain unregulated services are appropriately part of cosmetology training because Minn. Stat. § 155A.23, subd. 3, defines cosmetology as “the practice of personal services, for compensation, for the cosmetic care of the hair,

¹⁸⁹ Comments of Jennifer Walther (Dec. 19, 2022). Nino Altobelli (Hearing Tr. at 142-168); Lara Kelley (Nov. 4, 2022) (Dec. 14, 2022) (Hearing Tr. at 31-75, 100-127, 177-190).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Comments of Lara Kelley (Hearing Tr. at 31-75, 100-127, 177-190).

¹⁹³ *Id.*

nails, and skin” and expressly includes cleaning and conditioning. In addition, although the law exempts hairstyling and makeup application from licensure requirements when performed independently, a cosmetologist must perform these basic services as part of the other, more skilled services they provide for clients (for example, a haircut generally includes shampooing, conditioning, and hair styling).¹⁹⁴

230. Several other commenters argued that eyelash technician training should be removed from both the cosmetology and esthiology curriculum because eyelash technology is a separate, stand-alone license and most licensed cosmetologists and estheticians do not actually perform this service in their practice.¹⁹⁵ Commenter Nino Altobelli suggested that the Board should focus cosmetology curriculum on hair services only, rather than expand it into other areas of beauty.¹⁹⁶ Commenter Lara Kelley also inquired whether eyelash technology will be part of the practical skills test now required by the Board.¹⁹⁷

231. Once again, the Board responded that the statutory definition of “cosmetology” includes “the practice of personal services for compensation for the cosmetic care of the hair, nails, and skin.” Similarly, the statutory definition of “esthetician” includes a person who performs personal services for the cosmetic care of the skin. The Board believes eyelashes are part of the hair and skin, and a part of the scope of both cosmetology and esthiology even though eyelash technology is its own license. Accordingly, the Board refused to remove eyelash technology from the required curriculum for cosmetology and esthiology.¹⁹⁸

232. The Board made one modification to Item E after publication of the rule. The modification adds “nonpermanent” to modify “hair removal” in number 9 of the list of categories for clinical service exercises.¹⁹⁹ This change is reasonable and necessary to distinguish waxing, threading, etc. from laser or electronic hair removal. This modification does not render the rule substantially different from originally proposed.

233. Finally, the Administrative Law Judge recommends the following additional modifications to be consistent with the definition of “theory instruction” included in proposed Rule 2110.0010, subpart 19a:

Part 2110.0510, Item B, line 2 (line 20.11):

(2) ~~instruction in related theory~~ instruction ~~and sciences~~ of 420 hours

¹⁹⁴ Board’s Preliminary Responses to Hearing Comments (Dec. 16, 2022).

¹⁹⁵ Comments of Andria LaBuhn (Nov. 4, 2022); Kay Nguyen (Nov. 1, 2022); Kristin Bossuyt (Nov. 1, 2022); Craig Holtz (Nov. 2, 2022); Lynn Schuster (Nov. 1, 2022) (Dec. 12, 2022) (Hearing Tr. at 80-99, 169-173); Raven Appert (Nov. 1, 2022); Lara Kelley (joined by others) (Nov. 4, 2022) (Hearing Tr. at 31-75, 100-127, 177-190); Susan Chapple (Nov. 4, 2022); Tavi Vo (Nov. 4, 2022); Jean Vo (Nov. 4, 2022); Nino Altobelli (Hearing Tr. at 142-168).

¹⁹⁶ Comments of Nino Altobelli (Hearing Tr. at 142-168).

¹⁹⁷ Comments of Lara Kelley (Hearing Tr. at 31-75, 100-127, 177-190).

¹⁹⁸ Board Preliminary Responses to Hearing Comments (Dec. 16, 2022).

¹⁹⁹ Ex. N (Summary of Board Modifications).

Part 2110.0510, Item D (line 21.06):

. . . A school must provide a student with ~~theoretical~~theory and safety instruction. . .

234. The Administrative Law Judge also recommends that the Board consider clarifying the terms “chemical texture services” and “body treatments” in proposed Item E, as these terms are vague and subject to different interpretations.

235. The Judge’s technical suggestions can be considered by the Board and included with any modifications the Board may make to cure the material defect in Item E, related to the clinical service exercises.

L. Part 2110.0520: Esthetician Training

236. The proposed amendments to Rule 2110.0520 involve the training required for an individual to become a licensed esthetician in Minnesota. While the number of total training hours required for licensure has not changed, the Board has made some substantial changes to the rule in its amendments, similar to those made with respect to cosmetology.

237. Under the proposed Rule 2110.0520, to become licensed as an esthetician, an individual must complete 600 hours of training (Item A). The first 90 hours of training must include preclinical instruction in eight topics (Item C). The remaining hours must include practical instruction and at least 180 hours of student practice in five services (Item B). The training must also include clinical service exercises in facials, body treatments, eyebrow and eyelash services, makeup, hair removal, eyelash extensions, and blood exposure incidents (Item E).²⁰⁰

238. As with the proposed cosmetology rule, the proposed esthetician rule does not identify how many, or how many hours of, clinical service exercises are required for licensure, although a specific (but yet unknown) number of clinical service exercises will be required for licensure and must be included in the course completion certificate. The current version of the rule gives specifics as to the number of facials (60), makeup applications (40), face waxes (20), and body waxes (20) that a student must complete. The amended rule replaces these numbers with topics but does not identify the number of clinical service exercises required for each topic.

239. For the same reason that proposed Rule 2110.0510 was disapproved, proposed Rule 2110.0520 is **DISAPPROVED**. By failing to specify the number and/or hours of clinical service exercises required for licensure as an esthetician, the rule is defective.

240. In revising the rule, the Board should consider clarifying the topics for clinical service exercises because they are vague and subject to various interpretations.

²⁰⁰ A school must also provide “instruction in business practices and Minnesota laws regulating those practices and labor relations” (proposed Rule 2110.0520, Item F).

The Administrative Law Judge recommends clarifying “eyebrow and eyelash services” to specifying the services (tinting, waxing, etc.); clarifying the term “body treatment”; adding “application” after “makeup”; adding the words “permanent” or “nonpermanent” to “hair removal”; and adding the words “application and removal” to “eyelash extensions.”

241. The Administrative Law Judge also recommends the following modifications for clarity and consistency with defined terms:

Item A (lines 23.2 to 23.3)

A. Esthetician training must consist of at least 600 hours of instruction and training and ~~include training as described in this part.~~

Item B (line 23.6):

. . . and ~~instruction in related theory and sciences~~ instruction.

Item D (line 23.23):

. . . ~~theoretical theory~~ and safety instruction . . .

242. These recommended modifications are technical suggestions that the Board can consider but are not required.

M. Part 2110.0525: Advanced Practice Esthetician Training

243. The proposed amendments to Rule 2110.0525 involve the training required for an individual to become a licensed advanced practice esthetician in Minnesota. While the number of total training hours required for licensure has not changed, the Board has made some substantial changes to the rule in its amendments, similar to those made with respect to cosmetology.

244. Under the proposed Rule 2110.0525, to become licensed as an advanced practice esthetician, an individual must complete 500 hours of training beyond the 600 hours of training required for a licensed esthetician or the 1,550 hours required for a licensed cosmetologist (see Item A). A combined esthetician and advanced practice esthetician program must include 1,100 hours of training – the 600 hours required in Part 2110.0520 and the 500 hours required in Part 2110.0525 (see Item C). The training must include at least 150 hours of theory instruction in 11 topics and an unspecified number of clinical service exercises in advanced exfoliation chemical peels, advanced exfoliation machine or device treatments, electrical energy treatments, skin needling treatments, advanced extractions, and lymphatic drainage treatments (see Item F).

245. Commenters Barbara Baruth and Alva McMillan urged the Board to set minimum hour and number “quotas” for the required clinical service exercises, noting that it is critical for the Board to expressly state for schools, students, licensees, and applicants for licensure what exactly the Board will be requiring for licensure. These commenters explained that it is not enough that the Board gives categories or topics for these

exercises. Because a specific number of clinical service exercises are required for licensure on the course completion certificate, the commenters argue that this information must be part of the rule.²⁰¹ The Administrative Law Judge agrees, as explained above with respect to Rule 2110.0510.

246. Commenters Barbara Baruth and Alva McMillan also questioned the categories of clinical service exercises set forth for advanced practice estheticians in Item F.²⁰² Ms. Baruth asserts that the term “chemical peel”, “exfoliation machine or device”, and “electric energy treatments” are not specific enough and leave too much discretion to schools to decide what these terms mean.²⁰³

247. Ms. Baruth and Ms. McMillan encouraged the Board not to remove “skin analysis” and “client consultation” from the categories of clinical services exercises required for licensure for an advanced practice esthetician. Even though advanced practice estheticians have completed basic cosmetology or esthetician training, Ms. Baruth explained that advanced practice estheticians encounter different and more complex issues in these areas and, thus, these areas should be included in the clinical service exercises required for licensure.²⁰⁴

248. In response to these comments, the Board agreed to modify Item F to include “skin analysis” and “client consultation” in the categories of clinical service exercises required for advanced practice esthetician licensure.²⁰⁵

249. On December 22, 2022, the Board modified Item F of the rule to clarify the type of clinical service exercises required for licensure.²⁰⁶ The Board did not, however, clarify the other terms in the list, as advocated by Ms. Baruth.²⁰⁷ Item F was modified as follows:²⁰⁸

- F. An AP esthetician training course must include planned practical instruction and student practice. Each student must complete clinical service exercises in:
- (1) skin analysis;
 - (2) client consultation;
 - (3) advanced exfoliation chemical peels;

²⁰¹ Comments of Barbara Baruth (Dec. 13, 2022); Comments of Alva McMillan (Hearing Tr. at 132-142).

²⁰² Comments of Barbara Baruth (Dec. 13, 2022); Comments of Alva McMillan (Hearing Tr. at 132-142).

²⁰³ Comments of Barbara Baruth (Dec. 13, 2022).

²⁰⁴ Comments of Barbara Baruth (Dec. 13, 2022); Comments of Alva McMillan (Hearing Tr. at 132-142).

²⁰⁵ Board’s Preliminary Responses to Hearing Comments (Dec. 16, 2022); Board Rebuttal Response to Post-Hearing Comments (Dec. 22, 2022).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Board Rebuttal Response to Post-Hearing Comments (Dec. 22, 2022).

- (24) advanced exfoliation machine or device treatments;
- (35) electrical energy treatments;
- (46) skin needling treatments;
- (57) advanced extractions; and
- (68) lymphatic drainage treatments.

250. The Administrative Law Judge concurs with Ms. Baruth that the term “electrical energy treatments” is vague. While the Board has modified the categories of clinical service exercises in Item F, the Board has not cured the defect with the rule, which requires the Board to specifically identify the number and hours of clinical service exercises in each category.

251. For the same reason that proposed Rule 2110.0510 was disapproved, proposed Rule 2110.0525 is **DISAPPROVED**. By failing to specify the number and/or hours of clinical service exercises required for licensure as an advanced practice esthetician, the rule is defective.

252. The Administrative Law Judge also recommends the following modifications for consistency with the defined term “theory instruction”:

Item D (lines 25.24 and 25.25):

. . . at least 150 hours of ~~theoretical~~ theory instruction . . .

Item E (line 26.12):

E. A school must provide a student with theory ~~theoretical~~ and safety instruction . . .

253. These suggestions are merely technical recommendations for the Board to consider. They are not required changes.

N. Part 2110.0530: Nail Technician Training

254. The proposed amendments to Rule 2110.0530 involve the training required to become a licensed nail technician in Minnesota. While the number of total training hours required for licensure has not changed, the Board has made some substantial changes to the rule in its amendments, similar to those made with respect to cosmetology.

255. Under the proposed Rule 2110.0530, to become licensed as a nail technician, an individual must complete 350 hours of training and instruction (Item A). The first 50 hours must consist of preclinical training in seven specific topics (Item C). The remaining hours must include practical and theory instruction; at least 105 hours of student practice in four specific services (Item B), and an unspecified number of clinical

service exercises in: (1) manicuring, pedicuring and artificial nail applications; and (2) blood exposure incidents (Item E).

256. The current Rule 2110.0530 identifies the exact number of service exercises required of licensees (50 manicures, including 10 applications of artificial nails and 3 sculptured applications). The Board has amended the rule to remove the numbers of exercises, like it did for the cosmetology, esthetician, and advanced practice esthetician rules.

257. For the same reason that proposed Rule 2110.0510 was disapproved, proposed Rule 2110.0530 is **DISAPPROVED**. By failing to specify the number and/or hours of clinical service exercises required for licensure as a nail technician, the rule is defective.

258. The Administrative Law Judge also recommends the following modifications for clarity and consistency with the defined term “theory instruction”:

Item A (lines 27.14 to 27.15)

A. Nail technician training must consist of at least 350 hours of instruction and training and ~~include training~~ as described in this part.

Item B (line 27.18):

. . . and ~~instruction in related theory and sciences~~ instruction.

Item D (line 28.11):

. . . ~~theoretical theory~~ theory and safety instruction

259. These suggestions are merely technical recommendations for the Board to consider. They are not required changes.

O. Part 2110.0545: Skills Course

260. The proposed amendments to Rule 2110.0545 involve changes to the skills course requirement for all fields of practice and the practical skills test now expressly required by the Board for licensure. All schools must offer a skills course in the practice area(s) for which they offer instruction. Each skills course begins with a practical skills test. Students may pass the entire test or portions of the test on the first try. However, to be licensed in a particular practice area, the individual must pass all portions of the test. Portions of the test that are failed require the student to complete remedial training before retesting. When all portions of the practical skills test are passed successfully, the student receives a skills course certificate, which the student can then use to apply for a license with the Board. The rules authorize licensed schools to issue a skills course certificate, documenting completion of the course. Successful completion of the practice skills test is also noted on the course completion certificate, which is used by applicants for licensure to document completion of the requirements for licensure.

261. Several commenters joined in one comment that challenged Subpart A of the rule (requiring schools to offer skills courses), claiming that the “Board must approve those schools who would like to offer the skills course to comply with board statutory authority.”²⁰⁹

262. The commenters are correct. Minn. Stat. § 155A.27, subd. 4, requires “[a]ll theory, practical, and Minnesota law and rule testing must be done by a board-approved provider.” Therefore, the Board must approve the schools to administer the practical skills tests referenced in Rule 2110.0545. However, this issue is addressed with respect to Minn. R. 2110.0590 below and does not present a defect for Rule 2110.0545, so long as it is corrected in Rule 2110.0590.

263. Having reviewed the rule and SONAR, the Administrative Law Judge finds that the Board has established the need and reasonableness of the proposed changes, and Rule 2110.0545 is **APPROVED**. Any requirements related to Board approval for schools administering practical skills tests should be addressed in Rule 2110.0590, if the Board decides to correct the defect in that proposed rule.

P. Part 2110.0550: Credit Toward Another License

264. On December 7, 2022, the Board submitted a modification to Rule 2110.0550, Item A, paragraph 5, changing the credit hours for eyelash technician training from 38 hours to 14 hours, consistent with 2016 Minn. Laws Ch. 127, § 8.

265. This modification is legally necessary and does not render the rule substantially different. Accordingly, Minn. R. 2110.0550 is **APPROVED**, as modified.

Q. Part 2110.0580: Eyelash Technician Training

266. In 2016, the Minnesota Legislature first recognized a new field in the cosmetic and beauty industry: eyelash technician.²¹⁰ Representative Mary Franson and Senator Bill Ingebritsen introduced identical bills to recognize this new field of practice and declare the number of training hours required for the new licensure.²¹¹ Section 8 of the bill states: “Any educational or training requirements developed by the board regarding eyelash technician must be 14 hours.”²¹² The bill was signed into law on May 19, 2016.²¹³

267. Despite the legislation, in 2017, the Board promulgated rules in Part 2110 (now being amended) that required 38 hours of eyelash technician training for

²⁰⁹ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²¹⁰ 2016 Minn. Laws Ch. 127, §§ 1-8.

²¹¹ Comments of Sen. Bill Ingebritsen and Rep. Mary Franson (Oct. 14, 2022).

²¹² 2016 Minn. Laws Ch. 127, § 8.

²¹³ Comments of Sen. Bill Ingebritsen and Rep. Mary Franson (Oct. 14, 2022).

licensure.²¹⁴ These rules also recognized eyelash technology for the first time as a field of practice licensed by the Board.²¹⁵

268. Both Sen. Ingebrigtsen and Rep. Franson submitted comments on October 14, 2022, requesting that the Board correct the rules in this rulemaking.²¹⁶ Commenter Lee McGrath, Institute for Justice, a lobbyist for the eyelash industry, also provided comments to the same effect.²¹⁷

269. Acknowledging its mistake, the Board submitted modifications to the rules for changing the training requirement to 14 hours in proposed Rules 2110.0550, .0580, and .0590.²¹⁸

270. The modifications submitted by the Board for Rule 2110.0580 are as follows:²¹⁹

A. Eyelash technician training must consist of a curriculum of ~~38~~ 14 hours, including items B and C.

B. Eyelash technician training must include ~~24~~ 8 hours of preclinical theoretical instruction. . . .

C. Eyelash technician training must include ~~44~~ 6 hours of clinical instruction in the practical application of eyelash extensions, including client consultation, design, cleansing the eye area, applying eyelash extension, and removing eyelash extensions. Clinical instruction must not begin until the student has completed all of the theoretical instruction hours.

271. The Administrative Law Judge finds that these modifications are reasonable and necessary to comply with law, and do not arise to a substantial change.

272. However, to be consistent with the definitions set forth in Rule 2110.0010, the Judge recommends the following additional modifications:

A. Eyelash technician training must consist of a curriculum of 14 hours, including items B and C.

B. Eyelash technician training must include 8 hours of preclinical ~~theoretical~~ instruction. . . .

C. Eyelash technician training must include 6 hours of ~~clinical~~ practical instruction in the ~~practical~~ application of eyelash extensions,

²¹⁴ *Id.* See also, Minn. R. 2110.0580 (2017).

²¹⁵ See Minn. R. ch. 2110 (2017).

²¹⁶ Comments of Sen. Bill Ingebrigtsen and Rep. Mary Franson (Oct. 14, 2022).

²¹⁷ Hearing Tr. at 76-79; 127-131; Comments of Lee McGrath (Dec. 20, 2022).

²¹⁸ The Board should consider amending its licensure Rule 2105.0145 to reflect this legislative mandate. The rule, as it is written, would be unenforceable as against eyelash technicians.

²¹⁹ Ex. L (Board Responses to Prehearing Comments).

including client consultation, design, cleansing the eye area, applying eyelash extension, and removing eyelash extensions. ~~Clinical-Practical~~ instruction must not begin until the student has completed all of the ~~theoretical~~ theory instruction hours.

273. These suggested changes will not render the rule substantially different and will bring clarity and consistency to the rules. This is a technical suggestion, not a defect.

274. Item E of the rule, however, contains a material defect. Proposed Rule 2110.0580, item E identifies the subject matter of the clinical service exercises but does not identify the hours or number of exercises mandated on the course completion certificate and required for licensure. For the reasons articulated with respect to Rule 2110.0510 above, Item E of the proposed rule is **DISAPPROVED**. The Board can remedy this defect by identifying the exact number of exercises and hours required in each of the topic areas for licensure.

275. It should be noted that one commenter, in particular, advocated for additional training for eyelash technicians. Commenter Lynn Schuster is the owner of Minnesota Brow, Lash and MedSpa Academy. She contends that the 2016 legislation limiting the number of required training hours for eyelash technicians was drafted by lawmakers with no knowledge or experience in the field. Ms. Schuster fears that reducing the number of required training hours from 38 hours to 14 hours will place the public at risk and result in technicians with insufficient knowledge of the art and science of lash application. In addition, the rules do not require any continuing education or other oversight of practitioners. Ms. Schuster emphasizes the significant risk to the public that can exist from improperly trained eyelash technicians. Eyelash extensions: (1) involve using glue on the lash line; (2) are applied close to the eyeball with sharp tools that can scratch or infect an eye; and (3) can subject the eye to germs and disease. Unsanitary tools, improper application, and dangerous materials could result in infections, corneal abrasions and eye damage, permanent loss of lashes, and even blindness. Ultimately, Ms. Schuster urges the Board to support changing the statute to allow the Board to require 38 hours or more of required training for eyelash technicians, in line with several other states that require more training.²²⁰ The Board advised Ms. Schuster that an increase in training hours to 38 hours or more would require legislative action and exceeds the Board's rulemaking authority.²²¹

R. Part 2110.0590: Testing

276. Proposed Rule 2110.0590 imposes a new requirement for licensure: a practical skills test. While skills testing has always been a part of the instruction expected to be provided by cosmetology schools,²²² the amendments to the rules make passage of a "practical skills test" -- conducted by the schools -- a licensing requirement in this rule amendment. In addition, the course completion certificate, required for an applicant to

²²⁰ Comments of Lynn Schuster (Dec. 12, 2022); Hearing Tr. at 80-99, 169-174.

²²¹ Board's Preliminary Responses to Hearing Comments at 4 (Dec. 16, 2022).

²²² See current Rule 2110.0545 (2021).

apply for a license, mandates that the results of the applicant's practical skills test be stated on the form.²²³

277. The originally proposed Rule 2110.0590 read as follows:

A. A school must administer the practical skills test to each enrolled student who completes initial licensure training and a skills course and to a license applicant as required by chapter 2105. The practical skills test must be administered in person at a licensed cosmetology school by an instructor licensed in the subject of the test section that the instructor is administering.

B. A student who has a Minnesota license and who returns to school to complete an additional training course must only complete the sections of the practical skills test that are relevant to the student's training program and the additional license that the student is seeking.

C. A student must not take the practical skills test before completing:

- (1) 1,350 hours of the cosmetology program;
- (2) 500 hours of the esthetician program;
- (3) 315 hours of the nail technician program; or
- (4) 38 hours of the eyelash technology program.

D. A student in an advanced practice esthetician program may complete the advanced practice esthetician practical skills test sections at any time during the student's program.

278. The comments received with respect to this proposed rule noted the statutory requirement for the Board to approve schools to conduct the practical skills tests.²²⁴ Another comment questioned why this rule allows students to take the practical skills test before completing all required program hours.²²⁵ One commenter noted that adding a fourth test to licensing overburdens schools and students.²²⁶

279. After receiving prehearing comments, the Board amended Item A as follows (without explanation):²²⁷

²²³ Per proposed Rule 2110.0010: "Course completion certificate" means a notarized form that a student *must use to obtain a license in Minnesota*. A course completion certificate *must include* a student's program completion information, including *the number of clinical service exercises* that the student has completed *and the results of the practical skills test*. (Emphasis added).

²²⁴ Comments of Lara Kelley (joined by others) (Nov. 4, 2022) (Dec. 14, 2022).

²²⁵ Comments of Jennifer Walther (Dec. 19, 2022).

²²⁶ Comments of Lara Kelley (Hearing Tr. at 31-75, 100-127, 174-180).

²²⁷ Ex. L (Board Response to Prehearing Comments).

A. A school must administer the practical skills test to each enrolled student ~~who completes~~ completing initial licensure training and ~~to each skills course attendee a skills course and to a license applicant as required by chapter 2105.~~ The practical skills test must be administered in person at a licensed cosmetology school by an instructor licensed in the subject of the test section that the instructor is administering.

280. In addition to this modification, the Board modified Items C and D as follows:²²⁸

C. A student must not take the practical skills test before completing:

- (1) 1,350 hours of the cosmetology program;
- (2) 500 hours of the esthetician program;
- (3) 315 hours of the nail technician program; ~~or~~
- (4) ~~38~~ 14 hours of the eyelash technology program; or
- (5) 400 hours of the advanced practice esthiology program.²²⁹

~~D. A student in an advanced practice esthetician program may complete the advanced practice esthetician practical skills test sections at any time during the student's program.~~

281. The Board explained that it was reasonable to have “a minimum hour requirement” for advanced practice estheticians, like it proposed for the other programs, but it did not explain why it is allowing students to take the practical skills exam before completion of all the required training hours.²³⁰ In addition, the Board recognized that it cannot require more than 14 hours of training for eyelash technicians by statute, so it changed the hours from 38 hours to 14 hours for eye lash technicians.²³¹

282. The Administrative Law Judge identifies several defects with this proposed rule.

283. First, nowhere in the rules is “initial licensure training” defined. This is a material term that results in the rule being unclear. The Judge cannot determine what “initial licensure training” means, rendering the rule defective.

²²⁸ *Id.*

²²⁹ Presumably this was in response to the Comments of Judith Garcia (Nov. 4, 2022), who advocated for requiring that advanced practice esthiology be included in the hour requirement before being able to take a practical skill test.

²³⁰ Ex. L (Board Response to Prehearing Comments).

²³¹ *Id.*

284. Second, the rule, when read in conjunction with the definition of “course completion certificate” (a requirement for licensure) appears to mandate that applicants for licensure successfully complete a practical skills test. However, the rule identifying what is required for licensure (Rule 2105.0145) does not require a practical skills test. Minn. R. 2105.0145 requires only three types of tests for licensure: (1) a general theory test; (2) a *written* practical test; and (3) a test on Minnesota laws and rules. Nowhere in Rule 2105.0145 is there a requirement for a hands-on practical test, as is being required by proposed Rules 2110.0590 and 2110.0010, Subpart 12a (course completion certificate). Therefore, the proposed new rule presents a conflict between chapters 2105 and 2110 related to licensure requirements.

285. Third, there are no provisions in the rule to approve the provider of these tests, as required by Minnesota law. Minnesota statutes limit who can administer licensing tests. Minn. Stat. § 155A.27, subd. 4, provides:

All theory, *practical*, and Minnesota law and rule testing *must be done by a board-approved provider*. Appropriate standardized tests shall be used and shall include subject matter relative to the application of Minnesota law. In every case, the primary consideration shall be to safeguard the health and safety of consumers by determining the competency of the applicants to provide the services indicated.²³²

286. The new Rule 2110.0590 does not mention how it will approve the testing providers for the practical skills tests required for licensure. Simply adding a provision that a school licensed by the Board is approved by the Board to administer practical testing should correct this defect.

287. Finally, the Board has failed to explain the need and reasonableness of Subpart C, which sets forth the number of training hours required before a student may sit for the practice skills test. It is unclear in both the rule and SONAR, why a student is able to take the practical skills test before completing the full number of training hours required for course completion. If a student takes the practice skills test and passes with only 1,350 cosmetology training hours completed (as opposed to the 1,500 hours required for licensure), has the student completed all requirements for licensure? Are the hours required before taking the practical skills test the “initial licensure training” that the Board intended? Because of this ambiguity, the rule is defective for vagueness and failure to establish the need and reasonableness of the provisions.

288. Because the Board’s modifications have not cured the defects identified above, proposed Rule 2110.0590 is **DISAPPROVED**. The Board may correct these defects and return the rule for further review.

²³² Emphasis added.

S. Part 2110.0630: Instructors

289. The amendments to Rule 2110.0630 involve regulations on school instructors. Item A of the rule, as originally proposed, read:

A. ~~There must be at least two licensed instructors on the school premises whenever students are presented; and The A licensed instructor must provide all training to each student at a school. A licensed instructor must be available to each student for the duration of the student's scheduled in-person classroom, online classroom, and clinic time. A school must maintain a minimum ration of one instructor for each 1 to 20 per 15 students present each day. All students must be under the supervision of an instructor at all times when in a classroom or clinic and whenever the student is performing cosmetology services on the school's premises.~~

290. Commenter Georgina Davis questioned the need for instructors to be “available to each student during the duration” of online classes when online classes are generally attended by students on their own time and without live instruction.²³³ Ms. Davis explained that the rule would require schools to schedule online classes with live instructors and have students attend in real time on a schedule, thereby imposing a burden to both schools and students.²³⁴

291. In addition, Ms. Davis and two other commenters expressed concerns about the instructor-to-student ratio of one instructor for every 15 students, especially as it applies to online classes.²³⁵ Ms. Davis noted that it is common for online college courses to have hundreds of students and just one instructor.²³⁶ Ms. Davis asserts that theory classes can effectively be held online for more than 15 students and just one instructor, but that the 1:15 ratio might be more appropriate for clinical, hands-on courses.²³⁷

292. The other three commenters noted that the 1:15 ratio will have a significant financial impact on public high school programs that already struggle with funding for instructors.²³⁸ A change to the 1:15 ratio would likely reduce the number of students able to enroll in a high school program and result in fewer students being able to pursue a career in the field.²³⁹

293. Commenter Jennifer Walther noted that an instructor-to-student ratio of 1:15 will also be a hardship to schools with larger enrollment because they will now have to find more staff. This is difficult when the pool of licensed instructors is so small.

²³³ Comment of Georgina Davis (Oct. 6, 2022).

²³⁴ *Id.*

²³⁵ Comments of Georgina Davis (Oct. 6, 2022); Comments of David Fuller-Rueschman (Oct. 14, 2022); Comments of Mike Opp (Oct. 28, 2022).

²³⁶ Comments of Georgina Davis (Oct. 6, 2022).

²³⁷ *Id.*

²³⁸ Comments of David Fuller-Rueschman (Oct. 14, 2022); Comments of Mike Opp (Oct. 28, 2022); Comments of Carol Bengtson (Nov. 4, 2022).

²³⁹ Comments of David Fuller-Rueschman (Oct. 14, 2022); Comments of Mike Opp (Oct. 28, 2022); Comments of Carol Bengtson (Nov. 4, 2022).

She advocates for having a ratio of 1:20 for preclinical classes and reducing that ratio to 1:15 for clinical courses (i.e., hands-on courses where students are performing services on the floor).²⁴⁰

294. The Board agreed with the comments and modified Item A as follows:²⁴¹

A. ~~A licensed instructor must provide all training to each student at a school. A licensed instructor must be available to each student for the duration of the student's scheduled in-person classroom, online classroom, and clinic time.~~ The school must maintain a minimum ratio of one instructor per 20 students who are present at the school or participating virtually in synchronous real-time instruction.

295. The Board's modification to Item A appears to address the commenters concerns.

296. Accordingly, the Administrative Law Judge finds that the Board's modifications to Rule 2110.0630 are necessary, reasonable, and do not result in a rule that is substantially different from the rule originally published. Rule 2110.0630, as modified, is **APPROVED**.

T. Part 2110.0640: Enrollment Contracts

297. The amendments to Rule 2110.0640 require schools to provide enrollment contracts to students and set forth content requirements for enrollment contracts.

298. A group of commenters lead by Ms. Kelly objected to the rule on the basis that it was "overly burdensome" because other accreditation or licensing authorities may have similar requirements.²⁴² The Board explained that the amendments were intended to protect students, provide clarity for schools, and make the contracts consistent with the rules' other record-keeping requirements.²⁴³

299. The Board did, however, modify Item B of the rule to require the enrollment contract to contain the name and date of birth of the student, as follows:

B. An enrollment contract must include:

(1) the legal name and date of birth of the student;

(2)—~~(1)~~ the name of the student's training program...

300. This modification is reasonable and does not render the rule substantially different from the rule as originally proposed.

²⁴⁰ Comments of Jennifer Walther (Dec. 19, 2022).

²⁴¹ Ex. L (Board Responses to Prehearing Comments).

²⁴² Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁴³ Ex. L (Board Responses to Prehearing Comments).

301. The Board also modified Item B(6) to remove a reference to the school refund policy, consistent with the Board's modifications to Rule 2110.0650 (discussed below).²⁴⁴ The modification to Item B(6) reads:

- (6) a statement acknowledging that the student received and understood ~~the school's refund policy as required by part 2110.0650~~ and the student handbook as required by part 2110.0660; and

302. This modification is not required to make Rules 2110.0640 and 2110.0650 (as modified) consistent because Rule 2110.0650 still requires schools to maintain refund policies. In other words, Item B(6) as originally proposed would still be a good and valid requirement for including in enrollment contracts. Nonetheless, the Board's modification to Item B(6) is not unreasonable. The Board can choose to include the modification or leave the item as originally proposed and both options are approved.

303. In sum, the Administrative Law Judge has reviewed the enrollment contract requirements and finds them to be needed, reasonable, and not unduly burdensome to any party. Accordingly, the amendments and modifications to Rule 2110.0640 are **APPROVED**.

U. Part 2110.0650: Refund Policy

304. Rule 2110.0650 involves school refund policies for student tuition. The rule, as it currently exists, provides for a percentage of tuition to be retained by schools after a student withdraws from the program, dependent on the percentage of the total program a student completed before requesting a refund.

305. Commenters on this rule part claim that the rule is outdated and unfair and should be revised to favor students over the schools.²⁴⁵ These commenters suggest following federal school or Department of Education refund policies.²⁴⁶ In the alternative, they suggested clarifying the refund calculations in the rule to ensure that students receive more refunds from schools.²⁴⁷

306. In response to the comments, the Board modified the rule by essentially repealing the entire current rule, deleting the proposed rule, and substituting them with one sentence authorizing schools to establish their own refund policies.²⁴⁸ The Board did not submit any rationale for the policy decision. The modification from the originally proposed rule is as follows:

²⁴⁴ Ex. L at 13 (Board Responses to Prehearing Comments).

²⁴⁵ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Ex. L (Board Responses to Prehearing Comments).

2110.0650 REFUND POLICY.

Each school must have a written policy on the refund of tuition and fees when students terminate training. The policy must include the following requirements.:

~~A. — each school must provide an applicant or an applicant's parent or guardian with a complete refund of all money that the applicant or the applicant's parent or guardian paid if the school rejects the applicant, or if the applicant cancels the enrollment contract, in writing or in person, within three business days of the date that the contract was signed by both the applicant and agent of the school and before the applicant enters classes. The enrollment contract must include a "Notice of Cancellation" that explains how to cancel the contract;~~

~~B. — each school must provide an applicant or an applicant's parent or guardian with a refund of all money that the applicant or applicant's parent or guardian paid except a registration or enrollment processing fee up to 15 percent of the contract price if the applicant cancels the enrollment contract more than three business days after conclusion of the contract but before the applicant enters classes;~~

~~C. — if a student has started classes, the school must not withhold more than the following maximum tuition withholding limits:~~

~~Percentage of Total Program Represented by Maximum Amount of Total Tuition School~~

the Hours of Training Completed	May Receive or Retain
0 to 4.9 percent	20 percent
5 to 9.9 percent	30 percent
10 to 14.9 percent	40 percent
15 to 24.9 percent	45 percent
25 to 49.9 percent	70 percent
Over 50 percent	100 percent

~~D. — This part does not apply to schools governed by the Minnesota State Colleges and Universities system, schools licensed by the Office of Higher Education, and secondary schools licensed by the board.~~

~~Subp. 2. Refund deductions. A school may deduct fees for the student kit, textbooks, and workbook before applying the percentages in~~

~~refund computations, if these fees are included in the tuition and if these items become the property of the student. This deduction must be clearly stated in the refund policy contained in the enrollment contract.~~

307. The modification (essentially a repeal of the rule currently in place) does not serve to protect students like the existing rule or the originally proposed amendments. Commenters were concerned that the originally proposed amendments did not do enough to protect students and were confusing.²⁴⁹ This modification is certainly simpler, but it removes nearly all of the protections for students that once existed (in both the current rule and the originally proposed rule). In this way, the modification was not responsive to stakeholder input. Nonetheless, this is a policy decision that the Board has made and is within the discretion of the Board.

308. While it would have been helpful for the Board to provide some explanation for this modification, it is within the statutory authority of the Board to require schools to have refund policies.²⁵⁰ Because the modification is within the scope of the matter announced in the Notice of Hearing and is a logical outgrowth of the rule hearing, the modification does not arise to a substantial change under Minn. Stat. § 14.05, subd. 2(b). According, Rule 2110.0650, as modified, is **APPROVED**.

V. Part 2110.0660: Student Handbook

309. The proposed amendments to Rule 2110.0660 require schools to maintain a student handbook that includes the school's rules, attendance policies, and disciplinary policies. It also requires schools to provide students with the handbook and notify students of any changes.

310. A group of commenters objected to these amendments claiming that it is inconsistent with the "core mission of the board which is the health and safety of others and safety and sanitation."²⁵¹

311. The Board and the Administrative Law Judge disagree.²⁵² The amendments to Rule 2110.0660 ensure that students are advised of important information related to their education and training. This is needed and reasonable and well within the statutory authority of the Board.

312. As such, the amendments to Rule 2110.0660 are **APPROVED**.

W. Part 2110.0670: Record Maintenance and Retention

313. The proposed amendments to Rule 2110.0670 set forth the recordkeeping requirements for schools.

²⁴⁹ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁵⁰ See Minn. Stat. §§ 155A.26; .30, subd. 3(8).

²⁵¹ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁵² Ex. L at 14-15 (Board Responses to Prehearing Comments).

314. Several commenters claim that the rule is “overly burdensome” and results in redundant reporting requirements because other accrediting or licensing entities may have similar requirements. These commenters also questioned the Board’s authority to review student records.²⁵³

315. The Board explained that access to student records is often needed due to complaints or investigations, as authorized by Minn. Stat. § 155A.33.²⁵⁴ Section 155A.33 gives the Board authority to refuse or deny licensing applications, to suspend or revoke a license, or take disciplinary action against a licensee. The statute further authorizes the Board to take disciplinary action against a licensee (i.e., schools) if they refuse to comply with a Board request to inspect the premises or records.²⁵⁵

316. Moreover, the Board is authorized to grant license applications.²⁵⁶ To obtain a license, applicants must submit evidence that they have completed all required training hours, clinical service exercises, and the practical skills test. Hence, accurate recordkeeping by the schools is necessary to protect students’ investments and ensure that schools can document students’ qualifications so they can be licensed upon completion of the program. Similarly, documentation of instructor qualifications and work schedules, financial records related to student funds, and student access to transcripts and their own records are important to ensure that a school is fulfilling its obligations to students and its own licensing requirements.

317. The Board did, however, modify Item F of the rule to correct a word. That change is as follows:

F. A school must maintain all records related to individuals who complete a skills course, including ~~any~~ the enrollment contract and agreement, record of financial transactions, ...

318. This modification is reasonable and does not render the rule substantially different from the rule as originally proposed.

319. Finally, commenter Jennifer Walther questioned if the 10-year record retention requirement in Item I requires that the records be maintained on the school premises, like the current rule.²⁵⁷ Because Item I does not say “on the premises,” it would likely read to not require these documents to be on school premises. If the Board intended that these documents remain on school premises, the Board will need to modify the rule accordingly.

320. The Board has established the need and reasonableness of the proposed amendments and modification to Rule 2110.0670. Accordingly, Rule 2110.0670, as modified, is **APPROVED**.

²⁵³ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁵⁴ Ex. L at 15 (Board Responses to Prehearing Comments).

²⁵⁵ Minn. Stat. § 155A.33, subd. 4(14).

²⁵⁶ Minn. Stat. § 155A.25, subd. 5.

²⁵⁷ Comments of Jennifer Walther (Dec. 19, 2022).

X. Part 2110.0671: Student Records

321. Proposed Rule 2110.0671 requires schools to maintain certain documentation for students, including the enrollment contract, preclinical training hours, a course completion certificate, clinical service exercises, practical skill test results, and a transcript containing all training hours and clinical service exercises the student has completed.

322. The same commenters who objected to school record maintenance and retention, objected to the student record requirements, claiming that the rule was “overly burdensome” and “redundant” to requirements of other accreditation or licensing entities.²⁵⁸

323. The Board gave the same justification for the rule as it did for its amendments to Rule 2110.0670.²⁵⁹

324. The Board did modify Subpart 1, Item E of the rule to change one word, as follows:

E. documentation of all accrued clinical service exercises on a daily and monthly basis as required in part 2110.0680. A school must maintain all clinical service exercise documentation on a form prescribed provided by the board;

325. This modification does not render the rule substantially different from the rule as originally proposed and is helpful to schools and students because it ensures uniformity for schools, students, and license applicants.

326. The Board has established the need and reasonableness of the student record requirements in proposed Rule 2110.0671. Therefore, the rule, as modified, is **APPROVED**.

Y. Part 2110.0680: Certification of Student Hours and Clinical Service Exercises

327. The proposed amendments to Rule 2110.0680 correspond with the Board’s licensing requirements for documenting clinical service exercises and training hours (see proposed Rules 2110.0010, Subpart 12a, 0510, .0520, .0525, .0530, .0580).

328. Commenters argued that the requirements were overly burdensome and did not comply with the Board mission to focus on school sanitation and health, rather than practitioner licensing requirements, which should be placed in Minnesota Rule chapter 2105 (specific to individual licensing).²⁶⁰

²⁵⁸ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁵⁹ Ex. L at 15-16 (Board Responses to Prehearing Comments).

²⁶⁰ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

329. The Board responded that training hours and clinical service exercises are required for licensure. Therefore, it is needed and reasonable that the Board have a rule that requires schools to certify and record these important hours.²⁶¹

330. After publication of the rule, the Board did modify Item A of the rule as follows:²⁶²

A. A school must accurately record all student hours and completed clinical service exercises on a daily basis. Accrued student hours and clinical service exercises are valid for a maximum of five years from the last date of the student's attendance.

331. This modification adds clarity to the rule and does not render the rule substantially different from the rule as originally proposed.

332. The Administrative Law Judge does note that Minnesota Rule chapter 2105 appears the more appropriate place for individual licensing requirements and urges the Board to ensure that chapter 2105, when amended, be made consistent with Part 2110. Any conflict between the two chapters could subject the Board to legal challenges and confusion in the industry.

333. With respect to Rule 2110.0680, the Board has established the need and reasonableness of the proposed amendments and modification, rendering the rule, as modified, **APPROVED**.

Z. Part 2110.0705: Transfer Students

334. The amendments to Rule 2110.0705 relate to a school review of transfer student records from schools in other states or countries in order to certify the student for licensure in Minnesota. This rule delegates to schools the discretion and authority to assess an individual trained in a different state or county, and identify the additional training needed to issue a course completion certificate, thereby enabling the individual to apply to be licensed in Minnesota.

335. Commenters asserted that the amendments to Subpart 1 (applying to domestic transfers) rendered the rule “confusing” and not in compliance with law but did not identify how the amendments are confusing or in conflict with existing law.²⁶³

336. The Administrative Law Judge does not identify any defect in Subpart 1 causing it to be confusion or in conflict with other laws.

337. After publishing the proposed rules, the Board modified Subpart 1 as follows:²⁶⁴

²⁶¹ Ex. L at 16 (Board Responses to Prehearing Comments).

²⁶² Ex. N (Summary of Board Modifications).

²⁶³ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁶⁴ Ex. N (Summary of Board Modifications).

Subpart 1. Domestic transfers. An individual seeking licensure who has received previous training at a board-licensed school or a licensed school in another state or in a United States territory may...

338. The modification brings clarity to the subpart and is reasonable. It does not render the rule substantially different from the rule as originally proposed.

339. The same commenters assert that Subpart 2 (applying to international transfer students) imposes too many burdens on the students and schools and does not comply with current skills course requirements set forth in proposed Rule 2110.0545 and existing Rule 2105.0187.²⁶⁵ The commenters did not identify exactly how the rule conflicted with current skills course requirements.²⁶⁶

340. Proposed Rule 2110.0705, Subpart 2, Item A (foreign transfers) inserts an additional requirement not included in Subpart 1 (domestic transfers) -- the administration of the practical skills test. In other words, the practical skills test is only required for foreign students, not domestic transfers. Because the course completion certificate required for licensure requires information about the practical skills test, it is unclear why domestic transfers will not be subject to this same requirement. The Board should review its rules and determine if a modification is necessary to bring Subparts 1 and 2 into alignment.

341. In addition, Subpart 2 is unclear if a foreign transfer student who doesn't pass the practical skills test must complete a skills course. Subpart 1 does not require either a skills course or a practical skills test for domestic transfers. The Board should carefully review this rule again and ensure that it is clear as to whether these transfer students will need to complete a skills course and whether domestic transfers will also be subject to a practical skills test – now a requirement for licensure under the revised rules.

342. Finally, with respect to Subpart 3, the commenters assert that requiring the student or school to translate the records into English imposes undue expense and burden on both the schools and students.²⁶⁷

343. Subpart 3 states: “Any records from another country must be evaluated by a board-approved credentialing agency at the student’s or school’s expense.” The Board asserts that this requirement will “not result in any additional costs,”²⁶⁸ which is incorrect because the subpart will obviously result in costs to the schools and/or the students. Nonetheless, the Board has presented sufficient evidence that the requirement is needed and reasonable to ensure that international students have records that can be clearly understood.

344. However, it is unclear in the rules what a “board-approved credentialing agency” means. To avoid any issues, the Board should consider clarifying this term or identifying the credentialing agencies that the Board has approved. This is a technical

²⁶⁵ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁶⁶ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁶⁷ *Id.*

²⁶⁸ Ex. D at 41 (SONAR).

recommendation, not a defect. Modifying the rule to include this information will not result in a substantial change and would be helpful for all stakeholders.

345. Finally, this Rule 2110.0705 must be read in conjunction with Rule 2105.0145 (practitioner licensure). The Board is advised to take time to ensure that the two rules are consistent since many of the licensing requirements are now in Chapter 2110, including the requirement for a practical skills test. Any modifications needed for consistency can be submitted when the rules are resubmitted for final approval.

346. In sum, the Administrative Law Judge has reviewed Rule 2110.0705 and finds that the Board has established the need and reasonableness of the amendments. Accordingly, the proposed Rule 2110.0705, as modified, is **APPROVED**. Recommendations by the Judge do not render the rule defective but are provided solely for consideration by the Board before final rule approval.

AA. Part 2110.0730: Preenrollment Disclosures

347. The proposed amendments to Rule 2110.0730 require a school to provide to prospective students: (1) the minimum requirements of licensure; (2) the cost for tuition and fees; (3) the school's enrollment contract; (4) the school's refund policy; and (5) the student handbook.

348. Commenters assert that these disclosure requirements are overly burdensome on schools, "redundant," and conflict with the overall "mission" of the Board to ensure sanitation and safety. The commenters ask that the rule be "repealed."²⁶⁹

349. The Board explained that these disclosure requirements protect students, provide transparency for schools, and impose reasonable requirements that schools should be able to easily provide to students.²⁷⁰ The Administrative Law Judge agrees.

350. The Board has established that the amendments to Rule 2110.0730 are needed and reasonable. Accordingly, Rule 2110.0730 is **APPROVED**.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has authority and jurisdiction to review these rules under Minn. Stat. §§ 14.14, .15, .50(2022), and Minn. R. 1400.2100 (2021).

2. The Board gave all required notice to interested persons in this matter pursuant to Minn. Stat. §§ 14.101, .111, .116, .131, .14, .22, .23, .25, .37, 115.44 (2022)

²⁶⁹ Comments of Lara Kelley (joined by others) (Nov. 4, 2022).

²⁷⁰ Ex. L at 17-18 (Board Responses to Prehearing Comments).

and Minn. R. 1400.2060, .2070, .2080, .2230 (2022), including all additional notice requirements of rule and law.

3. The Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.101, .111, .116, .131, .14, .20, .22, .23, .24, .25, 115.44, and Minn. R. .2060, .2070, .2080, .2090, .2210, .2220, .2230, and all other applicable rules and laws.

4. The Board has demonstrated its statutory authority to adopt the proposed rules pursuant to Minn. Stat. § 14.05, subd. 1 (2022).

5. The Board has fulfilled all substantive requirements of Minn. Stat. §§ 14.002, .127, .128, .131, .14, .23, .24, .50, and Minn. R. 1400.2070, .2080, and all other applicable rules and laws.

6. The Additional Notice Plan, Notice of Hearing, proposed rules, and the SONAR complied with Minn. Stat. §§ 14.131, .22, .23 and Minn. R. 1400.2060, .2070, .2080.

7. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, .50, with the exception of the following proposed rules which are **DISAPPROVED**:

- 2110.0510
- 2110.0520
- 2110.0525
- 2110.0530
- 2110.0580
- 2110.0590

8. The Administrative Law Judge **APPROVES** the remaining rules, with some technical suggestions, as set forth above.

9. The Board's modifications to certain rules, as set forth above, are **APPROVED**. While these modifications were proposed by the Board after publication of the rules in the *State Register*, they do not render those rules "substantially different" within the meaning of Minn. Stat. § 14.05, subd. 2. Such modifications are needed and reasonable, and should be adopted by the Board.

10. The repeal of Rules 2110.0010, subparts 14, 15; .0100 (in its entirety); .0320, subparts 9, 11, 12; .0330, subparts 3, 4, 5; .0390, subpart 3a; .0410, subpart 2; and .0710 (in its entirety) are **APPROVED** as needed and reasonable.

11. Due to the disapproval of certain rules, this Report has been submitted to the Chief Administrative Law Judge for her consideration pursuant to Minn. Stat. § 14.15 and Minn. R. 1400.2240, subp. 4.

12. Any Finding of Fact that might properly be termed a Conclusion of Law, and any Conclusion of Law that might properly be termed a Finding of Fact, are hereby adopted as such.

13. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Board from further modification of the proposed rules, provided that the rule finally adopted is based upon facts appearing in this rule hearing record and the Board complies with the requirements of Minn. R. 1400.2110, if the modification results in a substantially different rule.

14. Should the Board accept the modifications recommended by the Administrative Law Judge in this Report, the Board should re-submit the modified rules in their entirety for review and final approval, along with revisions to the disapproved rules.

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

RECOMMENDATION

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

Dated: January 30, 2023



ANN C. O'REILLY
Administrative Law Judge

NOTICE

The Board 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 Board 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.

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 her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the Board of actions that will correct the defects, and the Board 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 Board 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. If the Board makes a submission to the Commission, it may not adopt the rules until it has received and considered the advice of the Commission. However, the Board is not required to wait for the Commission's advice for more than 60 days after the Commission has received the Board's submission.

If the Board 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 Board 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 Board 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 Board and the Board will notify those persons who requested to be informed of their filing.