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Children, Families & Learning

PROPOSED RULES RELATING TO SPECIAL EDUCATION MINNESOTA RULES, CHAPTER 3525

STATEMENT OF NEED AND REASONABLENESS

Introduction and Statutory Authority

The 1999 Minnesota Legislature amended various state laws regarding special education and provided for rulemaking authority. Specifically, 1999 Minnesota Laws, Chapter 123, § 20 authorizes the Commissioner of the Minnesota Department of Children, Families & Learning (CFL) to adopt rules as follows:

> The Commissioner shall adopt rules to update Minnesota Rules, Chapter 3525, for special education. Provisions of this chapter that exceed federal requirements are deemed valid for the purposes of providing special instruction and services to children with a disability. In addition to technical changes, corrections, and similarly needed revisions, specific rules shall be modified or repealed as indicated... .

This Statement of Need and Reasonableness (SONAR) includes a rule-by-rule analysis of the proposed amendments to Chapter 3525 and several appendices containing information pertinent to the rulemaking process and specific amendments to the rules. This SONAR also includes the requirements set forth in Minnesota Statutes, § 14.131, which states that the SONAR must include:

> [T]o the extent the agency, through reasonable effort, can ascertain this information:
> (1) a description of the classes of person 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 of 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; and
> (6) 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.
>
> The statement must describe how the agency, in developing the rules, considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002.

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Finally, Minnesota Statutes, § 14.002, states:

> [W]henever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.

Throughout the development of the proposed rules and this SONAR, CFL has made every attempt to develop rules that will ensure local educational agencies are able to operate effective special education programs in compliance with state and federal law and regulation. Further, CFL proposes the following new language and technical and substantive amendments described in this SONAR to make the rules governing special education clear in purpose and intent, yet not overly prescriptive and flexible but not difficult to interpret.

Alternative Format

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Kristin Asche at the Department of Children, Families & Learning, telephone: 651.582.8248. TTY users may call the Department of Children, Families & Learning at 651.582.8201.

Additional Notice

A Request for Comments was published in the State Register on August 30, 1999. The proposed rules and a Notice of Hearing will be published in the State Register in November 2000. At that time, CFL will also make the proposed rules available and send the Notice of Hearing to the following parties:

Directors of Special Education
Charter Schools
Low Incidence Regional Facilitators
Service Cooperative Units
Chairs of the Higher Education Departments
Correctional Facilities
Parent/Advocate Organizations
Special Education Interested Parties Mailing List
Department Registered Mailing List
Persons who submitted comments or requested copies of the proposed rules.

The scheduled hearings, additional notices, and opportunities for comment comply with IDEA '97 at 20 U.S.C. § 1412(a)(20), which states:

> A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions... . Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

Witnesses

At the public hearings, CFL anticipates having the following witnesses testify in support of the need for and reasonableness of the proposed rules:

1. Ms. Mimi Rice, an Indian Home-School Liaison for Robbinsdale Schools, will testify about the need for the new language defining cultural liaisons at part 3525.0200, subpart 1h.
2. Ms. Dixie Harrison, complaint investigator in CFL's Division of Accountability and Compliance, will testify regarding the development of the new definition of extended school year (ESY) at part 3525.0200, subpart 2e and the proposed state standard for determining a pupil's need for and the provision of ESY services at part 3525.0755.
3. Ms. Marilyn Leifgren, member of the EBD, DCD, and OHD Criteria Task Forces, will testify regarding the proposed amendments to the eligibility criteria for emotional and behavioral disorders at part 3525.1329, developmental cognitive disabilities at part 3525.1333, and other health disabilities at part 3525.1335.
4. Mr. Jim Mortenson, coordinator of the special education hearing system at CFL, will testify regarding the proposed amendments to the due process hearing procedures set forth at parts 3525.3600 to 3525.4770.
5. Other Department of Children, Families & Learning employees, as deemed appropriate.

RULE-BY-RULE ANALYSIS

In the following rule-by-rule analysis, CFL indicates whether the amendment to each rule is a technical change, correction, clarification, revision, or specific rule modification or repeal as directed by 1999 Minnesota Laws, Chapter 123, § 20. This analysis also includes CFL's response to oral testimony and written comments it received during the public comment period which began August 30, 1999. CFL received a number of public comments on issues outside the scope of these rules, and those comments are not addressed here. CFL also proposes multiple technical edits throughout Chapter 3525 to update statutory and rule references, improve format, and clarify language, and a technical edit will only address if it involves a previously controversial rule.

Pursuant to Minnesota Statutes, § 14.131, this rule-by-rule analysis also includes, where appropriate, a fiscal impact statement describing the anticipated costs school districts may incur to implement and comply with the proposed rules, and a determination of whether there are less costly or less intrusive methods available for achieving the purpose of the proposed rule. The proposed rules will not require CFL to expand its existing special education monitoring, due process hearing, or complaint systems. As a result, CFL does not anticipate an increase in the costs it will incur to implement and enforce the proposed rule. Finally, Minnesota Statutes, § 14.131 requires that this rule-by-rule analysis include an assessment of any differences between the proposed rule and existing federal regulations, and CFL will include this assessment, where appropriate. However, because many of the proposed amendments were legislatively-mandated to ensure that these rules are consistent with federal law and regulation, CFL does not anticipate any such differences will occur.

3525.0200 DEFINITIONS FOR SPECIAL EDUCATION.

The Legislature directed CFL to amend Minnesota Rule, part 3525.0200 to "add definition of caseload... ." See 1999 Minn. Laws, Ch. 123, § 20(1). However, because a definition of caseload and the caseloads themselves are addressed at part 3525.2430, CFL does not propose to add a definition of caseload to part 3525.0200 at this time.

Subpart 1h. Cultural liaison.

CFL proposes to add a definition of "cultural liaison" at part 3525.0200, subpart 1h.

Subp. 1h. Cultural liaison. "Cultural liaison" means a person who is of the same racial, cultural, socioeconomic, or linguistic background as the pupil, and who:
a. provides information to the IEP team about the pupil's race, cultural, ~~,~~ socioeconomic, and linguistic background;
b. assists the IEP team in understanding how racial, cultural, socioeconomic, and linguistic factors impact educational progress; and
c. facilitates the pupil's parent's understanding and involvement in the special education process.
If a person who is of the same racial, cultural, socioeconomic, or linguistic background as the pupil is not available, then a person who has knowledge of the pupil's racial, cultural, socioeconomic, and linguistic background may act as a cultural liaison.

CFL received a number of comments expressing concern for the pending legislatively-mandated repeal of part 3525.2900, subpart 1, item A, subitem 9, which requires that, in the development of an IEP, the team must include, "if appropriate, someone who is a member of the same minority or cultural background or who is knowledgeable concerning the racial, cultural, or disabling differences of the pupil." Specifically, one commentor stated:

> "[I]t is my opinion that American Indians and People of color are not being served adequately or equitably by Special Education. If we were being served, our statistics in Special Education, dropout rates, and achievement would be comparable to the general population... . Removal of the present language [in part 3525.2900] would cause Indian students and parents not to be served. It may also eliminate funding for the Indian Home School Liaison program."

CFL must adopt legislatively-mandated repeals. As a result, CFL cannot prevent the repeal of part 3525.2900. However, in response to the comment described above and other comments CFL received expressing the importance of a cultural liaison in educational planning for pupils of many racial, cultural, socioeconomic, and linguistics backgrounds, CFL proposes to add a definition of "cultural liaison" at part 3525.0200, subpart 1h to clarify the role a cultural liaison may have in the educational planning process for pupils of many racial, cultural, socioeconomic, and linguistic backgrounds. In addition, it is necessary to define the role of cultural liaisons for funding purposes. Specifically, CFL currently funds cultural liaisons under Minnesota Statutes, § 125A.76. As a result, it is necessary to define the services cultural liaisons must provide.

The proposed language will have no fiscal impact for two reasons. First, as stated above, cultural liaisons are currently funded through Minnesota Statutes, § 125A.76. As a result, no additional funding will be required for school districts who utilize cultural liaisons. Second, the proposed language serves only to define the role of cultural liaisons, not mandate their use.

Subpart 2. Days.

~~Supb. 2. Days. "Days" means the days school is in session when used in parts 3525.1100 to 3525.3600. "Days" means calendar days when used in parts 3525.3700 to 3525.4700.~~

CFL proposes to repeal the definition of "day" at subpart 2 as obsolete and duplicative of federal regulation. The existing definition of "day" is obsolete because it does not include a definition for "business" day, and it does not include all of the parts in Chapter 3525 which include

day requirements. For example, parts 3525.4750 and 3525.4770 are not included in the existing definition, and both of these parts contain references to calendar and business days. The existing definition of "day" is duplicative of federal regulations at 34 C.F.R. § 300.9, which states, in part:

> [T]he term –
> (a) Day means calendar day unless otherwise indicated as business day or school day;
> (b) Business day means Monday through Friday, except for federal and state holidays... and
> (c) School day means any day, including a partial day, that children are in attendance at school for instructional purposes.

Rather than update the existing definition, CFL proposes to adopt the federal definition of "day," and insert a "school," "business," or "calendar" modifier before each reference to "day" throughout the chapter. The proposed amendment is necessary to clarify the definition of "day" in each situation and to ensure that school districts and parents are fully aware of necessary timelines while minimizing the amount of duplicative rules. These amendments are not substantive and will not alter the purpose or effect of the impacted rule parts.

The proposed amendment has no fiscal impact because it merely clarifies an existing standard.

Subpart 2e. Extended school year services.

> Subp. 2e. Extended school year (ESY) services. "Extended school year (ESY) services" means special education instruction and related services for pupils who demonstrate the need for continued service beyond the instructional year as a necessary component of a free, appropriate public education.

CFL proposes to insert a definition of extended school year services at subpart 2e. This definition is reasonable because it is consistent with the federal regulations at 34 C.F.R. § 300.309, which states:

> Each public agency shall ensure that extended school year services are available as necessary to provide FAPE.... As used in this section, the term extended school year services means special education and related services that-
> (1) Are provided to a child with a disability beyond the normal school year of the public agency; in accordance with the child's IEP and at no cost to the parents of the child; and
> (2) Meet the standards of the SEA.

The federal regulations mandate that school districts provide ESY services that "meet the standards of the SEA." The existing rule does not contain useful guidance as to the state standards for the provision of ESY services. As a result, CFL proposes to insert this definition and new language at part 3525.0755 to provide such guidance. These amendments are necessary to assist school districts in complying with the federal mandate to "ensure that extended school year services are available as necessary to provide FAPE."

The proposed language delineating the standards for determining ESY needs can be found under part 3525.0755 of this SONAR.

3525.0550 PUPIL IEP MANAGER.

> The district shall assign a teacher or licensed related service staff who is a member of the pupil's IEP team as the pupil's IEP manager to coordinate the instruction and related services for the pupil. The IEP manager's responsibility shall be to coordinate the delivery of special education service in the pupil's IEP and to serve as the primary contact for the parent. A district may assign the following responsibilities to the pupil's IEP manager: assuring compliance with procedural requirements; communicating and coordinating among home, school, and other agencies; coordinating regular and special education programs; facilitating placement; and scheduling team meetings.

The Legislature directed CFL to "revise Minnesota Rules, part 3525.0550, to update role of IEP manager... ." See 1999 Minn. Laws, Ch. 123, § 20(2). CFL believes the original intent of this mandate was for CFL to address interagency service coordination through this rule part. However, because many of the issues involving interagency services have yet to be resolved, CFL has elected to maintain the existing language at part 3525.0550 until these issues can be addressed by the appropriate agencies. As a result, CFL does not propose substantive amendments to part 3525.0550 at this time.

CFL proposes to add the word "coordinating" to the phrase "regular and special education programs" in final sentence of the existing rule to make this phrase parallel to the other phrases in the sentence. The proposed amendment is technical in nature and will not alter the purpose or intent of the existing rule.

3525.0755 EXTENDED SCHOOL YEAR SERVICES.

As stated in part 3525.0200, subpart 2e of this SONAR, federal regulations at 34 C.F.R. § 300.309(2) require that school districts provide ESY services that "meet the standards of the SEA." Due to the pending legislatively-mandated repeal of part 3525.2900, the existing rule does not contain useful guidance as to the state standards for the provision of ESY services. As a result, CFL proposes the following new language governing extended school years services.

Subpart 1. Scope

> Subpart 1. Scope. School districts are required to provide extended school year (ESY) services to a pupil if the IEP team determines the services are necessary for the provision of a free, appropriate public education.

CFL proposes the language at subpart 1 to clarify the scope of ESY. The proposed amendment is consistent with federal regulations at 34 C.F.R. § 300.309, which states:

> Each public agency shall ensure that extended school year services are available as necessary to provide FAPE... .

Subparts 2. Definitions.

> Subp. 2. Definitions. For the purposes of ESY, the terms in this subpart have the meanings given them:

A. "Learning rate" means the amount of learning that has taken place during the term of the current IEP.
B. "Recoupment" means a pupil's ability to regain the performance of a skill or acquired knowledge. Recoupment becomes significant when a pupil's ability to regain a skill or acquired knowledge exceeds 30 percent of the pupil's learning rate.
C. "Regression" means a significant deficit in the performance of a skill or acquired knowledge specified in a pupil's annual goals as stated in the pupil's IEP.
D. "Self-sufficiency" means a domain of skills which a pupil attains to achieve a reasonable degree of personal independence as identified in the pupil's annual IEP goals. Skill areas within the domain of self-sufficiency include:
(1) basic self-help, including toileting, eating, feeding, and dressing;
(2) muscular control;
(3) physical mobility;
(4) impulse control;
(5) personal hygiene;
(6) development of stable relationships with peers and adults; and
(7) basic communication.

CFL proposes to include the definitions of regression, recoupment, learning rate, and self-sufficiency at subpart 2. CFL developed these definitions from federal case law governing ESY which will be further described under subpart 3 and from general practices in the field. These definitions are necessary to clarify the major components of an ESY determination.

Subpart 3. Provision of ESY.

Subp. 3. Provision of ESY. The basis for determining ESY needs is a significant regression and delay in recoupment of skills or acquired knowledge or the attainment and maintenance of the pupil's self-sufficiency. On an annual basis, the IEP team must determine a pupil is in need of ESY services when the pupils meets the conditions of item A or B.
A. Regression of a skill or acquired knowledge occurs following a break in instruction or services, and the time required to recoup the skill or knowledge exceeds 30 percent of the pupil's learning rate.
B. Services are necessary to attain and maintain self-sufficiency.

CFL proposes to establish regression and recoupment and attainment and maintenance of self-sufficiency as alternate standards for determining a pupil's ESY needs at subpart 3. These standards are reasonable because they are adopted from federal case law governing ESY, and they are consistent with long-standing state policy at Minnesota Rules, part 3525.2900, subpart 1, item G.

Regression and Recoupment

Federal court cases have established the use of regression and recoupment in determining a pupil's need for extended school years services. An ESY Task Force established by CFL in 1995 produced a final report entitled "Extended School Year Procedures Document," which summarizes relevant state and federal case law governing ESY. See Appendix A. In sum, this report reflects that courts have stated that school districts must provide ESY services to any pupil with a disability who suffers such regression during extended breaks in educational programming that an inordinate period of time will be required for the pupil to recoup losses in critical goal areas.

Several courts have attempted to clearly define an "inordinate amount of time" for the purposes of establishing recoupment. However, the existing standards vary greatly from court to court. For example, the Fifth Circuit Court of Appeals established that a pupil who experiences

substantial regression was entitled to ESY services even when there was evidence that the recoupment time was limited to three to four weeks. See Appendix B for *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1157 (5th Cir. 1986). The Western District Court of New York established still another standard in holding that a pupil was entitled to ESY when experts testified that it would take between two and five months for the pupil to recoup losses suffered during the summer. See Appendix C for *Holmes v. Sobol,* 690 F. Supp. 154 (W.D.N.Y. 1988).

In comparing the holdings of these and other cases, CFL was unable to find clear and specific guidance establishing a reasonable standard for recoupment. In addition, CFL felt the use of a specified time period for recoupment to be problematic. Specifically, ESY must be based on the individual needs of each pupil. To require districts to establish an "inordinate amount of time... required to recoup losses" as a generally applied time period without consideration of each disability or level severity would contradict that principle. For example, one pupil may take nine months to learn the sound-symbols relationship of vowels; another may attain this skill in two months. Applying a strict 30-day recoupment period for both of these pupils is disparate because it is unreasonable to expect the first pupil to recoup the regressed skill in 30 days when it took nine times that length of time to attain it in the first place.

CFL searched for a more reasonable, universally applicable standard that could apply to each pupil regardless of the pupil's disability or level of severity. The most reasonable standard CFL found was established in the findings of a complaint filed with the Office for Civil Rights (OCR). In the complaint, OCR reviewed the ESY policies of the Baltimore City Public Schools to determine whether the district violated Section 504 by failing to provide ESY services based on the individual needs of the students. The district's ESY policy required that ESY services must be provided to a pupil if time required for recoupment exceeds 30 percent of the pupil's learning rate. Learning rate is defined as the amount of learning a pupil may achieve during a specified time frame. See Appendix D for Baltimore City (MD) Public Schools (ESY) (OCR, 1986). The use of "30 percent of the pupil's learning rate" is a standard applicable to any disability or level of severity, and the relevant time interval for evaluating recoupment capability will pertain to the individual pupil's demonstrated progress in a goal area. As a result, it is a more reasonable and appropriate standard for establishing the individual ESY needs of each pupil.

As a result of the above-mentioned holdings and OCR's decision in Baltimore City, CFL proposes language stating that ESY must be provided to a pupil where "regression of a skill or acquired knowledge occurs following a break in instruction or services, and the time required to recoup the skill or knowledge exceeds 30 percent of the pupil's learning rate."

Self-sufficiency

The concept of self-sufficiency as it relates to ESY was adopted from the United States Supreme Court case of *Board of Education of the Hendrick Hudson School District v. Rowley*. See Appendix E. In *Rowley*, the Court established that the purpose of special education is to enable a child to achieve a "reasonable degree of self-sufficiency." The Court went on to define self-sufficiency as personal independence and to establish that self-sufficiency is a necessary component of a free, appropriate public education.

Because self-sufficiency is an integral part of a free, appropriate public education, CFL proposes to include language stating that ESY services must be provided to a pupil where "services

are necessary to attain and maintain self-sufficiency." This language is consistent with long-standing state policy that ESY be provided for regression and recoupment consideration or the attainment and maintenance of self-sufficiency as state at part 3525.2900, subpart 1, item G.

Subpart 4. Other factors to be considered.

> Subp. 4. Other factors to be considered. In making its determination of ESY needs, the IEP team must consider the following factors:
> (1) The pupil's progress and maintenance of skills during the regular school year;
> (2) The pupil's degree of impairment;
> (3) The parent's ability to provide an educational structure at home;
> (4) The pupil's rate of progress;
> (5) The pupil's behavioral or physical problems;
> (6) The availability of alternative resources;
> (7) The pupil's ability and need to interact with non-disabled peers;
> (8) The areas of the pupil's curriculum which need continuous attention; and
> (9) The pupil's vocational needs.

CFL proposes to include other factors to be considered in an ESY determination at subpart 4. These factors have been adopted from the Tenth Circuit Court of Appeals decision in *Johnson v. Indpendent School District No. 4*, which established that "regression and recoupment is not the only measure used to determine the necessity of [ESY]." The court stated:

> "In addition to the degree of regression and the time necessary for recoupment, courts have considered many factors important in their discussion of what constitutes an "appropriate" education program under [IDEA '97]. These include the degree of impairment and the ability of the child's parents to provide the educational structure at home, the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-[disabled] children, the areas of the child's curriculum which need continuous attention, and the child's vocational needs.... " See Appendix F.

This amendment is necessary to bring the existing state standard up to date, and ensure districts consider all of the factors that may impact a pupil's needs in determining whether a pupil requires ESY services in accordance with established standards.

As stated above, this language is necessary to assist school districts in complying with the federal mandate to "ensure that extended school year services are available as necessary to provide FAPE." In addition, because the proposed language merely provides necessary guidance in compliance with an existing federal mandate, and it is not a change in state policy, it should not have a marked fiscal impact on school districts.

3525.1100 STATE AND DISTRICT RESPONSIBILITY FOR TOTAL SPECIAL EDUCATION SYSTEM ~~(TSES)~~.

Minnesota Rules, part 3525.1100, subpart 2, item D is repealed by specific mandate of the Legislature to "repeal Minnesota Rules, part 3525.1100, subpart 2, item D, on parent advisory council as duplicative... ." See 1999 Minn. Laws, Ch. 123, § 20(3). The mandate for parent advisory councils is clearly stated in state statute at Minnesota Statutes, § 125A.24, which states:

In order to increase the involvement of parents of children with disabilities in district policymaking and decision making, school districts must have a special education advisory council that is incorporated in the district's special education system plan.
(1) This advisory council may be established either for individual districts or in cooperation with other districts who are members of the same special education cooperative.
(2) A district may set up this council as a subgroup of an existing board, council, or committee.
(3) At least half of the designated council members must be parents of students with a disability. The number of members, frequency of meetings, and operational procedures are to be locally determined.

CFL received a number of written and oral comments raising concern that if CFL adopted this legislatively-mandated repeal, school districts would no longer be required to maintain parent advisory councils. However, this concern is untenable because, as stated above, the mandate for parent advisory councils remains. It is simply now governed by state statute rather than rule.

3525.1325 AUTISM SPECTRUM DISORDER

CFL proposes multiple technical edits to Minnesota Rules, part 3525.1325 to improve format and clarify language. These technical edits are not substantive and will not alter the purpose or effect of the existing rule. However, because this part was previously controversial, CFL felt it necessary to include the following brief explanation of the proposed technical edits.

Subpart 1. Definition.

Subpart 1. Definition. "Autism spectrum disorders (ASD)" means a range of pervasive developmental disorders, with onset in childhood, that adversely affect a pupil's functioning and result in the need for special education instruction and related services. ASD is a disability category characterized by an uneven developmental profile and a pattern of qualitative impairments in several areas of development , including social interaction, communication, or the presence of restricted, repetitive, and stereotyped patterns of behavior, interests, and activities, with onset in childhood Characteristics can These core features may present themselves in a wide variety of combinations that range from mild to severe, as well as in and the number of symptoms behavioral indicators present, for example may vary. ASD may include Autistic Disorder, Childhood Autism, Atypical Autism, Pervasive Developmental Disorder Not Otherwise Specified, Asperger's Disorder, or other related pervasive developmental disorders.

CFL proposes to move the phrase "with onset in childhood" from its current place toward the end of the existing definition and place it closer to the beginning of the definition to clarify what the phrase modifies. CFL also proposes to delete references to the terms "characteristics" and "symptoms" and replace them with "core features" and "behavioral indicators" respectively. This technical change is necessary to ensure that the language is consistent with terms generally used in the field and the terms used in the DSM-IV. See Appendix G. Finally, CFL proposes several minor technical changes to the second, third and fourth sentences to improve the overall structure and clarity of this language. All of the above-mentioned amendments are technical in nature and will not alter the purpose or effect of the existing rule.

Subpart 3. Criteria.

Subp. 3. Criteria. The A multidisciplinary team shall determine that a pupil is eligible and in need of special education instruction and related services if the pupil demonstrates a patterns

~~of behavior consistent with~~ meets the criteria in items A and ~~fulfills the requirements in item~~ B. A determination of eligibility must be supported by information collected from multiple settings and sources.

A. An educational evaluation must address all three core features in subitems (1) to (3). ~~For eligibility purposes, there~~ The team must ~~be documented evidence~~ document that the ~~student~~ pupil demonstrates ~~the specific~~ patterns of behavior described in at least two of these subitems, one of which must be subitem (1). ~~The eligibility determination must be supported by information collected from multiple settings and sources.~~

The behavioral indicators ~~of these core features~~ demonstrated must be atypical for the pupil's developmental level. ~~Documentation of~~ The team shall document behavioral indicators ~~must include the use of~~ through at least two of these methods: structured interviews with parents, autism checklists, communication and developmental rating scales, functional behavior assessments, application of diagnostic criteria from the current Diagnostic and Statistical Manual (DSM), informal and standardized evaluation instruments, or intellectual testing.

(1) Qualitative impairment in social interaction, as documented by two or more behavioral indicators, ~~such as~~ for example: limited joint attention and limited use of facial expressions directed toward others; does not show or bring things to others to indicate an interest in the activity; demonstrates difficulties in relating to people, objects, and events; a gross impairment in ability to make and keep friends; significant vulnerability and safety issues due to social naivete; may appear to prefer isolated or solitary activities; misinterprets others' behaviors and social cues.

(2) Qualitative impairment in communication, as documented by one or more behavioral indicators, ~~such as~~ for example: not using finger to point or request, using others' hand or body as a tool; showing lack of spontaneous imitations or lack of varied imaginative play; absences or delay of spoken language; limited understanding and use of nonverbal communication skills such as gestures, facial expressions, or voice tone; odd production of speech including intonation, volume, rhythm, or rate; repetitive or idiosyncratic language or inability to initiate or maintain a conversation when speech is present.

(3) Restricted, repetitive, or stereotyped patterns of behavior, interests, and activities, as documented by one or more behavioral indicators, ~~such as~~ for example: insistence on following routines or rituals; demonstrating distress or resistance to changes in activity; repetitive hand or finger mannerisms; lack of true imaginative play versus reenactment; overreaction or underreaction to sensory stimuli; rigid or rule-bound thinking; an intense focused preoccupation with a limited range of play, interests, or conversation topics.

B. The team shall verify document and summarize in an evaluation report that ~~an~~ ASD adversely affects a pupil's ~~present level of~~ performance and that the pupil is in need of special education instruction and related services. ~~This verification is completed through the multidisciplinary team evaluation and summarized in the pupil's evaluation report.~~

Documentation must ~~be supported by data from each of the following components~~ include:

(1) ~~The~~ an evaluation ~~must identify~~ of the pupil's present levels of performance and educational needs in each of the core features identified by the team in item A. In addition, the ~~evaluation process must give consideration to~~ team must consider all other areas of education concern ~~consistent with the IEP process.~~ related to the suspected disability;

(2) ~~The pupil's need for instruction and services must be documented and supported by evaluation and~~ Observations of the pupil in two different settings, on two different days. ; and

(3) A ~~developmental history which summarizes~~ summary of the pupil's developmental ~~information~~ history and behavior patterns.

Subp. 4. Team membership. The team determining eligibility and educational programming must include at least one professional with experience and expertise in the area of ASD ~~must be included on the team determining eligibility and educational programming~~, due to the complexity of this disability and the specialized intervention methods. The team must include a school professional knowledgeable of the range of possible special education eligibility criteria.

Subp. 5. Implementation. Pupils with various educational profiles and related clinical diagnosis may ~~be included as eligible if they~~ meet the criteria of ASD under subpart 3. However, a clinical or medical diagnosis is not required for a pupil to be eligible for special

education services, and even with a clinical or medical diagnosis, a pupil must meet the criteria in subpart 3 to be eligible. ~~Due to the wide variation in characteristics and needs, pupils with different educational profiles or a specific clinical diagnosis must also be determined as eligible following the criteria in subpart 3. Following this eligibility determination process is essential to identify and document individual strengths and weaknesses and the pupil's unique educational needs so that an effective individual educational program may be planned and implemented.~~

CFL proposes several edits to the first paragraph of subpart 3 to improve format and to create a structural parallel between this and other disability categories in Chapter 3525. CFL also proposes to delete several phrases throughout items A and B and replace them with more precise language to improve the clarity of the rule. Finally, CFL proposes to delete the last two sentences of subpart 5 and replace them with the more concise phrase "and even with a clinical or medical diagnosis, a pupil must meet the criteria in subpart 3 to be eligible." These technical edits are necessary to reduce excessive wordiness and improve clarity.

3525.1329 EMOTIONAL AND BEHAVIORAL DISORDERS.

Minnesota Rule, part 3525.1329 is amended according to the specific mandate of the Legislature to "amend the eligibility criteria for emotional or behavior disorders so that the standards reflect severe emotional disorder and professional standards... ." 1999 Minn. Laws, Ch. 123, § 20(4).

In September of 1999, CFL convened the EBD Criteria Task Force to review the existing definition and criteria for emotional or behavioral disorders at Minnesota Rules, part 3525.1329 and make recommendations to the commissioner. See Appendix H for a list of EBD Criteria Task Force members. The Task Force met on multiple occasions in 1999 and 2000 to address the identification and needs of pupils with EBD. The proposed rule and related justification as detailed below reflects the recommendations of the EBD Criteria Task Force.

Subpart 1. Definition

Subpart 1. Definition. "Emotional ~~or~~ and behavioral disorders" means an established pattern ~~characterized by~~ of one or more of the following ~~behavior clusters~~ emotional and behavioral responses:

A. ~~severely aggressive or impulsive behaviors~~ withdrawal, anxiety, depression, problems with mood, or feelings of self-worth;

B. ~~severely withdrawn or anxious behaviors, general pervasive unhappiness, depression, or wide mood swings; or~~

~~C. severely~~ disordered thought processes ~~manifested by~~ with unusual behavior patterns~~,~~ and atypical communication styles~~, and distorted interpersonal relationships.~~

~~This category may include children or youth with schizophrenic disorders, affective disorders, anxiety disorders, or other sustained disorders of conduct or adjustment when they adversely affect education performance. The established pattern adversely affects education performance and results in either an inability to build or maintain satisfactory interpersonal relations necessary to the learning process with peers, teachers, and others, or failure to attain or maintain a satisfactory rate of educational or developmental progress that cannot be improved or explained by addressing intellectual, sensory, health, cultural, or linguistic factors.~~ ; or

C. aggression, hyperactivity, or impulsivity.

The emotional and behavioral responses must adversely affect educational or developmental performance, including intrapersonal, academic, vocational, or social skills; be

significantly different from appropriate age, cultural, or ethnic norms; and be more than temporary, expected responses to stressful events in the environment. The emotional and behavioral responses must be exhibited in at least three different settings, two of which must be educational environments. The responses must not be primarily the result of intellectual, sensory, or acute or chronic physical health conditions.

In conducting its review, the EBD Criteria Task Force determined that pupils have often been identified as having EBD and in need of special education and related services on the basis of behavioral issues without a consideration of emotional issues that may manifest themselves in the form of behavior. As a result, CFL now proposes to change the title of this disability category from "emotional or behavioral disorders" to "emotional and behavioral disorders." CFL also proposes to reorganize the characteristics of EBD as defined in items A, B, and C to emphasize the emotional component of EBD. Specifically, CFL proposes to move the behavioral responses defined in the existing rule at item A to item C, and place the emotional responses defined in the existing rule at items B and C to more prominent positions in items A and B, respectively. These amendments are necessary to ensure that school districts appropriately consider both the emotional and behavioral components when identifying and serving pupils with emotional and behavioral disorders.

CFL proposes to delete the term "severely" from the characteristics described in items A, B, and C. This term is unnecessary because "severely" was removed from the federal definition of emotional disturbances at 34 C.F.R. § 300.7(c)(4). In addition, it is not necessary to establish the level of impairment required in the definition because that level is clearly established in the proposed criteria. CFL also proposes multiple amendments to the characteristics themselves to simplify the language and to more accurately identify the pupils who may have EBD. Specifically, CFL proposes to delete the phrase "general pervasive unhappiness... or wide mood swings" and replace it with the broader phrase "problems with mood, or feelings of self-worth," and CFL proposes to add "hyperactivity" to the list of characteristics. These amendments are necessary for CFL to assist the field in a clear understanding of the characteristics of EBD and the types of behavior a pupil with EBD may exhibit.

CFL proposes to place the phrase, "These emotional and behavioral responses must adversely affect education or developmental performance, " in a more prominent place in the definition. This amendment is necessary to emphasize that a pupil may not be identified as EBD solely on the basis of behavior. Rather, the pupil must exhibit a pattern of behavior reflecting one or more of the areas as defined in items A, B, and C, and the pattern of behavior must impact the pupil's educational or developmental performance.

CFL also proposes to add the following to the definition of EBD: "The emotional and behavioral responses... must be significantly different from appropriate age, cultural or ethnic norms; and must be more than temporary, expected responses to stressful events in the environment. The emotional and behavioral responses must be consistently exhibited in at least three different settings, two of which must be educational environments. The responses must not be primarily the result of intellectual, sensory, or acute or chronic physical health conditions." These amendments are consistent with federal regulation at 34 C.F.R. § 300.7(c)(4) and are necessary to ensure that school districts do not deem a pupil's emotional and behavioral responses as inappropriate without considering the pupils age, cultural background, or other conditions.

Finally, CFL proposes to delete the sentence "This category may include children or youth with schizophrenic disorders, affective disorders, anxiety disorders, or other sustained disorders of conduct or adjustment... " to simplify the definition. Any pupil who meets the criteria for EBD will be eligible for special education regardless of whether the pupil suffers from any of the listed disorders. As a result, the deleted language only serves as unnecessary elaboration of the rule.

Subpart 2a. Criteria.

CFL proposes to delete the existing criteria for EBD at subpart 2 and replace it with new criteria at subpart 2a.

> Subp. 2a. Criteria. A pupil is eligible and in need of special education and related services for an and behavioral disorder when the pupil meets the criteria in items A to D.
> A. A pupil must demonstrate an established pattern of emotional and behavioral responses that is described in at least one of the following subitems and which represents a significant difference from peers:
> (1) withdrawn or anxious behaviors, pervasive unhappiness, depression, or severe problems with mood or feelings of self-worth defined by behaviors, for example: isolating self from peers; displaying intense fears or school refusal; overly perfectionistic; failing to express emotion; displaying a pervasive sad disposition; developing physical symptoms related to worry or stress; or changes in eating or sleeping patterns;
> (2) disordered thought processes manifested by unusual behavior patterns, atypical communication styles, or distorted interpersonal relationships, for example: reality distortion beyond normal developmental fantasy and play or talk; inappropriate laughter, crying, sounds, or language; self-mutilation or developmentally inappropriate self-stimulation; rigid, ritualistic patterning; perseveration or obsession with specific objects; overly affectionate behavior towards unfamiliar persons; or hallucinating or delusions of grandeur; or
> (3) aggressive, hyperactive, or impulsive behaviors that are developmentally inappropriate, for example physically or verbally abusive behaviors; impulsive or violent, destructive, or intimidating behaviors; or behaviors that are threatening to others or excessively antagonistic.
> The pattern must not be the result of cultural factors, and must be based on evaluation data which may include a diagnosis of mental disorder by a licensed mental health professional.
> B. The pupil's pattern of emotional and behavioral responses adversely affects educational performance and results in:
> (1) an inability to demonstrate satisfactory social competence that is significantly different from appropriate age, cultural, or ethnic norms; or
> (2) a pattern of unsatisfactory educational progress that is not the result of the pupil's intellectual, sensory, physical health, cultural, or linguistic factors; illegal chemical use; autism spectrum disorders under part 3525.1325; or inconsistent educational programming.
> C. The combined results of prior documented interventions and the evaluation data for each pupil must establish significant impairments in one or more of the following areas: intrapersonal, academic, or vocational or social skills. The data must document that the impairment:
> (1) severely interferes with the pupil's or other students' educational performance;
> (2) is consistently exhibited by occurrences in at least three different settings, including two educational environments, one of which is the classroom except for children not yet enrolled in kindergarten, and either the home, childcare, or community settings; and
> (3) has been occurring throughout a minimum of six months, or in the case of well-documented, sudden onset of a serious mental health disorder diagnosed by a licensed mental health professional.

Item A. At subpart 2a, item A, CFL proposes to add the phrase "which represents a significant difference from peers, is not the result of cultural factors, and is based on evaluation data

which may include a diagnosis of mental disorder by a licensed mental health professional." The existing criteria do not give sufficient guidance to the field on what factors must be considered in an appropriate evaluation, and the existing rule does not emphasize the important part a medical diagnosis may play in identifying a pupil with EBD. As a result, it is necessary to include language clarifying these factors.

CFL also proposes to reorganize the characteristics of EBD as defined in item A, subitems 1, 2, and 3 to emphasize the emotional component of EBD. Specifically, CFL proposes to move the behavioral responses defined in the existing rule from subitem 1 to subitem 3, and CFL proposes to place the emotional responses defined in the existing rule from subitems 2 and 3 to more prominent positions in subitems 1 and 2, respectively. These amendments are necessary to ensure that school districts appropriately consider both the emotional and behavioral components when identifying and serving pupils with emotional and behavioral disorders.

Item B. CFL proposes several technical edits to the existing language at item B, subitem 1. For example, CFL proposes to delete the phrase "a pattern of inability to build or maintain satisfactory interpersonal relations with peers, parents, teachers, and other significant adults necessary to the learning process" from the existing rule and replace it with "an inability to show satisfactory social competence that is significantly different from appropriate age, cultural, and ethnic norms." The proposed language is clearer and more generally used in the field. CFL also proposes simpler language to define the exclusionary factors as outlined in item B, subitem 2. These amendments are necessary to ensure that school districts clearly understand the criteria and do not misidentify pupils as having EBD when the pupil demonstrates emotional and behavioral responses that may be appropriate for the pupil's age or cultural or ethnic norms.

Item C. CFL proposes to delete the sentence "This finding must be supported by data from two or more of the following procedures... " in the existing rule at item C as duplicative. CFL proposes to clearly state the appropriate evaluation procedures in subpart 3, item A. As a result, it is not necessary to restate it here.

Subpart 3. Evaluation.

CFL proposes to separate the evaluation requirements stated in subpart 2, items D and E in the existing rule and place them in a new subpart 3.

Subp. 3. Evaluation.
A. The evaluation findings in subpart 2a must be supported by current or existing data from:
(1) clinically significant scores on standardized, nationallynormed behavior rating scales;
(2) individually administered, standardized, nationallynormed tests of intellectual ability and academic achievement;
(3) three systematic observations in the classroom or other learning environment;
(4) record review;
(5) interviews with parent, pupil, teacher;
(6) health history review procedures; and
(7) a mental health screening.
The evaluation may include data from vocational skills measures; personality measures; self-report scales; adaptive behavior rating scales; communication measures; diagnostic assessment and mental health evaluation reviews; environmental,socio-cultural, and ethnic information reviews; a functional behavioral assessment; gross and fine motor and sensory motor measures; or chemical health assessments.

B. Children not yet enrolled in kindergarten are eligible for special education and related services if they meet the criteria listed in subpart 2a, items A, B, and C, subitem (2) and (3). The evaluation process must show developmentally significant impairments in self-care, social relations, or social or emotional growth, and must include: two or more systematic observations, one in the home; case history, including medical, cultural, and developmental information; information on the pupil's cognitive ability, social skills, and communication abilities; standardized and informal interviews, including teacher, parent, caregiver, or childcare provider; or standardized adaptive behavior scales.

Item A. CFL proposes to renumber subpart 2, item D as subpart 3, item A and make the necessary elements of an appropriate educational evaluation more prescriptive. The proposed amendments are intentionally expansive and more prescriptive than the existing rule to assist the field in preventing the misidentification of pupils.

Item B. CFL proposes to renumber subpart 2, item E as subpart 3, item B and to remove duplicative language and to more clearly prescribe how early childhood pupils must be identified under this disability category. The proposed language is very similar to the existing language.

The amendments and technical changes described above are necessary to ensure that pupils with EBD are appropriately evaluated and identified in accordance with professional standards. The EBD Criteria Task Force felt it necessary to provide more guidance to the field as a result of the possible overemphasis on behavior factors with little or no consideration of emotional issues a pupil may be facing. The proposed rule will assist the field in the appropriate identification of pupils suspected of having EBD, and it will prevent the misidentification of pupils with behavioral issues that may be attributed to factors not related to an emotional and behavioral disorder.

CFL does not anticipate an increase in the number of pupils appropriately identified under the proposed criteria for EBD because the increased clarity and specificity of the proposed rule will assist districts in more accurately identifying pupils with needs in this area. As a result, the criteria itself should not have a fiscal impact. However, because of the added clarity and specificity in the proposed rule, some school districts may expect additional costs related to the evaluation of pupils. Further, the EBD Criteria Task Force determined each of the proposed amendments to this part are essential to ensure that pupils are appropriately identified under this eligibility category. As a result, less costly and less intrusive methods for the appropriate evaluation of a pupil who may be eligible for special education and related services under this disability category do not exist.

3525.1333 ~~MENTALLY IMPAIRED: MILD-MODERATE/MODERATE-SEVERE~~ DEVELOPMENTAL COGNITIVE DISABILITIES.

Minnesota Rules, part 3525.1333 is amended by the specific mandate of the Legislature to "amend Minnesota Rules, part 3525.1333, to revise eligibility for cognitive impairment to reflect professional standards... ." See 1999 Minn. Laws, Chapter 123, § 19(11). This part was slated for revision through the expedited rulemaking process, and due to public feedback, it was removed from the expedited process. As a result, this part will now be addressed here.

Over the past several years, two groups have studied the existing criteria for mentally impaired: mild-moderate/moderate-severe: Task Force II (1995) and the Criteria Task Force (2000). See Appendix I for the written report of Task Force II and Appendix J for a list of Criteria Task

Force members. The Criteria Task Force did not release a formal report, but it considered the recommendations of Task Force II, current federal law and regulation, and current professional standards in conducting its review and developing its recommendation. Please note, although the recommendations of the Criteria Task Force may impact the number of pupils determined to be eligible for special education and related services under this disability category, the Criteria Task Force did not intend to develop recommendations that would increase or decrease the number of eligible pupils. Rather, these recommendations are based on state and federal law and professional standards, and any impact on the number of eligible pupils is incidental to changes in these standards. CFL adopted the recommendations of the Criteria Task Force and now proposes the following amendments to part 3525.1333.

Subpart 1. Definition.

Subpart 1. Definition. ~~"Mentally impaired" refers to pupils with significantly subaverage general intellectual functioning resulting in or associated with concurrent deficits in adaptive behavior that may require special education instruction and related services.~~ "Developmental cognitive disability (DCD) means a condition that results in intellectual functioning significantly below average and is associated with concurrent deficits in adaptive behavior that require special education and may require related services. DCD does not include conditions primarily due to a sensory or physical impairment, traumatic brain injury, autism spectrum disorders, severe multiple impairments, cultural influences, or inconsistent educational programming.

CFL proposes several amendments to the title and definition of this disability category at subpart 1. First, CFL proposes to change the title from "Mentally Impaired: mild-moderate/ moderate-severe" to "Developmental Cognitive Disability (DCD)." The proposed title is the result of the recommendations of both Task Force II and the Criteria Task Force. Specifically, it is generally accepted in the field that the title "Mentally Impaired" may be offensive and does not appropriately describe the disability area. As a result, in 1995 Task Force II recommended that the title be changed to "Cognitive Impairment." The Criteria Task Force agreed with this, but further recommended that the term "impairment" be replaced with "disability" to make the title more consistent with other disability categories. The Criteria Task Force also recommended that the term "developmental" be added to the title so the proposed title, "Developmental Cognitive Disability," would reflect a balance of both the intellectual functioning and adaptive behavior components of the criteria. Specifically, the term "Developmental Disability" represents the adaptive behavior component, and the term "Cognitive Disability" represents the intellectual functioning component.

In forming its recommendation, the Criteria Task Force also considered the impact the title may have on teacher licensure and interagency services. Specifically, a teacher serving MMMI and MSMI pupils must hold a teaching license under the category of "Developmental Disability," and Developmental Cognitive Disability is a smaller subset of Developmental Disability. In addition, pupils found eligible under this disability category are often served by interagency service providers outside the school district, and the term "developmental disability" is commonly used for county- and community-based services for these pupils. As a result, the Criteria Task Force felt it necessary that the proposed title be consistent with this term.

For the reasons described above, CFL now proposes to change the title from "Mentally Impaired: Mild Moderate/Moderate Severe" to "Developmental Cognitive Disability."

The proposed definition does not greatly alter the purpose or effect of the old definition nor does it stray from the federal definition of "mental retardation" at 34 C.F.R. § 300.7(c)(6), which states:

> Mental retardation means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

CFL proposes other amendments to the definition. First, CFL proposes to replace the phrase "significantly subaverage general intellectual functioning" with the phrase "intellectual functioning significantly below average" to make the proposed definition consistent with commonly used measurements and to eliminate the negative connotation inherent in as the existing language.

Second, CFL proposes to include a final sentence detailing six factors that may exclude a pupil from eligibility under DCD and refer them to other disability categories that may be more appropriate to the pupil's individual needs. CFL proposes to include the first four factors, sensory or physical impairment, traumatic brain injury, autism spectrum disorders, and multiple impairments, because each of these disabilities may impact general intellectual functioning and adaptive behavior. If a pupil has a documented disability in one of these four areas, one would have to determine if the pupil demonstrates a deficit in general intellectual functioning and adaptive behavior as a result of the documented disability or because of a DCD. For example, if a pupil has a documented Traumatic Brain Injury and demonstrates below average general intellectual functioning, the team must determine whether the deficit is the result of the TBI. If the deficit in general intellectual functioning is the result of the TBI, that would be the pupil's primary disability and it would not be necessary to further evaluate the pupil's needs under DCD. CFL proposes to include the final two factors, cultural influences or inconsistent education programming, because these factors are consistent with the federal regulations at 34 C.F.R. § 300.534(2)(b)(1), which states:

> A child may not be determined eligible under this part if the determinant factor for that eligibility determination is lack of instruction in reading or math; or limited English proficiency.

Further, cultural influences and inconsistent educational programming clearly impact performance on output based measures such as general intellectual functioning or adaptive behavior measures. As a result, it is necessary to consider these things when conducting an educational evaluation.

The proposed amendments described above are necessary to improve the language and form of the definition of Developmental Cognitive Disabilities.

Subp. 2. Criteria.

CFL proposes to delete much of subpart 2 and all of subpart 3 in the existing rule, and replace them with language establishing the eligibility criteria for pupils with Developmental Cognitive Disabilities: Moderate Range (DCD:M) and pupils with Developmental Cognitive Disabilities: Severe Range (DCD:S).

> Subp. 2. Criteria ~~for mild moderate~~. The team shall determine that a pupil is eligible as having ~~mild moderate mental impairment~~ DCD and is in need of special education instruction and ~~service~~ may require related services if the pupil meets the criteria in items A and B.

The first paragraph of the proposed criteria at subpart 2 does not contain amendments beyond the technical changes necessary to insert the proposed title of this disability criteria.

Item A.

> A. The pupil demonstrates below average adaptive behavior across multiple environments which must include school and home, and community, if appropriate. For the purposes of this item, "below average" means:
> (1) a composite score at or below the 15th percentile on a nationally normed, technically adequate measure of adaptive behavior; and
> (2) documentation of needs and level of support required, in at least four of the seven adaptive behavior domains, across multiple environments. Systematic observation and parent input must be included as sources to document need and level of support. All of the following adaptive behavior domains must be considered:
> (a) daily living and independent living skills;
> (b) social and interpersonal skills;
> (c) communication skills;
> (d) academic skills;
> (e) recreation and leisure skills;
> (f) community participation skills; and
> (g) work and work-related skills.
> Other sources of documentation may include checklists; classroom or work samples; interviews; criterion-referenced measures; educational history; medical history; or pupil self-report.

Item A represents the adaptive behavior component of the DCD criteria, and CFL proposes significant changes in this area. Each proposed amendment will be addressed in turn.

In the first paragraph of item A , CFL proposes to include the statement, "The pupil demonstrates below average adaptive behavior across multiple environments which must include school and home, and community, if appropriate." This amendment is not a significant change from the existing rule which requires that the pupil's adaptive behavior be evaluated in "school and home or community." However, the amendment is necessary for clarity. CFL also proposes to split the adaptive behavior criteria component into two elements. Subitem 1 addresses the level of significance in adaptive behavior deficits, and subitem 2 addresses the functional impact of the adaptive behavior deficits.

Subitem 1. CFL proposes to include new language at subitem 1 requiring that the level of significance in adaptive behavior deficits be measured by "a composite score at or below the 15th percentile on a nationally normed, technically adequate measure of adaptive behavior." This is a change from the existing rule which requires that the level of significance be measured by pupil "performance at or below the 15th percentile" on four adaptive behavior subscales. The use of a composite score is necessary to align the evaluation requirements with the common components found on the tools used to evaluate adapted behaviors, such as the Scales of Independent Behavior-Revised (SIB-R). See Appendix K for a description of the SIB-R. CFL does not anticipate that this amendment will impact the number of pupils who will be eligible under this disability category.

Subitem 2. CFL proposes to address the functional impact of the adaptive behavior deficits by requiring "documentation of needs, including level of support required, in at least four of the seven adaptive behavior domains..." at subitem 2. The proposed language is consistent with current practices in the fields of mental retardation, intellectual disabilities, and developmental disabilities.

For example, the American Association on Mental Retardation (AAMR) elevated the importance of defining level of support required in its current definition of mental retardation, which states: "With appropriate supports over a sustained period, the life functioning of the person with mental retardation will generally improve." See Appendix L for a copy of the current definition of mental retardation according to AAMR. See Appendix M for "An Evaluation of State Guidelines of Mental Retardation: Focus on Definition and Classification Practices."

CFL also proposes to expand the number of behavior domains from four to seven to provide school districts some flexibility in meeting the individual adaptive behavior needs of pupils and to ensure that the adaptive behavior domains are useful beyond eligibility determinations. While the existing behavior domains, personal or independent functioning, personal or social functioning, functional academic competencies, and vocational or occupational competencies, may address some pupil's adaptive behavior needs, they may not adequately parallel transition needs or classroom curriculum for the purposes of program planning. The existing rule at part 3525.2900, subd. 4 states:

> By grade nine or age 14, whichever comes first, the IEP plan shall address the pupil's needs for transition.... Areas of assessment and planning must be relevant to pupil's needs and may include work, recreation and leisure, home living, community participation, and post-secondary training and learning opportunities.

In addition, the Special Education Functional Skills Alternate Assessment requires an evaluation of student support needs in home living, recreation and leisure, community participation, jobs and training, social skills, communication, and academics. See Appendix N for a copy of the Special Education Functional Skills Alternate Assessment.

CFL proposes to include many of the above-mentioned areas at subitem 2. Specifically, the proposed rule requires that school districts consider daily living and independent living skills, social and interpersonal skills, communication skills, academic skills, recreation and leisure skills, community participation skills, and work and work-related skills, and the pupil need only demonstrate deficits in at least four of them. The proposed language is necessary to make any information required through a special education evaluation useable in the classroom and useful for other special education purposes, such as transition and program planning.

Finally, under item A, CFL proposes to include a list of additional sources of information that may be used to document a pupil's needs in the adaptive behavior domains. The list is intended to guide evaluation teams to suggested sources of information. It is not intended to create additional evaluation requirements or require additional verification for the adaptive behavior composite score.

Item B.

> B. The pupil demonstrates significantly ~~subaverage~~ below average general intellectual functioning ~~as indicated by an intelligence quotient below 70 plus or minus 1 Standard Error of Measurement (using instruments with a reliability coefficient of .90 or greater) on an intelligence test that is standardized, nationally normed, technically adequate, and~~ that is measured by an individually administered, nationally normed test of intellectual ability. For the purposes of this subitem, "significantly below average general intellectual functioning" means:
> (1) moderate range: two standard deviations below the mean, plus or minus one standard error of measurement.

(2) severe range: three standard deviations below the mean, plus or minus one standard error of measurement.

Significantly below average general intellectual functioning must be verified through a written summary of results from at least two systematic observations with consideration for culturally relevant information, medical and education histories, and one or more of the following: supplemental tests of specific abilities; criterion referenced tests; alternative methods of intellectual assessment; clinical interviews with parents, including family members, if appropriate; or observation and analysis of behavior across multiple environments

In item B, CFL proposes to delete existing language requiring that a pupil demonstrate "significantly subaverage intellectual functioning as indicated by an intelligence quotient below 70 plus or minus 1 standard error of measurement on an intelligence test," and replace it with a requirement that the pupil demonstrate "below average general intellectual functioning that is measure by an individually administered, nationally normed test of intellectual ability." The proposed amendment is necessary because an absolute number score may vary from test to test, but the level of statistical significance as indicated in subitem 1 will not. The proposed amendment will create commonality in the standards and still allow school districts some flexibility in determining which measures they would like to use in meeting this requirement. Please note, "standard error of measurement" is not further defined in this part because the numerical value of an error of measurement will vary based on the reliability of the chosen instrument and the age of the pupil.

Subitem 1. CFL proposes to delete all references to "mild-moderate" and "moderate-severe" in the existing rule and replace them with references to developmental cognitive disability: moderate range (DCD:M) or developmental cognitive disability: severe range (DCD:S) to more accurately describe the population of pupils who may be eligible under this disability category. Pupils eligible as DCD:M must demonstrate general intellectual functioning at two standard deviations below average on an individually administrated, nationally normed test of intellectual ability. Because 97.73% of the population scores above this level, it is clear that this level of disability is not mild. Pupils eligible as DCD:S must demonstrate general intellectual functioning at three standard deviations below average on an individually administered, nationally normed test of intellectual ability." Because only .13% of the population scores at this level, it is clear that this level of disability is severe. CFL proposes to use "range" at each of these levels to more accurately reflect the variety and diversity of individual needs of the pupils who fall between two and three standard deviations.

Subitem 2. CFL proposes language at subitem 2 which requires school districts to verify the existence of significantly below average general intellectual functioning through the use of systematic observations with consideration for culturally relevant information, medical and education histories, and other supporting information. The proposed language is consistent with current practices in the field, and this requirement is necessary to assist in the elimination of bias in evaluation and to ensure that school districts are considering all of these factors when conducting an educational evaluation.

CFL also proposes language requiring a team to consider at least one source of information in addition to the observations described above. The additional sources listed in the proposed rule are intended to provide the IEP team with flexibility in gathering information in evaluating the pupil's general intellectual functioning. The additional sources also create multiple sources of input, including school psychologists, parents, and teachers.

The technical edits and substantive amendments proposed above are necessary to address current practices in the field and new federal law and regulation, and to ensure that the criteria parallels the evaluation tools available to the field.

CFL does not anticipate an increase in the number of pupils appropriately identified under the proposed criteria for DCD because the general intellectual functioning requirement and the level of significance required for adaptive behavior are consistent with the existing criteria. Further, the increased clarity in the proposed criteria, particularly with respect to pupils that may meet the criteria in other, more appropriate disability areas, may reduce the number of pupils inappropriately identified under DCD. However, because these pupils will continue to be identified as in need of special education, CFL does not anticipate that the proposed criteria will impact the number of pupils receiving special education and services or the fiscal resources required to serve those pupils.

CFL received several comments regarding the existing and previously proposed criteria for this disability category. Most of these comments were specific responses to the recommendations of Task Force II and did not apply to the recommendations of the Criteria Task Force. However, many of the concerns raised were incorporated into the discussions of the Criteria Task Force. For example, several commentors raised issues related to changing the IQ level and the "Additional eligibility option" recommended by Task Force II and the resulting increase of pupils eligible for special education services. The Criteria Task Force considered these concerns and proceeded to recommend that the IQ level remain at the same level. CFL also received comments regarding the Task Force II recommendation that the levels of mild-moderate and moderate-severe be removed from the criteria. The Criteria Task Force considered this comment and determined that the levels of severity were essential, and, although the levels have been renamed as "Moderate Range" and "Severe Range," the levels of severity remain in the proposed rule.

3525.1335 OTHER HEALTH ~~IMPAIRED~~ DISABILITY.

Minnesota Rules, part 3525.1335 is amended by the specific mandate of the Legislature to "amend Minnesota Rules, part 3525.1335, to revise eligibility for other health impaired to reflect professional standards... ." See 1999 Minn. Laws, Ch. 123, § 19(12).

Over the past several years, three groups have reviewed the existing criteria for Other Health Impaired: Task Force II (1995), the Other Health Impaired Practitioners Task Force (1998-99), and the Other Health Impaired Criteria Task Force (1999-2000).

In its 1995 report, Task Force II makes the following statement regarding the existing criteria for OHI: "This rule also received a great deal of scrutiny and discussion because feedback from the field indicated the present rule was highly confusing. The proposed changes eliminate redundant provisions and reorganize the rule to more clearly state that a student is eligible with a diagnosed health condition and either low achievement or other adverse education affects that are caused by the health condition." See Appendix I.

In 1998, the OHI Practitioners Task Force, made up of facilitators, coordinators, and practitioners, was convened under the auspices of the state's Physical/Other Health Impaired Network to review the existing rule and the recommendations of Task Force II. See Appendix O for a list of Practitioners Task Force members. In conducting its review, the Practitioners Task Force

determined that the number of pupils identified as eligible for special education services under OHI has increased at a rapid rate. See Appendix P. The increase may be the result misidentification of pupils under OHI as a result of a lack of clarity in the criteria and a lack of expertise in the field.

First, the existing criteria lack clarity and the measurement requirements are subjective or nonexistent. The lack of clarity is evident from anecdotal evidence indicating that IEP teams and special education directors have frequently requested clarification of the existing criteria. In addition, the existing criteria do not clearly reflect the changing needs of the student population. For example, the criteria do not address both chronic and acute health impairments, neuro-biological disabilities, the increased number of medical diagnoses of pupils with Attention Deficit Disorder, or the new federal definition of Other Health Impairments at 34 C.F.R. § 300.7(c)(9).

Second, the increase in the number of pupils identified under this disability category may be the result of a lack of expertise in the identification and evaluation of pupils who may be eligible for special education and related services under the disability category of Other Health Impaired. Specifically, there is no teacher licensure in Minnesota for Other Health Impairments, and any special educator "knowledgeable" of health disabilities can identify, evaluate, and provide services to pupils in this disability category.

In accordance with 1999 Minnesota Laws, Chapter 123, § 19(12), the Practitioners Task Force recommended multiple technical and substantive amendments to part 3525.1335 to CFL. CFL then proposed amendments to part 3525.1335 through the expedited rulemaking process in 1999. Throughout that process, CFL received a number of public comments requesting CFL to remove part 3525.1335 from the expedited process. For example, a representative from PACER stated:

> "[B]ecause it is important that we view OHI, EBD, and Cognitive Impairment together to ensure that children do not fall through the cracks, PACER recommends that the OHI criteria be pulled from the [expedited] rule changes."

In response to this and other similar comments, CFL removed part 3525.1335 from the expedited rulemaking process and convened the OHI Criteria Task Force to review the existing rule, the recommendations of the Practitioners Task Force, and the public comments CFL received in response to the proposed language. See Appendix Q for a list of OHI Criteria Task Force members and the minutes of the OHI Criteria Task Force meetings.

The OHI Criteria Task Force recommended several substantive and technical amendments to make the criteria more clear, concise, and measurable. CFL has adopted the recommendations of the OHI Criteria Task Force and now proposes the following amendments to part 3525.1335.

Subpart 1. Definition.

> Subpart 1. Definition. "Other health ~~impaired~~ disability" means having limited strength, endurance, vitality or alertness, including a heightened or diminished alertness to environmental stimuli, with respect to the educational environment that is due to a broad range of medically diagnosed chronic or acute physical health conditions that ~~may~~ adversely affect ~~academic functioning and result in the need for special education instruction and related services~~ a pupil's educational performance. ~~The decision that a specific health condition qualifies as other health impaired will be determined by the impact of the condition on academic functioning rather than by the diagnostic label given the condition.~~

CFL proposes several technical and substantive edits to the definition at subpart 1. First, CFL proposes to change the title from "Other Health Impaired" to "Other Health Disability (OHD)." The OHI Criteria Task Force reported the receipt of feedback from the field indicating that the term "disability" would add clarity to the title. As a result, CFL now proposes that the title of this disability criteria be "Other Health Disability."

Second, CFL proposes to add the phrase "having limited strength, endurance, vitality, or alertness, including a heightened or diminished alertness to environmental stimuli, with respect to the educational environment..." to the existing definition to make it consistent with federal regulation at 34 C.F.R. § 300.7(c)(9), which states:

> Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment.

Although it is not contained in the federal definition, CFL also proposes to add the phrase "diminished alertness to environmental stimuli" to ensure that the criteria include pupils with diagnosed physical health conditions or medical treatments that may impact the pupil's ability to attend school due to poor strength or endurance.

CFL proposes to add the term "physical" to modify "health conditions" in the phrase "due to a broad range of medically diagnosed chronic or acute physical health conditions." This amendment is necessary to differentiate between pupils who may be eligible for special education and related services as a result of a physical health condition and those who may be eligible as a result of a mental or emotional health condition. Pupils who suffer from mental or emotional health conditions may be eligible for special education and related services under the criteria for Emotional and Behavioral Disorders. Therefore, these pupils need not be served under OHD.

CFL also proposes to add the phrase "adversely affects a pupil's educational performance" to make the definition of OHD consistent with the definitions of other disability categories throughout this chapter.

Subpart 2. Criteria.

> Subpart 2. Criteria. The team shall determine that a pupil is eligible and in need of special education instruction and services if the pupil meets the ~~criterion~~ criteria in items A, ~~and one of the criteria in item~~ B, and C.
> A. There is written and signed documentation by a licensed physician of a medically diagnosed chronic or acute physical health ~~impairment~~ condition. A diagnosis of Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder must include documentation that DSM-IV criteria A through E have been met. This documentation must be provided by either a licensed physician or a practitioner with appropriate clinical training and experience in diagnosis. All documentation must be dated within the previous twelve months.
> B. ~~The pupil's:~~
> ~~(1) need for special education instruction and service is supported by evidence of inadequate academic progress attributable to excessive absenteeism as verified by attendance records, or impaired organizational and independent work skills as assessed by functional and other appropriate assessment procedures due to limited strength, endurance, alertness, or intrusive health procedures as verified by a minimum of two or more documented, systematic~~

~~observations or structured interviews in daily routine settings, one of which is to be completed by a special education teacher; or~~
~~(2) need of special education instruction and service is supported by evidence of an inability to manage or complete classroom tasks within routine timelines due to excessive absenteeism as verified by attendance records, or limited strength, endurance, alertness, intrusive health procedures, or medications that affect cognitive functioning as verified by a minimum of two or more documented, systematic observations or structured interviews in daily routine settings, one of which is completed by a special education teacher; or~~
~~(3) health impairment interferes with educational performance as shown by an achievement deficit of 1.5 standard deviations or more below the mean on an individually administered reliable, valid, and adequately normed achievement test.~~

In comparison with peers, the health condition adversely affects the pupil's ability to complete educational tasks within routine timelines as documented by three or more of the following:
(1) excessive absenteeism linked to the physical health condition, for example hospitalizations, medical treatments, surgeries, or illnesses;
(2) specialized health care procedures that are necessary during the school day;
(3) medications that adversely affect learning and functioning in terms of comprehension, memory, attention, or fatigue;
(4) limited physical strength resulting in decreased capacity to perform school activities;
(5) limited endurance resulting in decreased stamina and decreased ability to maintain performance;
(6) heightened or diminished alertness resulting in impaired abilities, for example, prioritizing environmental stimuli; maintaining focus; or sustaining effort or accuracy;
(7) impaired ability to manage and organize materials and complete classroom assignments within routine timelines; or
(8) impaired ability to follow directions or initiate and complete a task.
C. The health condition results in a pattern of unsatisfactory educational progress as determined by a comprehensive evaluation documenting the required components of items A and B above. The eligibility findings must be supported by current or existing data from items (1) through (5):
(1) an individually administered, nationally normed standardized evaluation of the pupil's academic performance;
(2) documented, systematic interviews conducted by a licensed special education teacher with classroom teachers and the pupil's parent or guardian;
(3) one or more documented, systematic observations in the classroom or other learning environment by a licensed special education teacher;
(4) a review of the pupil's health history, including the verification of a medical diagnosis of a health condition; and
(5) records review.

The evaluation findings may include data from: individually administered, nationally normed tests of intellectual ability; an interview with the pupil; information from the school nurse or other individuals knowledgeable about the health condition of the pupil; standardized, nationally normed behavior rating scales; gross and fine motor and sensory motor measures; communication measures; functional skills checklists; and environmental, socio-cultural, and ethnic information reviews.

CFL proposes multiple technical edits and substantive amendments to the criteria for OHD as described in subpart 2. Each edit and amendment will be addressed in turn.

Item A. First, CFL proposes to add several phrases to the first sentence in item A to clarify that documentation of a medically diagnosed health condition is not sufficient unless it is "written and signed" by a "licensed physician". This technical edit is necessary to ensure that the rule is clear as to what is required to appropriately document a diagnosed health condition. In addition, this

technical edit is necessary to clarify that educators do not diagnose chronic or acute health conditions because medical diagnosis is not within the scope of their training or practice.

Second, CFL proposes to add the phrase "chronic or acute physical" to modify "health condition" in the first sentence of item A. This amendment is necessary to differentiate between pupils who may be eligible for special education and related services as a result of a physical health condition and those who may be eligible as a result of a mental or emotional health condition. As described above, pupils who suffer from mental or emotional health conditions may be eligible for special education and related services under the criteria for Emotional and Behavioral Disorders. As a result, these pupils need not be served under the disability category of OHD.

Third, CFL proposes to add the following sentences to item A: "A diagnosis of Attention Deficit Disorder/Attention Deficit Hyperactivity Disorder (ADD/ADHD) must include documentation that DSM-IV criteria A through E have been met. This documentation must be provided by a licensed physician or a practitioner authorized to administer the DSM-IV." This amendment is necessary to respond to concerns in the medical and educational communities regarding the number of pupils diagnosed as ADD/ADHD without the benefit of a comprehensive medical evaluation. Specifically, many children present issues similar to ADD/ADHD due to other diagnosed or undiagnosed conditions. In addition, according to the American Academy of Pediatrics Diagnosis and Evaluation of the Child with ADHD, as many as one third of pupils diagnosed with ADHD also have a co-existing condition. See Appendix R. CFL now proposes to amend item A to require that all diagnoses of ADD and ADHD include documentation that the criteria in the most current Diagnostic and Statistical Measure (DSM) have been met to ensure that physicians and other medical practitioners eliminate other diagnosed or undiagnosed conditions and co-existing conditions before reaching a diagnosis of ADD/ADHD. See Appendix S for a copy of the DSM-IV criteria for ADD/ADHD.

Finally, CFL proposes to add the sentence "All documentation must be dated within the previous twelve months" to item A. This amendment is necessary to ensure that the evaluation team is using only current data when determining if a pupil may be eligible for special education and related services under OHD.

CFL received a number of public comments regarding the proposed language at Item A. For example, in a written comment, a representative of the School Nurse Organization of Minnesota stated:

> "The proposed Minnesota rule change appears to be significantly more restrictive than the Code of [Federal] Regulations by requiring documentation and signature from a licensed physician.... Many children in the state of Minnesota utilize certified nurse practitioners as their primary care provider.... Requiring documentation and signature of a licensed physician may interfere with the mandate to provide a Free and Appropriate Public Education (FAPE). Many families may incur additional costs because their insurance may not pay for additional visits needed to obtain physician documentation and signature."

The commentor recommended that CFL adopt a rule that would allow certified nurse practitioners to diagnose a pupil's health condition.

According to the OHI Criteria Task Force, nearly every state requires that the health condition be diagnosed by a licensed physician in order for a pupil to be evaluated for educational

need under this disability category. In addition, the OHI Criteria Task Force felt it was very important to require the diagnosis to be made by a licensed physician because licensed physicians have a broad scope of practice while certified nurse practitioners have a much smaller scope of practice. As a result of the above findings, CFL maintains its proposal that in order to be eligible for special education and related services under OHD, the pupil must have written and signed documentation by a licensed physician of a medically diagnosed chronic or acute health condition.

In a comment regarding the proposed language addressing the diagnosis of ADD/ADHD, one commentor stated:

> "While no one disputes the needs of children who have either chronic of acute medical conditions that confirm the need for special education services, there is concern that the proposed language will open the flood gates for students with Attention Deficit Disorder or Attention Deficit Hyperactive Disorder who have been receiving 504 services."

The proposed language is based on the federal regulations at 34 C.F.R. § 300.7(c)(9), which states that Other Health Impairments may include a number of physical health conditions including attention deficit disorder or attention deficit hyperactivity disorder. As a result, it is reasonable for CFL to include ADD/ADHD as one of the health conditions that may potentially lead to a determination of eligibility under OHD.

In a comment regarding CFL's decision to omit a list of possible health conditions in the proposed rule, one commentor stated:

> "[34 C.F.R. §] 300.7(c)(9) lists specific health conditions such as asthma, attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia. The state propose rule is silent on this."

Another commentor asked why Fetal Alcohol Syndrome/Fetal Alcohol Effects are not included in the criteria for OHD, and yet another commentor requested that ADD/ADHD be not only listed but clearly defined in the definition of OHD.

The OHI Criteria Task Force and CFL agree that it is best to leave a list of health conditions out of the rule because it would be impractical to include every possible condition that may lead to a determination of eligibility under OHD, and any list provided may be perceived as exclusive and, pupils with health conditions not listed may not be appropriately served. In addition, a determination of eligibility must be based on two factors: (1) the existence of a medically diagnosed health condition, and (2) evidence that the health condition adversely affects the pupil's educational performance. As a result, including a list of possible health conditions would not serve to benefit the field in identifying or evaluating pupils. As discussed above, CFL does propose to include specific language dealing with ADD/ADHD, but only to ensure that a pupil with ADD/ADHD is properly diagnosed.

Item B. CFL proposes to delete all of item B in the existing rule and replace it with clearer, simplified criteria for OHD. For example, CFL proposes to include the sentence "In comparison with peers, the health condition adversely affects the pupil's ability to complete educational task within routine timelines as documented by three or more of the following... " at the beginning of item B. This amendment is necessary to define how the diagnosed health condition adversely affects

a pupil's educational performance in both learning and functioning and to clarify what is required to support the determination that a pupil's ability has been impaired.

CFL also proposes to amend item B to include eight subitems defining presenting problems that may adversely affect a pupil's ability to perform educational tasks within routine timelines. The existing rule includes many of these presenting problems, but the proposed language clarifies that three or more of these presenting problems must be documented and directly linked to the pupil's diagnosed health condition for the pupil to be eligible for special education and related services under this disability category.

CFL received one comment specific to the presenting problems in item B. The commentor stated that some of the presenting problems were too vague to be useful and some were too similar to others. CFL feels this comment is untenable because each of the eight presenting problems listed reflect different skills. For example, subitem 6, "heightened or diminished alertness" impacts a pupil's ability to focus, sustain effort, or participate in classroom activities. Subitem 7 addresses the issue of organization. Finally, subitem 8 addresses the pupil's ability to work independently.

Item C. CFL proposes to include item C to clarify what data must be used to support a determination of eligibility under OHD. The existing rule does not require a determination of eligibility to be supported by comprehensive data of any kind, and as a result, the existing rule does not provide appropriate guidance to the field.

The proposed rule outlines five sources of data that must be used to demonstrate that a pupil's health condition results in a pattern of unsatisfactory educational progress. Specifically, subitem 1 requires that the school district conduct an individually administered, nationally normed standardized evaluation of the pupil's academic performance. This data is necessary to document a pupil's academic achievement. Further, the proposed language allows an evaluation team to make a determination based on the pupil's present levels of performance and not based on a discrepancy between achievement and ability as the existing rule requires. Subitem 2 requires documented, systematic interviews conducted by a licensed special education teacher with classroom teachers and the pupil's parent or guardian. This data is necessary to document daily educational progress and patterns of learning by persons familiar with the pupil's day to day functioning. Subitem 3 requires one or more documented, systematic observations in the classroom or other learning environment by a licensed special education teacher. This data is necessary to ensure that the evaluation team considers the observations and findings of a practitioner with special education knowledge and an understanding of health disabilities and how the disabilities may impact a pupil's ability to learn and function. Subitem 4 requires a review of the pupil's health history, including the verification of a medical diagnosis of a health condition. This data is necessary to ensure that the team is able to understand the scope and severity of a pupil's health condition and how the condition may impact the pupil's educational performance. Subitem 5 requires a review of the pupil's educational records. This data is necessary to ensure that the evaluation team considers the pupil's past educational performance, attendance, test scores, and report cards prior to the pupil's referral for a special education evaluation.

CFL also proposes to include eight other sources of data at Item C that may be used to further support a determination of eligibility under the disability category of OHD. This amendment is necessary to allow the field flexibility in determining whether further sources of data are necessary to support a determination of eligibility under OHD. This flexibility is necessary to allow school

districts to appropriately evaluate a diverse population of pupils with a variety of educational needs. For example, if a pupil is ADHD, the evaluation team may want to use a behavior rating scale in determining the pupil's needs. However, the behavior rating scales may not be useful in determining the needs of a pupil with cancer or a heart condition, but information from the school nurse may be imperative to properly evaluating a pupil with one of these conditions. These eight other sources of data are optional and need only be used if the evaluation team determines it is necessary to consider sources of data in addition to those required above.

CFL does not anticipate an increase in the number of pupils appropriately identified under the proposed criteria for OHD because the proposed language does not substantively alter the purpose or intent of the existing criteria. However, because the proposed criteria is more clear than the existing criteria, and it requires a more complete documentation for ADD/ADHD, CFL anticipates the number of pupils inappropriately identified will be reduced. As a result, the proposed criteria may reduce the number of pupils receiving special education and related services under OHD and the fiscal resources required to serve those pupils. At the same time, because the proposed criteria requires the IEP team to complete a more comprehensive evaluation, school districts may require more resources to appropriately evaluate pupils under OHD. Further, because this more complete documentation is essential to the appropriate identification of pupils who are eligible for special education and related services under this disability category, less costly or less intrusive methods for making appropriate eligibility determinations do not exist.

3525.1510 PERSONNEL VARIANCES.

~~A district may apply to the commissioner of Children, Families, and Learning for and the commissioner shall grant a variance from Minnesota Statutes, section 125.04, with regard to its employees for one year or less when:~~
~~A. the district has made attempts to employ an appropriately licensed person and no one who meets district qualifications is available; and~~
~~B. the person who will be employed holds any license issued by the Board of Teaching or the commissioner of Children, Families, and Learning.~~

CFL proposes to repeal part 3525.1510 governing personnel variances as duplicative of state rule. Specifically, Minnesota Rules, part 8710.1400, which states, in part:

> Subpart 1. Authority to issue personnel variances. The Board of Teaching hereby authorizes the issuance of personnel variances which permit a teacher to teach in related subjects or fields for which such teacher is not currently licensed. The designated administrator of a local school district or charter school may request the Board of Teaching to issue a personnel variance which permits a teacher to teach subjects or fields for which that teacher is not currently licensed.
> Subp. 2. Criteria for issuance. A personnel variance authorized by subpart 1 shall be issued to the designated administrator of a school district or charter school if the following conditions are met:
> A. the designated administrator of the school district or charter school requests a personnel variance according to this part;
> B. the designated administrator of the school district or charter school verifies in writing that:
> (1) reasonable efforts have been made to assign existing staff to fill the position with a fully licensed teacher;
> (2) no applicant holding a teaching license in a subject or field for which a personnel variance is requested can fulfill the requirements of the position; and
> (3) the position has been advertised, and if the position is one-half time or more, the position has been advertised statewide;

C. the teacher for whom the request is made holds a current valid Minnesota entrance, professional, or nonrenewable license granted by the Board of Teaching; and
D. the teacher for whom the request is made is aware of the assignment.

Because Board of Teaching rules, as cited above, include a provision governing the waiver of all teacher licensure fields, including special education teachers, it is unreasonable to maintain a duplicative rule here.

3525.2325 EDUCATION PROGRAMS FOR K-12 PUPILS AND REGULAR STUDENTS PLACED IN CENTERS FOR CARE AND TREATMENT.

The Legislature directed CFL to "amend Minnesota Rules, part 3525.2325, to revise outdated standards for students placed for care and treatment to be compatible with related legislation...." See 1999 Minn. Laws, Ch. 123, § 20(5). However, because the care and treatment rules affect many entities beyond CFL and the school districts, CFL has elected to propose legislation to address education programs for K-12 pupils and regular students placed in centers for care and treatment. As a result, CFL proposes no amendments to part 3525.2325 at this time.

3525.2340 CASE LOADS.

CFL proposes no substantive amendments to part 3525.2340 at this time. However, CFL proposes several corrections to subpart 4, item A.

Subp. 4. Case loads for school-age educational service alternatives.
A. The maximum number of school-age pupils that may be assigned to a teacher:
(1) for pupils who receive direct special education instruction from a teacher 50 percent or more of the instructional day, but less than a full school day:
(a) deaf-blind, ~~autistic~~ autism spectrum disorders, developmental cognitive disabilities: severe range, or severely multiply impaired, three pupils;
(b) deaf-blind, ~~autistic~~ autism spectrum disorders, developmental cognitive disabilities: severe range, or severely multiply impaired with one program support assistant, six pupils;
(c) ~~mild-moderate mentally impaired~~ developmental cognitive disability: moderate range or specific learning disabled, 12 pupils;
(d) ~~mild-moderate mentally impaired~~ developmental cognitive disability: moderate range or specific learning disabled with one program support assistant, 15 pupils;
(e) all other disabilities with one program support assistant, ten pupils; and
(f) all other disabilities with two program support assistants, 12 pupils; and
(2) for pupils who receive direct special education for a full day:
(a) deaf-blind, ~~autistic~~ autism spectrum disorders, developmental cognitive disability: severe range, or severely multiply impaired with one program support assistant, four pupils;
(b) deaf-blind, ~~autistic~~ autism spectrum disorders, developmental cognitive disability: severe range, or ~~severely~~ multiply impaired with two program support assistants, six pupils; and
(c) all other disabilities with one program support assistant, eight pupils.

CFL proposes to delete references to autism throughout the subpart and replace them with references to autism spectrum disorders. CFL also proposes to delete references to mild moderate mental impairments throughout the subpart and replace them with references to developmental cognitive disability: moderate range. These technical edits are necessary to update the title of these disability categories in conformance with the recently adopted amendments to part 3525.1325 and

the proposed amendments to part 3525.1333. Finally, CFL proposes to insert references to developmental cognitive disability: severe range at item 1, subitems a and b and item 2, subitems a and b. This amendment is necessary to correct the omission of this disability category from the caseloads in the existing rule.

Because these corrections are not substantive in nature, the proposed amendments will not have a fiscal impact.

3525.2405 DIRECTORS.

The school board in every district shall employ, either singly or cooperatively, a director of special education to be responsible for program development, coordination, and evaluation; in-service training; and general special education supervision and administration in the district's total special education system. Cooperative employment of a director may be through a host district, joint powers agreement, or a service cooperative. A director may not be assigned direct instructional duties.

CFL proposes to add the sentence, "A director may not be assigned direct instructional duties," to clarify that school districts may not required a director of special education to take on instructional duties in addition to the director's administrative responsibilities. This amendment is necessary because the administrative responsibilities of a director of special education require that the director be consistently available to meet with parents, resolve staff issues, and address individual student needs as these issues arise. Direct instructional duties unduly interfere with a director's ability to fulfill these responsibilities.

3525.2550 CONDUCT BEFORE ~~ASSESSMENT~~ EVALUATION.

~~Subpart 1. Student performance review. After a referral is submitted and before conducting an assessment, the team shall conduct a review of the person's performance in the following areas: intellectual functioning, academic performance, communicative status, motor ability, vocational potential, sensory status, physical status, emotional and social development, and behavior and functional skills. The referral review shall:~~

~~A. Include a review of any additional screening, referral, or other data about the person and select licensed special education personnel and others as appropriate to conduct the assessment including licensed special education personnel and others who may have the responsibility for implementing the educational program for the person.~~

~~B. Include a review of the regular education based prereferral interventions required by Minnesota Statutes, section 125A.56, conducted before referral for an assessment. Prereferral interventions are planned, systematic efforts by regular education staff to resolve apparent learning or behavioral problems.~~

Subp. 2. Team duties. The team shall:

~~A. Plan to conduct the educational assessment preferably at the home, school, or community setting which the person attends. When the district determines that the assessment or a portion of the assessment cannot be performed utilizing the personnel resources of the district, the district shall make arrangements elsewhere for that portion of the assessment and shall assume all costs for such assessment.~~

~~B. Give due consideration to assessment results provided by outside sources but need not implement recommendations unless agreed to by the team.~~

~~C.~~ conduct ~~the assessment~~ an evaluation for special education purposes within a reasonable time not to exceed 30 school days from the date the district receives parental permission to conduct the ~~assessment~~ evaluation or the expiration of the ~~ten day~~ 14 calendar day parental

response time in cases other than initial ~~assessment~~ evaluation, unless a conciliation conference or hearing is requested.

Minnesota Rules, part 3525.2550, except subpart 2, item C, is repealed according to the specific mandate of the Legislature to "repeal Minnesota Rules, part 3525.2550, on conduct before assessment except for subpart 2, item C... ." See 1999 Minn. Laws, Chapter 123, § 20(6).

3525.2750 EDUCATIONAL ASSESSMENT.

~~Subpart 1. Function of the assessment. The assessment must reflect the person's present level of performance and shall be the basis for later educational planning. An assessment:~~
~~A. must be conducted when a person's academic, behavioral, emotional, social, physical, communication, or functional skill acquisition in the present educational placement indicates a disability and a need for a special educational placement, program, or service;~~
~~B. [Repealed, L 1998 c 398 art 2 s 63]~~
~~C. may be conducted if the student or other agency requests;~~
~~D. must be conducted if the parent or student over age 18 requests;~~
~~E. must be conducted by a multidisciplinary team in accordance with parts 3535.0900 to 3535.1200 together with an assessment plan developed as part of the referral review. The team shall conduct a comprehensive assessment in those areas of suspected disability using technically adequate instruments and procedures;~~
~~F. must make reasonable efforts to obtain information from the parents and others with knowledge of the person and about the person's functioning in current and anticipated environments when the team determines it to be necessary because of cultural or other differences presented by the person or due to the nature of the person's disability;~~
~~G. must be provided and administered in the person's primary language or mode of communication unless it clearly is not feasible to do so;~~
~~H. must be performed in accordance with recognized professional standards which include recognition or accommodation for persons whose differences or conditions cause standardized instruments to be invalid and otherwise in accordance with the requirements of nondiscrimination;~~
~~I. must be conducted with procedures that ensure that, in accordance with recognized professional standards, testing, and evaluation materials and procedures used for the purposes of identification, assessment, classification, educational program plan development, educational placement, including special education services, program implementation, review, and evaluation, notice, and hearing, are selected and administered so as not to be discriminatory, including cultural discrimination. The procedures and materials shall take into account the special limitations of persons with disabilities and the racial or cultural differences presented by persons and must be justified on the basis of their usefulness in making educational program decisions that serve the individual pupil; and~~
~~J. must include an analysis of purpose, effect, and seriousness of behavior when the use of a conditional intervention procedure is under consideration. The assessment team must document that it has ruled out any other treatable cause such as a medical or health condition for the interfering behavior.~~
~~Subp. 2. [Repealed, 19 SR 2432]~~
~~Subp. 3. Assessment summary report. For the person assessed, results of any or all assessments shall be summarized in a report. The summary report shall include the results and interpretation of the assessment, the person's present level of performance in the areas assessed, and the team's judgments regarding eligibility for services. The assessment summary report shall contain the team members' names, titles, and date of report.~~

Minnesota Rules, part 3525.2750 is repealed according to the specific mandate of the Legislature to "repeal Minnesota Rules, part 3525.2750, on educational assessment as duplicative... ." See 1999 Minn. Laws, Chapter 123, §20(8).

3525.2900 DEVELOPMENT AND CONTENT OF INDIVIDUAL EDUCATION PROGRAM PLAN.

~~Subpart 1. General requirement to develop an IEP for pupils who are disabled. Following an initial assessment, and annually thereafter, an IEP must be developed and implemented for each pupil determined to be disabled under parts 3525.1325 to 3525.1354. The responsible district shall:~~

~~A. Designate a team of persons responsible for determining the IEP and authorizing expenditures to implement the IEP of pupils through age 21, which, at a minimum, shall include:~~

~~(1) one or both parents;~~

~~(2) the pupil, if appropriate. In cases when transition needs are being considered, the pupil must be invited to the meeting. If the pupil fails to attend, the district must implement procedures to determine pupil preferences;~~

~~(3) the pupil's special education teacher;~~

~~(4) a teacher or other representative of the general education program where the pupil is enrolled or expected to enroll;~~

~~(5) a representative of the school district, other than the pupil's teacher, who is qualified to provide or supervise the provision of special education services;~~

~~(6) for the pupils initial evaluation, at least one member of the assessment team or a person knowledgeable of the evaluation procedures used and the results;~~

~~(7) other individuals at the discretion of the parent or district;~~

~~(8) when a regulated procedure is being considered, one person on the team who is knowledgeable about ethnic and cultural issues relevant to the pupil's behavior and education; and~~

~~(9) if appropriate, someone who is a member of the same minority or cultural background or who is knowledgeable concerning the racial, cultural, or disabling differences of the pupil.~~

~~B. Document which team members attended the IEP meeting.~~

~~C. Schedule the IEP team meeting at a time and place that is mutually acceptable to the school, parents, and pupil according to part 3525.0700. The district shall proceed if the parents do not respond to the district's efforts for the parent to participate.~~

~~D. Prepare an IEP in writing before an initial out of district placement, ensuring that both districts have representatives participating in the meeting. When the responsible district is not the resident district for subsequent IEPs, a copy of the IEP must be sent to the resident district.~~

~~E. Provide notice according to parts 3525.3200 to 3525.3600, whenever the responsible school district proposes to initiate or change or refuse to initiate or change the educational placement. For the purposes of this part, the terms "initiate" or "change" must be construed to include the proposals in Minnesota Statutes, section 125A.09, paragraph (d), clauses (2) to (5); "significant change" is defined in part 3525.0200, subpart 19b.~~

~~F. Ensure that the duration of the IEP does not exceed 12 calendar months. For a team to determine the appropriateness of the placement or to resolve questions regarding the content of the IEP including instructional goals and objectives, an interim IEP may be written for a period of no more than 60 school days.~~

~~G. Provide extended school year services for those pupils when it is determined:~~

~~(1) that the pupil will experience "significant regression" in the absence of an educational program;~~

~~(2) the time required to relearn the skills lost is excessive; or~~

~~(3) the effects of the breaks in programming are such to prevent the student from attaining the state of self sufficiency that the student would otherwise reasonably be expected to reach. The amount and type of service for summer must be appropriate to maintain performance on IEP goals.~~

~~H. The educational components of an individual family services plan (IFSP) must meet all requirements of an IEP.~~

~~I. Prepare an IEP when contracting for special education services from a public, private, or voluntary agency.~~

Subp. 2. [Repealed, 16 SR 1543]

~~Subp. 3. Content of individual educational program plan. In preparing the IEP, the district shall include the following:~~
~~A. for the areas identified in part 3525.2550, subpart 1, item A, where there are presenting problems, a statement of the pupil's present levels of educational performance;~~
~~B. a statement of annual goals, including short-term instructional objectives;~~
~~C. a statement of the specific special education and related services to be provided to the pupil and the extent that the pupil will be able to participate in regular educational programs;~~
~~D. the projected dates for initiation of each service and the anticipated duration of services;~~
~~E. alterations of the pupil's school day, when needed, which must be based on student needs and not administrative convenience;~~
~~F. a transition plan, as required by subpart 4;~~
~~G. conditional intervention procedures to be used;~~
~~H. appropriate evaluation procedures and schedules for determining, on at least an annual basis, whether the short-term instructional objectives are being achieved; and~~
~~I. the pupil's need for and the specific responsibilities of a paraprofessional shall be described in the pupil's IEP.~~
Subp. 4. Transition planning. By grade nine or age 14, whichever comes first, the IEP plan shall address the pupil's needs for transition from secondary services to postsecondary education and training, employment, and community living.
A. For each pupil, the district shall conduct ~~a multidisciplinary assessment~~ an evaluation of secondary transition needs and plan appropriate services to meet the pupil's transition needs. The areas of ~~assessment~~ evaluation and planning must be relevant to the pupil's needs and may include work, recreation and leisure, home living, community participation, and postsecondary training and learning opportunities. To appropriately ~~assess~~ evaluate and plan for a pupil's secondary transition, additional IEP team members may be necessary and may include vocational education staff members and other community agency representatives as appropriate.
B. Secondary transition ~~assessment~~ evaluation results must be documented as part of an ~~assessment summary according to part 3525.2750~~ evaluation report. Current and secondary transition needs, goals, and instructional and related services to meet the pupil's secondary transition needs must be considered by the team with annual needs, goals, objectives, and services documented on the pupil's IEP.
Subp. 5. The IEP and regulated interventions.
A. There are two types of regulated interventions: conditional procedures and prohibited procedures.
(1) Conditional procedures may only be used when included as part of the pupil's IEP or in an emergency situation according to part 3525.0200. In order to utilize a conditional procedure, the IEP team must:
(a) identify the frequency and severity of target behaviors for which the conditional procedure is being considered;
(b) identify at least two positive interventions implemented and the effectiveness of each; and
(c) design and implement regulated interventions based on present levels of performance, needs, goals and objectives, and document in the IEP.
(2) Prohibited procedures are interventions that are prohibited from use in schools by school district employees, contracted personnel, and volunteers. The procedures or actions listed in subitems (a) to (i) are prohibited:
(a) corporal punishment as defined in Minnesota Statutes, section 121A.58;
(b) requiring a pupil to assume and maintain a specified physical position, activity, or posture that induces physical pain as an aversive procedure;
(c) presentation of intense sounds, lights, or other sensory stimuli as an aversive stimulus;
(d) use of noxious smell, taste, substance, or spray as an aversive stimulus;
(e) denying or restricting a pupil's access to equipment and devices such as hearing aids and communication boards that facilitate the person's functioning except temporarily when the pupil is perceived to be destroying or damaging equipment or devices;
(f) faradic skin shock;
(g) totally or partially restricting a pupil's auditory or visual sense not to include study carrels when used as an academic intervention;

(h) withholding regularly scheduled meals or water; and
(i) denying a pupil access to toilet facilities.
B. All behavioral interventions not covered in the IEP must be consistent with the district's discipline policy. Continued and repeated use of any element of a district's discipline policy must be reviewed in the development of the individual pupil's IEP.
C. If an emergency intervention is used twice in a month or a pupil's pattern of behavior is emerging that interferes with the achievement of the pupil's educational goals and objectives, a team meeting must be called to determine if the pupil's IEP is adequate, if additional ~~assessment~~ evaluation is needed, and, if necessary, to amend the IEP. Districts may use conditional procedures in emergencies until the IEP team meets, provided the emergency measures are deemed necessary by the district to protect the individual pupil or others from harm. The IEP team shall meet as soon as possible, but no later than five school days after emergency procedures have commenced. District administration and parents must be notified immediately when a regulated procedure is used in an emergency situation.
D. Time-out procedures that seclude a student in a specially designated isolation room or similar space must meet the following conditions:
(1) specific criteria for returning the pupil to the routine activities and regular education environment;
(2) an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons;
(3) provision for the pupil to be continuously monitored by trained staff;
(4) adequate access to drinking water and to a bathroom for a time-out that exceeds 15 minutes;
(5) documentation of the length of time spent in each time-out procedure and the number of occurrences each day;
(6) a safe environment for the pupil where all fixtures are tamper proof, walls and floors are properly covered, and control switches are located immediately outside the room;
(7) an observation window or other device to permit continuous monitoring of the pupil;
(8) a space that is at least five feet by six feet or substantially equivalent to these dimensions and be large enough to allow the pupil to stand, to stretch the pupil's arms, and to lie down;
(9) be well-lighted, well-ventilated, adequately heated, and clean; and
(10) all applicable fire and safety codes.
E. A parent has the right to withdraw consent for a behavior intervention plan at any time by notifying the program administrator or designee and the district must stop the procedure immediately. After parental consent is withdrawn and the procedure is stopped, the school must send written acknowledgment to the parent and request parental signature. If a parent's signature to withdraw consent cannot be obtained, the district must document its efforts to communicate and obtain the signature. Parents must be contacted within three school days to determine the need to convene the IEP team to consider a change in program or placement.

Minnesota Rules, part 3525.2900 except subparts 4 and 5 are repealed according to the specific mandate of the Legislature to "repeal Minnesota Rules, part 3525.2900, on IEP development and content except subparts 4 and 5 on regulated interventions... ." See 1999 Minn. Laws, Chapter 123, § 20(9).

CFL received a number of comments regarding this legislatively-mandated repeal. Most of the comments were relative to the provision of subpart 1, item A, subitem 9, which requires that, in the development of an IEP, the team must include, "if appropriate, someone who is a member of the same minority or cultural background or who is knowledgeable concerning the racial, cultural, or disabling differences of the pupil." In response to these comments, CFL proposes to add a definition of "cultural liaison" at part 3525.0200, subpart 1h.

The Legislature also directed CFL to "add a rule to make the responsibilities of the IEP team for assessment, IEP development, and placement decisions consistent with federal requirements... ." See 1999 Minn. Laws, Ch. 123, § 20(7). At one time, CFL believed it was necessary to develop a rule requiring school districts and other agencies to implement the mandates of IDEA '97 and its regulations with regard to the responsibilities of the IEP team for assessment, IEP development, and placement decisions, and the 1999 session law reflects this belief. However, with the United States Office of Special Education Programs has indicated to CFL that a memo from the commissioner stating as such would suffice. As a result, CFL proposes no amendments to part 3525.2900 at this time.

3525.3300 CONTENTS OF NOTICE.

~~Notices must be sufficiently detailed and precise to constitute adequate notice for hearing of the proposed action and contain a full explanation of the procedural safeguards available to parents under parts 3525.0200 to 3525.4700. Notices must:~~

~~A. Inform the parents of their right and the procedure and time for them to participate as a team member in developing and determining their child's educational program, including special education services and to provide information relative to the child's assessment and the development of the program plan.~~

~~B.~~ Inform the parents of their right and the procedure to receive interpretations of ~~assessment~~ evaluation or ~~reassessment~~ reevaluation procedures, instruments and data or results and of the program plan from a knowledgeable school employee and for that conference to be held in private.

~~C. Inform the parents of their right and the procedure to have included on the team that interprets the assessment data and develops the individual program plans, the persons described in part 3525.2900, subpart 1, including a person who is a member of the same minority or cultural background or who is knowledgeable concerning the racial, cultural, or disability differences of the student.~~

~~D. Inform the parents that they may:~~

~~(1) Obtain an independent assessment at their own expense.~~

~~(2) Request from the district information about where an independent assessment may be obtained.~~

~~(3) Obtain an independent assessment at public expense if the parent disagrees with an assessment obtained by the district. The district shall initiate conciliation and a due process hearing if necessary when refusing a parent's request for an independent assessment at public expense. If the hearing officer determines that the district's assessment is appropriate, the parents still have the right to an independent assessment, but not at public expense. When an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria the district uses when it initiates an evaluation.~~

~~E. Inform the parents that the district will not proceed with proposed actions defined in part 3525.0200, subparts 7a and 8a, without prior written consent.~~

~~F. Inform the parents that if they notify the district in writing that they do not agree with the proposed assessment or placement, they will be requested to attend a conciliation conference at a mutually convenient time and place. If this is not an initial assessment or an initial placement being proposed by the district, the district must proceed with its proposal after ten school days of the parent's receipt of the notice and response form unless the parent objects in writing.~~

~~G. Inform the parents that if they do not wish to participate in a conciliation conference they have a right to proceed directly to an impartial due process hearing and bypass the informal conciliation conference. Even if they do attend a conciliation conference, if they do not agree with action proposed by the district, they have a right to proceed to a due process hearing. The conciliation process cannot be used to delay or deny the parents' rights to a due process hearing.~~

~~H. Inform the parents that they have the right to be represented by counsel or another person of their choosing at the conciliation conference or the impartial due process hearing.~~
~~I. Include a statement assuring that their child's educational program will not be changed as long as the parent objects to the proposed action, in the manner prescribed by parts 3525.0200 to 3525.4700.~~
~~J. Inform the parents of their right to be represented in preparation of and at the hearing by legal counsel or other representative of their choice.~~
~~K. Inform the parents of their right, in accordance with laws relating to confidentiality, to examine and receive copies of the child's school records before the hearing, including tests, assessments, reports, or other information concerning the educational assessment or reassessment upon which the proposed action may be based.~~
~~L. Inform the parents of their right to call their own witnesses and to present evidence, including expert medical, psychological, and educational testimony and relevant records, tests, assessments, reports, or other information.~~
~~M. Inform the parents of their right to compel the attendance of any official or employee of the providing or resident school district or any other person, who may have evidence relating to the proposed action and the manner and time in which to do so.~~
~~N. Inform the parents of their right to present evidence and cross examine any employee of the school district or other persons who present evidence at the hearing.~~
~~O. Inform the parents of any free or low cost legal services available in the area.~~
~~P. Inform the parents of their right to have the child who is the subject of the hearing present at the hearing.~~
~~Q. Inform the parents that the hearing shall be closed unless the parents request an open hearing.~~
~~R. Inform the parents that they have a right to obtain a record of the hearing including the written findings of fact and decisions whether or not they appeal.~~
~~S. Inform the parents that if a due process hearing is held and the parents' position is upheld, the parents may be awarded attorney's fees by the courts in certain situations.~~
~~T. Inform the parents that their consent for their child's program and placement including the use of aversive and deprivation procedures is voluntary and that they may revoke it at any time.~~
~~U. Include a response form on which the parents may indicate their approval of or objection to the proposed action and identify the district employee to whom the response form must be mailed or given and to whom questions may be directed.~~
~~V. Inform parents of a pupil's entitlement to special education until age 21 unless the team agrees the pupil no longer needs special education or the pupil is eligible for a high school diploma according to part 3525.3150.~~

Minnesota Rules, part 3525.3300, except item B is repealed according to the specific mandate of the Legislature to "repeal Minnesota Rules, part 3525. 3300, except item B, on contents of notice as duplicative." See 1999 Minn. Laws, Chapter 123, § 20(10).

HEARING PROVISIONS

In addition to the amendments described above, CFL was directed to make "technical changes, corrections, clarifications, and similarly needed revisions" to Chapter 3525. See 1999 Minn. Laws, Ch. 123, § 20. In response to this mandate and the expressed interest of the Governor and the Legislature to reduce unnecessary and duplicative rules, CFL reviewed the rules regarding due process hearings at parts 3525.3600 through 3525.4770 and now proposes several amendments to the hearing provisions. The proposed amendments will not reduce the procedural safeguards afforded pupils and their parents through the due process hearing system. Rather, the amendments are necessary to clarify and simplify existing language, reduce redundancies and duplicative rules, and improve the overall utility of the hearing provisions. Because the proposed amendments will not

substantively alter the purpose or effect of the existing rules, the amendments will have no foreseeable fiscal impact.

In the following rule-by-rule analysis, CFL indicates whether the proposed amendment to each rule is a technical change, correction, clarification, or revision. However, this analysis will not address technical edits necessary to update obsolete rule references or those necessary to replace citations to IDEA '97 with citations to the Code of Federal Regulations, title 34, section 300, which provide specific guidance as to the subject matter of the rule provision.

3525.3700 CONCILIATION CONFERENCE, MEDIATION, OR OTHER ALTERNATIVE DISPUTE RESOLUTION.

In response to Minnesota Statutes, § 125A.09, subds. 4 and 5, governing alternative dispute resolution and mediation, CFL proposes a number of technical edits to Minnesota Rules, part 3525.3700, governing conciliation conferences. Each amendment will be addressed in turn.

Subpart 1. When ~~a conference must be~~ offered.

Subpart 1. When ~~a conference must be~~ offered. ~~If the parent does not object in writing, to a proposed action as set forth in parts~~ 3525.2550 ~~to~~ 3525.2750 ~~or part~~ 3525.2900, ~~subpart 5, within 14 days after receipt of the notice, and the proposed action is not an initial action as defined in part~~ 3525.0200, ~~subparts 7a and 8a, the proposed action shall take place. If a written objection is made, the resident school district shall offer the parent an opportunity to conciliate the matter. If the parent is willing to enter conciliation, the district shall arrange for a conference with the parent to review the reasons for the proposed action and conciliating the matter. The conference shall be held at a time and place mutually convenient to the parent and the school district representatives and shall be held within ten days after receipt of the written objection. There may be more than one conference and the parent or district may request a hearing under part~~ 3525.3800 ~~at any time.~~

A parent must be offered at least one conciliation conference, mediation, or other form of alternative dispute resolution developed by the commissioner if, within 14 calendar days after receipt of notice, the parent refuses to provide prior written consent for initial ~~assessment and~~ evaluation or initial placement ~~under parts~~ 3525.3500, ~~item D,~~ ~~and~~ 3525.3600, ~~item A, subitem (2), within ten days after the receipt of the notice and response form, the district shall offer the parent an opportunity to conciliate the matter. If the parent is willing to enter conciliation, the district shall arrange for a conference with the parent to review the parent's suggestions and concerns, and to conciliate the matter~~ the parent objects ot any proposal, or the district refuses to make a change as described in Code of Federal Regulations, title 34, section 300.503(a)(1). Mediation and other forms of alternative dispute resolution must be agreed to by both parties. The district must engage in a conciliation conference if one is requested by the parent.

CFL proposes to amend subpart 1 to incorporate state and federal policy encouraging the use of mediation and other forms of alternative dispute resolution. Specifically, Minnesota Statutes, § 125A.09, subds. 4 and 5 state:

> Subd. 4. Dispute resolution. Parents and guardians must have an opportunity to meet with appropriate district staff in at least one conciliation conference, mediation, or other method of dispute resolution that the parties agree to, if they object to any proposal of which they are notified under subdivision 1. The state intends to encourage parties to resolve disputes through mediation or other form of alternative dispute resolution... .

> Subd. 5. Mediation. The commissioner must establish a mediation process to assist parents, districts, or other parties to resolve disputes arising out of the identification, assessment, or educational placement of children with a disability. The mediation process must be offered as an informal alternative to the due process hearing provided under subdivision 6, but must not be used to deny or postpone the opportunity of a parent or guardian to obtain a due process hearing.

In addition, the federal regulations at 34 C.F.R. § 300.506 states:

> Each agency shall ensure that procedures are established and implemented to allow parties to... resolve disputes through a mediation process that, at a minimum, must be available whenever a hearing is requested under §§ 300.507 or 300.520 – 300.538.

In response to the expressed desire of the Minnesota Legislature to encourage the use of mediation and other methods of dispute resolution as alternatives to more costly and confrontational hearings and court actions, CFL proposes to incorporate the public policy from Minnesota Statutes, § 125A.09, subd. 4 at subpart 1. This amendment does not compromise the due process rights of pupils. Rather, it will encourage the continued use of mediation and allow the commissioner to further expand methods of alternative dispute resolution to reduce the monetary and personal costs experienced through hearings and court actions.

CFL also proposes to amend subpart 1 to eliminate unnecessary and redundant language and to more concisely state the standards for when a conciliation conference, mediation, or other form of alternative dispute resolution must be offered. Specifically, the existing rule at 3525.3700 states the circumstances under which conciliation must be offered in two separate places, the first and second paragraphs. CFL proposes to delete the above-mentioned redundancies and replace them with one straightforward sentence stating, "A parent must be offered at least one conciliation conference, mediation, or other form of alternative dispute resolution developed by the commissioner, if, within 14 calendar days after receipt of notice, the parent refuses to provide prior written consent for initial evaluation or initial placement, the parent objects to any proposal, or the district refuses to make a change as described at Code of Federal Regulations, title 34, section 300.503(a)(1)." As described above, this language was adopted from Minnesota Statutes, § 125A.09, subd. 4, and it will not compromise the due process rights as defined in the existing rule.

CFL also proposes to include the statement, "Mediation and other forms of alternative dispute resolution must be agreed to by both parties. The district must engage in a conciliation conference if one is requested by the parent." The proposed language is necessary to emphasize that parents must have access to conciliation regardless of whether the school district wishes to proceed with this form of dispute resolution, but that mediation and other forms of alternative dispute resolution are voluntary for both parties. As stated, the proposed language is consistent with Minnesota Statutes, § 125A.09, subd. 4, and will not alter the purpose or intent of the existing rule.

Subpart 1a.

> Subpart 1a. When and where held; results. ~~The~~ A conciliation conference, mediation, or other form of alternative dispute resolution shall be held within ten calendar days after receipt of written objection at a time and place mutually convenient to the parent and school district representatives. ~~If no response is received in cases of initial assessment or placement, the school district shall offer a conciliation conference to be held within ten days after the expiration of the ten day period of parent response. In cases where the parent fails to attend the initial conciliation conference, the district may choose to offer to schedule additional~~

~~conciliation conferences.~~ A conciliation conference, mediation, or other form of alternative dispute resolution must not be used to unilaterally delay or deny a parent's right to a hearing. All evidence involving or concerning the contents of a conciliation conference, mediation, or other form of alternative dispute resolution must remain confidential and must not be permitted as evidence in a due process hearing.

CFL proposes to separate the last three sentences of subpart 1 and place them in a new subpart 1a which defines when and where a conciliation conference, mediation, or other form of alternative dispute resolution must be held, and the results. CFL also proposes the following amendments:

First, CFL proposes to delete the sentence, "If no response is received in cases of initial assessment or placement, the school district shall offer a conciliation conference to be held within ten days after the expiration of the ten day period of parent response," as unnecessary and overly complicated. CFL proposes to simplify this requirement with the phrase, "within ten calendar days after receipt of written objection," and insert it into the sentence prior to the deletion as follows: "The conference shall be held within ten calendar days after receipt of written objection at a time and place mutually convenient to the parent and school district representatives." The proposed language is necessary to simplify the existing rule language.

Second, CFL proposes to add "A conciliation conference, mediation, or other forms of alternative dispute resolution must not be used to unilaterally delay or deny a parent's right to a due process hearing. All evidence involving or concerning the contents of a conciliation conference, mediation, or other form of alternative dispute resolution must remain confidential and must not be permitted as evidence in a due process hearing." This amendment is necessary to ensure that a conciliation conference, mediation, and other forms of alternative dispute resolution are conducted in compliance with state and federal law. Specifically, Minnesota Statutes, § 125A.09, subd. 4 and federal regulation at 34 C.F.R. § 300.506(b)(1)(ii) state:

> The procedures must ensure that the mediation process is not used to deny or delay a parent's right to a due process hearing... or to deny any other rights afforded under Part B of the Act.

In addition, federal regulation at 34 C.F.R. § 300.506 (b)(6) states:

> Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings....

That language is similar to Minnesota Statutes, § 125A.09, subd. 4, which states:

> Notwithstanding other law, in any proceeding following a conciliation conference, the district must not offer a conciliation conference memorandum into evidence, except for any portions that describe the district's final proposed offer of service.

These amendments, primarily technical in nature, are made to improve the language of part 3525.3600 and will not compromise the due process rights of pupils with disabilities.

Subpart 2.

~~Subp. 2. Memorandum. After the parents and district agree the final conciliation conference was held, the district shall serve the parent with a written memorandum within seven days that informs the parent:~~
~~A. Of the school district's proposed action following the conference.~~
~~B. That if they continue to object to the proposed action they have a right to object to the proposed action at an impartial due process hearing and the procedure and time in which to do so, including a request form on which the parent may request the hearing, and the identification of the district employee to whom the written request form or other written request for hearing should be mailed, and to whom questions and legal documents or requests relating to the hearing may be directed.~~
~~C. That if they do not request a hearing on the written request form or otherwise in writing pursuant to part 3525.3800 within seven days after receipt of the notice, the district will proceed with the proposed action; unless the proposed action is an initial action as defined in part 3525.0200, subparts 7a and 8a. In cases of proposed initial actions, when a parent continues to refuse to provide written permission, the district shall schedule a hearing within seven days after the expiration of the seven days allowed for parent response.~~
~~D. That if a hearing is scheduled, the district shall send a notice describing the rights and procedures available to the parents relative to the hearing.~~

CFL proposes to delete subpart 2 regarding the conciliation conference memorandum as duplicative of federal law. Specifically, the federal regulations at 34 C.F.R. § 300.503(a) and (b) state:

> Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency (i.) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child... . The notice required under paragraph (a) of this section must include... a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained... .

The existing rule requires that a school district produce a memorandum stating the school district's proposed action; that if the parents disagree with the proposed action, the parent has a right to proceed to a due process hearing; that if the parents do not object in writing to the proposed action, the district will proceed with the proposed action or proceed to a due process hearing; and that if either the district or the parent proceed to a due process hearing, the district must send a notice of the rights and procedures available to the parent in a due process hearing. Although this part appears to afford parents additional notice, the existing language simply restates the parental notice required anytime a district proposes to initiate or change the identification, evaluation or educational placement of a child. As a result, it is not necessary to restate this requirement here.

Subpart 3.

Subp. 3. ~~Right to a hearing without conciliation~~ Refusal to conciliate; request for hearing. ~~The conciliation process must not be used to deny or delay a parent's right to a due process hearing. If the parent refuses efforts by the district to conciliate the dispute with the school district, the district's obligation to offer an opportunity for conciliation is satisfied.~~

When the parent refuses efforts by the district to conciliate the dispute and notifies the district of the intent to go to an impartial due process hearing, the district must provide the parent with the procedure and time in which to request the hearing, and the identification of the district employee to whom the written request form or other written request for a hearing must be mailed, and to whom questions and legal documents or requests about the hearing may be directed.

CFL proposes to delete the first two sentences of subpart 3 as redundant. Specifically, CFL proposes to delete the first sentence because the information included therein is now clearly stated in subpart 1a of the proposed rule, and CFL proposes to delete the second sentence in subpart 3 because the information included therein is clearly stated at Minnesota Statutes, § 125A.09, subd. 4.

The above-described amendments are technical in nature and will not compromise the due process rights available to pupils with disabilities.

3525.3900 NOTICE OF ~~A~~ HEARING.

Written notice of the time, date, and place of a hearings shall be given to all parties by the hearing officer at least ten calendar days in advance of the hearings~~; and~~. The hearing shall be held at a time, date, and place ~~determined by the hearing officer~~ in the district responsible for assuring that an appropriate program is provided and that is reasonably convenient to the parents and child involved, as determined by the hearing officer.

Upon receipt of the parent's written request for a hearing, or upon the district's initiation of a hearing, the district shall serve the parent with a written notice of rights and procedures relative to the hearing that informs the parent:

A. That the hearing shall take place before an impartial hearing officer mutually agreed to by the school board and the parent. The notice must include a list of possible hearing officers and information on their backgrounds as maintained by the state. If the parties have not agreed upon a hearing officer, and the board has not requested that a hearing officer be appointed by the commissioner within four business days after the receipt of the request, the commissioner shall appoint a hearing officer upon the request of either party.

B. That ~~they~~ the parent will receive notice of the time, date, and place of the hearing at least ten calendar days in advance of the hearing which ~~will~~ must be held within 30 calendar days after the written request.

C. Of ~~their~~ the parent's right to receive a list of persons who will testify on behalf of the district concerning the ~~proposed action~~ issues within five business days of the date the district receives ~~their~~ the parent's written request for the list of persons testifying.

D. Of ~~their~~ the parent's responsibility, within five business days after written request by the school district, to provide to the district a list of persons who will testify on the parent's behalf concerning the ~~proposed action~~ issues.

E. Consistent with Code of Federal Regulations, title 34, section 300.509, that the hearing officer may prohibit evidence not disclosed five business days before a hearing.

F. That at the hearing the burden of proof is on the district to show that the proposed action or refusal is justified on the basis of the ~~person's~~ pupil's educational needs, current educational performance, or ~~presenting disabilities~~ progress, taking into account the presumption that placement in a regular public school class with special education services is preferable to removal from the regular classroom.

G. That the hearing officer will make a written decision based only on evidence received and introduced into the record at the hearing not more than 45 calendar days from the receipt of the request for the hearing and that the proposed action or refusal will be upheld only upon showing by the school district by a preponderance of the evidence. ~~A proposed action that would result in the pupil being removed from a regular education program may be sustained only when, and to the extent the nature or severity of the disability is such that a regular education program would not be satisfactory and the pupil would be better served in an alternative program. Consideration of alternative educational programs must also be given.~~

H. That the decision of the hearing officer is binding on all parties unless appealed to the commissioner by the parent or the district, except as provided in Code of Federal Regulations, title 34, section 300.514.

I. That unless the district and parents agree otherwise, the pupil shall not be denied initial admission to school and the pupil's education program shall not be changed in conformance

with ~~United State Code, title 20, section 1415(j)~~ Code of Federal Regulations, title 34, section 300.514.

CFL proposes to insert the phrase, "or upon the district's initiation of a hearing," in the second paragraph of part 3525.3900. The proposed language is necessary to clarify that regardless of which party initiates a due process hearing, the school district maintains the responsibility to ensure that parents are notified of their rights and procedures relative to the hearing.

Item A. CFL proposes to insert the sentence, "The notice must include a list of possible hearing officers and information on their backgrounds as maintained by the state," at item A. CFL proposes this amendment in response to the federal mandate that each agency keep a list of persons who serve as hearing officers, and the list must include the hearing officers' qualifications. See Federal regulation at 34 C.F.R. § 300.508(2)(c). This amendment is necessary to ensure that parents are allowed access to this required list of possible hearing officers and their qualifications before the parent is required to agree to a particular hearing officer.

Item F. CFL proposes to insert the phrase "or refusal" to the first sentence of item F and the first sentence of item G. This amendment is necessary to clarify that a school district maintains the burden of proof whether the hearing is the result of a disagreement regarding the district's proposed action or the district's refusal to initiate or change the identification, evaluation, or educational placement.

CFL also proposes to delete the reference to a pupil's "presenting disabilities" at item F and replace it with a reference to the pupil's "progress." The proposed language is consistent with state and federal law requiring each pupil's services to be developed according to the pupil's individual needs and not their primary disability. In addition, progress is critical in determining whether appropriate services have been provided, and therefore, progress is an appropriate means by which to justify a district's proposed action or refusal to initiate or change a pupil's services.

Item G. CFL proposes to delete the last two sentences of item G as duplicative of state and federal law. Specifically, federal regulation at 34 C.F.R. § 300.550(b) states:

> Each public agency shall ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are education children who are not disabled and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot achieved satisfactorily.

In addition, the existing rule at part 3525.0400 states:

> To the maximum extent appropriate, children, with disabilities shall be educated with children who do not have disabilities and shall attend regular classes. A person with disabilities shall be removed from a regular educational program only when the nature or severity of the disability is such that education in a regular educational program with the use of supplementary aids and services cannot be accomplished satisfactorily. Furthermore, there must be an indication that the pupil will be better served outside of the regular program. The needs of the pupil shall determine the type and amount of services needed.

The proposed amendment is technical in nature and will not alter the purpose or effect of the existing rule. It is reasonable to reduce the amount of unnecessary, duplicative rules where the result is a clearer and more useful rule.

3525.4000 HEARING OFFICERS.

~~The hearing shall take place before an impartial hearing officer mutually agreed to by the school board and the parents. If the parties have not agreed upon a hearing officer, and the board has not requested that a hearing officer be appointed by the commissioner within four business days after the receipt of the request, the commissioner shall appoint a hearing officer upon the request of either party.~~ The hearing officer shall not be a school board member or employee of the school district where the pupil ~~or child~~ resides or of the child's school district of residence, an employee of any other public agency involved in the education or care of the child or regular education pupil, or any person with a personal or professional interest which would conflict with the person's objectivity at the hearing. A person who otherwise qualifies as a hearing officer is not an employee of the district solely because the person is paid by the district to serve as a hearing officer. ~~If a hearing officer requests an independent educational evaluation of a child or regular education pupil, the cost of the evaluation shall be at district expense.~~

CFL proposes to delete the first two sentences and the last sentence at part 3525.4000 as redundant. Specifically, the information included in these sentences is contained in the notice requirements as stated in part 3525.3900. As a result, it is not necessary to restate it here.

3525.4100 PREHEARING REVIEW BY ~~THE~~ HEARING OFFICER

Subpart 1. Information received before ~~the~~ hearing. Five business days before the hearing, ~~the person conducting~~ the hearing officer shall receive copies of:
A. the district's due process notices ~~and memorandum~~ prepared pursuant to parts ~~3525.3700, subpart 2~~ 3525.3600 and 3525.3900 and Code of Federal Regulations, title 34, section 300.503, to the parents;
B. written information concerning the district's educational evaluation or ~~re-evaluation~~ reevaluation and copies of any parties' tests, evaluations, or other admissible reports or written information relating to the evaluation or ~~re-evaluation~~ reevaluation, or the proposed action or refusal;
C. a copy of the pupil's current and proposed IEP; ~~and~~
D. information about relevant progress made by the pupil; and
E. other information from the district or parent as the hearing officer may have requested at a prior date provided that a copy of the information is provided to all parties, and further provided that the information is made a part of the hearing record.

The provisions of items B and C need not apply when the hearing concerns a proposed action under ~~parts 3525.2550 to 3525.2750~~ Code of Federal Regulations, title 34, sections 300.532 to 300.533.

Subp. 2. Duties of hearing officers after receipt of the information. Upon receipt of the information in subpart 1, the hearing officer:
A. shall review the same for compliance with parts 3525.0200 to ~~3525.4700~~ 3525.4770 and Code of Federal Regulations, title 34, part 300;
B. may subpoena any person or paper considered necessary for an adequate review of the appropriateness of the proposed action that is the subject of the hearing;
C. may meet with the parties together before the hearing;
D. may require the district to perform an additional educational evaluation ~~or re-evaluation~~ or may arrange for an independent educational evaluation, which must be at district expense;
E. may require the district to propose an alternative IEP;

F. may require the district to send additional notice to the parents;
G. may do the additional things necessary to comply with parts 3525.0200 to ~~3525.4700~~ 3525.4770 and Code of Federal Regulations, title 34, part 300;
H. may postpone the hearing for up to 15 calendar days to achieve the purposes of this subpart; and
I. may grant specific extensions of time beyond the 45-calendar day period established in ~~part 3525.3900, item E~~ Code of Federal Regulation, title 34, section 300.511, at the request of either party for good cause shown on the record.

CFL proposes a number of technical edits to update references to state and federal law and regulation, and to clarify existing language in accordance with proposed amendments to related provisions. First, CFL proposes to delete the reference to "memorandum" at subpart 1, item A as a result of the proposed repeal of part 3525.3700, subpart 2. Second, CFL proposes to insert the phrase, "information about relevant progress made by the pupil," at subpart 1, item D as a result of the proposed amendment to part 3525.3900, item F. Finally, CFL proposes to insert the phrase "may arrange for an independent educational evaluation, which must be at district expense," at subpart 2, item D as a result of the proposed amendment to 3525.4000. Each of these amendments is technical in nature and will not alter the purpose or effect of the existing rule.

3525.4210 HEARING RIGHTS OF RESPECTIVE PARTIES.

Subpart 1. Basic hearing rights. The hearing rights of the respective parties are those in Code of Federal Regulations, title 34, section 300.509.
Subp. 2. Additional hearing rights. At least five business days after the request for hearing is made, the objecting party shall provide the other party with a brief statement of the particulars of the objection, the reasons for the objection, and the specific remedies sought. The other party must provide the objecting party with a written response to the statement of objections within five business days of receipt of the objecting party's statement. Any request to compel the attendance of witnesses must be made in writing to the appropriate school district or to the person whose attendance is compelled at least five business days in advance of the hearing. The written requests shall also be filed with the hearing officer at the time of hearing. The hearing officer may subpoena witnesses and documents under Minnesota Statutes, section 14.51.

CFL proposes to repeal part 3525.4200 and create a new part 3525.4210, which includes simplified language defining the hearing rights as described at 34 C.F.R. § 300.509. Specifically, CFL proposes to reference 34 C.F.R. § 300.509, at 3525.4210, subpart 1, and to clearly outline the hearing rights beyond those stated at 34 C.F.R. 300.509, at subpart 2.

CFL also proposes to make several technical edits to the newly created subpart 2 to improve the existing language and clarify a hearing officer's authority to subpoena witnesses and documents pursuant to Minnesota Statutes, § 14.51, which states:

> Upon the chief administrative law judge's own initiative or upon written request of an interested party, the chief administrative law judge may issue a subpoena for the attendance of a witness or the production of books, papers, records or other documents as are material to the matter being heard.

The above-described amendments are essentially technical in nature and will not alter the purpose or effect of the existing rule. The amendments are necessary to reduce the number of rules proscribing rights and procedures that clearly defined in state or federal statute or regulation.

3525.4300 HEARING PROCEDURES.

The hearing officer shall preside over and conduct the hearing and shall rule on procedural and evidentiary matters~~, and the hearing officer's decision shall be based solely upon the evidence introduced and received into the record~~. The district ~~shall~~ bears the burden of proof as to all facts and ~~as to~~ the grounds for the proposed action or refusal. ~~One purpose of the hearing is to develop evidence of specific facts concerning the educational needs, current educational performance, or apparent disabilities of the person as it relates to the need for the proposed action. Consistent with the rights and procedures in parts 3525.3300 to 3525.4770,~~ The hearing officer must ensure that issues for hearing are appropriately identified and that evidence is limited to that which is relevant to the issues and is not incompetent, immaterial, cumulative, or irrelevant. The hearing officer must limit the hearing to the amount of time necessary for each party to present its case and must establish the means for doing so. ~~Nothing in parts 3525.0200 to 3525.4770 limits the right of~~ The hearing officer has the unlimited authority to question witnesses ~~or~~ and request information.

A tape recording, stenographic record, or other record of the hearing shall be made~~, and if an appeal is filed under parts 3525.4600 and 3525.4700, the hearing must be transcribed by the district and must be accessible to the parties involved within five days of the filing of the appeal~~

CFL proposes to delete the phrase, "and the hearings officer's decision shall be based solely upon the evidence introduced and received into the record," from the first sentence of part 3525.4300. CFL also proposes to delete the sentence, "One purpose of the hearing is to develop evidence of specific facts concerning the educational needs, current educational performance, or apparent disabilities of the person as it relates to the need for the proposed action." The information included in these sentences reiterate hearing procedures that are clearly defined in federal regulations at 34 C.F.R. §§ 300.507 to 300.509. As a result, it is not necessary to restate it here.

CFL also proposes to add two sentences stating "The hearing officer must ensure that issues for hearing are appropriately identified and that evidence is limited to that which is relevant to the issues and is not incompetent, immaterial, cumulative, or irrelevant. The hearing officer must limit the hearing to an amount of time sufficient for each party to present its case and may establish the means for doing so." This amendment is necessary to clarify the hearing officer's duties consistent with Minnesota Statutes, § 125A.09, subd. 6, which states:

> A hearing officer may limit an impartial due process hearing to an amount of time sufficient for each party to present its case. The party requesting the hearing shall plead with specificity as to what issues are in dispute and all issues not pleaded with specificity are deemed waived. Parties must limit evidence to the issues specifically pleaded. A hearing officer, at the officer's discretion, may exclude cumulative evidence or may encourage parties to present only essential witnesses.

The proposed language allows hearing officers to take appropriate action to ensure that hearings are conducted in a timely and efficient manner which will result in the efficient and accurate resolution of issues for pupils. The proposed language will also assist hearing officers in meeting the 45-calendar-day timeline in which to render a decision in accordance with 34 C.F.R. § 300.511(a). The need to improve the conduct and timelines of hearings reflect often-raised criticisms of the current hearing system.

Finally, CFL proposes to delete the language regarding appeal in the final paragraph of part 3525.4300 as duplicative of part 3525.4500, which states:

The decision shall also include information detailing the right to appeal the decision, the procedures and time in which to do so, and an appeal form on which to indicate the desire to appeal as set forth in part 3525.4600.

The amendments described above are essentially technical in nature and will not alter the purpose or effect of the existing rule.

3525.4410 DECISIONS OF HEARING OFFICER.

Not more than 45 calendar days from the receipt of the request for a hearing, the hearing officer shall prepare a written decision based on evidence received and introduced into the record at the hearing.

The decision must:

A. contain written findings of fact and conclusions of law, including a statement of the controlling facts upon which the decision is made in sufficient detail to apprise the parties and the commissioner of the basis and reasons for the decision;

B. be based upon a preponderance of the evidence;

C. be based on the standards and principles in this chapter, Minnesota Statutes, section 125A.08, and the Code of Federal Regulations, title 34, part 300; and

D. be consistent with FAPE standards according to Code of Federal Regulations, title 34, section 300.13.

CFL proposes to repeal part 3525.4400 and replace it with more clear and concise language at part 3525.4410. This amendment is necessary to ensure that the rule is consistent with the requirements of Minnesota Statutes, § 125A.09, subd. 7 and 34 C.F.R. § 300. 13(b). In addition, the proposed amendments eliminate unnecessary language and clarify a hearing officer's responsibilities without compromising the due process rights of pupils with disabilities. These amendments are technical in nature and will not alter the purpose or effect of the existing rule.

3525.4600 EFFECTIVE DATE OF ACTION AND APPEALS.

~~The decision of the hearing officer is binding on all parties unless appealed to the commissioner by the parent or the district, except as provided in Code of Federal Regulations, title 34, section 300.514(c). The hearing officer's decision issued under part 3525.4400, subpart 2, 3, or 4, may be appealed by the parent or the district to the commissioner within 30 days of that written decision in the following manner:~~ The hearing officer's decision is final in accordance with Code of Federal Regulations, title 34, sections 300.510, 300.511, and 300.514(c). Notices of appeal ~~shall~~ may be on the appeal form ~~or otherwise~~ but must be in writing and ~~shall be~~ sent by mail to all parties to the hearing when the appeal is filed with the commissioner. The notice of appeal must identify the specific parts of the hearing decision being appealed.

~~The school board shall be a party to any appeal.~~ The hearing review officer's ~~shall issue a~~ final decision must be issued within 30 calendar days after the filing of the appeal and be based on a review of the local decision and the entire records and any additional evidence obtained ~~within 30 calendar days after the filing of the appeal.~~ A written transcript of the hearing shall be made by the district; the transcript and entire record shall be ~~accessible~~ provided to the parties and ~~provided to~~ the hearing review officer within five calendar days after the filing of the appeal. If the transcript and record are not provided to the hearing review officer within five calendar days of the filing of the appeal, the district shall request an extension of the time beyond the 30-calendar day period equal to the number of days which exceeded the five-calendar day period for filing the transcript and entire record. The hearing review officer shall seek additional evidence if necessary and may afford the parties an

opportunity for written or oral argument. A hearing held to seek additional evidence must be an impartial due process hearing but is not a contested case hearing. The hearing review officer may grant specific extensions of time beyond the 30-calendar day period at the request of any party for good cause shown on the record.

CFL proposes to delete the first two sentences at part 3525.4600 and replace them with one sentence indicating, "The hearing officer's decision is final in accordance with the Code of Federal Regulations, title 34, sections 300.510, 300.511, and 300.514(c)." The proposed amendment is necessary to reduce unnecessary language that complicates the intent of the rule.

CFL proposes to insert the phrase "with the commissioner" at the end of the first paragraph to clarify that hearing appeals must be filed with the commissioner of CFL, and not with a hearing review officer, and that appeals are issued on behalf of the commissioner.

3525.4700 FINAL DECISION.

The hearing review officer's final decision must be in writing, include findings and conclusions, and be based on the standards in this chapter, Minnesota Statutes, section 125A.08, ~~and the standards, requirements, and principles in parts 3525.4400, subparts 2 and 3, and 3525.0200 to 3525.4700~~and Code of Federal Regulations, title 34, part 300, and be consistent with FAPE standards according to Code of Federal Regulations, title 34, section 300.13.

The decision of the hearing review officer is final and effective upon issuance. Any party aggrieved by the findings and decisions made by a hearing review officer shall have the right to bring a civil action ~~regarding the complaint and decision in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy~~ pursuant to Code of Federal Regulations, title 34, section 300.512.

If the district fails to implement the hearing officer's or hearing review officer's decision, the parent shall have the right to bring the failure to the attention of the commissioner through the special education complaint process. In accordance with Minnesota Statutes, section 127A.42, the commissioner of Children, Families, and Learning shall impose sanctions necessary to correct any failure.

Within the first two paragraphs of part 3525.4700, CFL proposes to delete excessive and duplicative language and replace it with more concise references to law and regulation giving specific guidance as to the standards hearings officers must use in making a decision. This amendment is technical in nature and will not alter the purpose or intent of the existing rule.

In the final paragraph, CFL proposes to insert the phrase "through the special education complaint process." This amendment is necessary to clarify the means by which an aggrieved party may bring a district's failure to implement a hearing officer or hearing review officer's decision to the attention of the commissioner in accordance with the federal regulations at 34 C.F.R. § 300.661, which outlines the minimum standards for state special education complaint procedures.

3525.4770 EXPEDITED HEARINGS, TIMELINES.

Subpart 1. When parents request hearing. When requesting an expedited hearing the parents shall provide the district with:

A. the address of the residence of the pupil;

B. the name of the school the pupil is attending;

C. a description of the nature of the problem of the pupil relating to the manifestation determination, interim placement, or proposed interim placement; and
D. a proposed resolution of the problem to the extent known and available to the parents at the time.

The district may not deny or delay a parent's right to an expedited hearing for failure to provide the notice required here.

Immediately upon receipt of the request for an expedited hearing by the district superintendent, or upon initiating an expedited hearing, the district shall serve the parents with a written notice of right and procedures relative to the hearing, including the availability of free or low-cost legal and other relevant legal services and a list of approved hearing officers.

Subp. 2. When district requests hearing. When the district requests an expedited hearing it shall provide the parents with a written notice of:
A. a description of the nature of the problem including the behavior for which the change of placement is requested;
B. a description of the interim placement or proposed interim placement; ~~and~~
C. a proposed resolution of the problem to the extent known at the time; and
D. a list of approved hearing officers.

Subp. 3. Hearing officer appointment. The parties may agree upon a hearing officer, but the district shall send a copy of the hearing request to the commissioner by facsimile by the end of the business day following receipt of the parent's notice to the district superintendent or initiation of an expedited hearing. ~~Upon~~ Within two business days of receipt of the notice, if the parties have not agreed to a hearing officer, the commissioner shall appoint a hearing officer ~~from the roster maintained by the department for that purpose. The parties may agree to a hearing officer other than the one appointed by the commissioner in which case the district shall send, by facsimile, notice of the hearing officer requested.~~ If the ~~agreed~~ parties agree upon a hearing officer, ~~is~~ the hearing officer must be from the roster maintained by the department~~, the department shall appoint the hearing officer, if available, and assign a hearing case number~~. The district must contact the agreed upon hearing officer, and the hearing officer, if available to hear the matter, must notify the commissioner, who will then assign a hearing case number. If the agreed upon hearing officer is unavailable, the ~~department~~ district shall inform ~~both parties~~ the parents and the commissioner of that fact, and the ~~parties may mutually agree to~~ commissioner must appoint another hearing officer by the end of the following business day. If the parties are unable to reach agreement, either party may inform the department of that fact and request the immediate appointment of the next available hearing officer. ~~If the agreed upon hearing officer is not from the department's roster, the department shall inform the parties of the case number so that it can maintain a record of all hearing proceedings.~~ The same hearing officers shall be used for the expedited hearings as for hearings under Minnesota Rule, parts 3525.3800 to 3525.4500.

Subp. 4. ~~Strikes~~ Removal of hearing officer. In an expedited hearing, ~~a party may not strike the appointment of a hearing officer as of right, but~~ a party may only remove a hearing officer on an affirmative showing of prejudice under Minnesota Statutes, section 125A.09. ~~A hearing officer must meet the qualifications under Minnesota Statutes, section 125A.09, subdivision 11.~~

Subp. 5. Disclosure of data. At least three business days prior to an expedited hearing, or longer, if ordered by the hearing officer, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. A hearing officer may bar any party who fails to comply with this subpart from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

Subp. 6. Prehearing conference. Within two business days of appointment, the hearing officer shall hold a prehearing conference, which may be by telephone. At that conference, or later, the hearing officer may take any appropriate action ~~a court may take under Rule 16 of Minnesota Rules of Civil Procedure including, but not limited to,~~ relating to scheduling, jurisdiction, and listing witnesses, including expert witnesses. Specific pleadings including statements of objection under Minnesota Statutes, section 125A.09, subdivision 6, clause (5), and the statement of material allegations under part 3525.4200 shall be required; however the

timelines for their exchange shall be established by the hearing officer. Issues not pled with specificity in an expedited due process hearing are not waived in subsequent proceedings. ~~The~~ Any exchange of witness lists, evidence, and any other information deemed necessary by the hearing officer shall be exchanged based on the timeline ordered by the hearing officer as required to allow the hearing officer to render a written decision within 20 business days of the request for the hearing. At the prehearing conference, and subsequently, the hearing officer may order either party to submit educational records, evaluations, and any other information to the hearing officer for prehearing review. The hearing officer may establish procedures necessary to ensure the timely and fair resolution of the dispute~~e~~.

Subp. 7. Appeal. The final decision of a hearing officer in an expedited hearing may be appealed to a hearing review officer in the same manner as set forth in ~~United States Code, title 20, section 1415,~~ this chapter and Code of Federal Regulations, title 34, sections 300.510 and 300.511, ~~and Minnesota Rules,~~ except that the appeal must be made within five business days of the hearing officer's final decision. The hearing review officer's decision must be issued within ten business days of appointment and receipt of the hearing records. A time extension of up to five business days may be granted for good cause shown on the record.

Subp. 8. Decision. A written decision for an expedited hearing shall be rendered by the hearing officer in 20 business days. An extension of up to five business days may be granted by the hearing officer for good cause shown on the record. The decision is effective upon issuance consistent with Code of Federal Regulations, title 34, section 300.514.

Subparts 1 and 2. CFL proposes to add the phrase, "a list of approved hearing officers" to the end of the last sentence in each subpart at part 3525.4770 to ensure that the rule is consistent with federal regulation at 34 C.F.R. § 300.508(2)(c), which states:

> Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

This amendment is also necessary to ensure that parents are allowed access to information regarding possible hearing officers before the parent is asked to agree to a particular hearing officer.

Subparts 3 and 4. CFL proposes considerable technical amendments to subparts 3 and 4 to make the rules consistent with Minnesota Statutes, § 125A.09, and to simplify the process of selecting a hearing officer. The proposed language is necessary to ensure that potential parties have access to all necessary information in preparing for and participating in an expedited due process hearing which is necessary to avoid unnecessary delays in the process.

Subpart 6. CFL proposes to delete the reference to the Minnesota Rules of Civil Procedure at subpart 6. This amendment is necessary to comply with a decision of the Minnesota Court of Appeals stating, "Absent an express statutory authorization or rulemaking, an administrative review officer may not employ the Minnesota Rules of Civil Procedures to interpret an administrative body's own procedural rules." See Appendix T for the text of E.N. v. Special School District #1, 603 N.W.2d 344, 345 (Minn. Ct. App., 1999).

CFL also proposes to add, "The hearing officer may establish procedures necessary to ensure the timely and fair resolution of the dispute." This amendment is necessary to ensure issues are resolved with efficiency to ensure that pupils are appropriately served without delay.

REPEALER

Minnesota Rules, parts 3525.0200, subpart 2; 3525.1329, subpart 2; 3525.1333, subpart 3; 3525.1510; 3525.2550, subpart 1; 3525.2750; 3525.2900, subparts 1 and 3; 3525.3700, subpart 2; 3525.4200; and 3525.4400, are repealed.

CONCLUSION

Based on the foregoing, the proposed rules are both needed and reasonable.

11-27-00
Date

Barbara Yates
for Christine Jax, Ph.D.
Commissioner