Minnesota Department of Education

Proposed Amendment to Rules Governing Special Education, *Minnesota Rules*, Chapter 3525; Repeal of *Minnesota Rules* 3525.2435 and 3525.2710

Introduction

Minnesota provides special education services for eligible children from birth to age 21. These rules guide the provision of special education services for children in grades kindergarten through 12, and the provision of early intervention services for children under age five and their families.

In 2006, the federal regulations that implement the Individuals with Disabilities Education Act (IDEA) were amended. *See* 34 C.F.R. Part 300. Some of those federal changes have resulted in conflict between the new federal provisions and Minnesota's existing rules. The Minnesota Department of Education (Department) also has been directed by state legislation to consolidate its behavioral intervention rules and to revise its care and treatment rule to conform with recent changes to Minnesota statute. Therefore, the Department is proposing amendments to Minnesota's special education rules, in order to remain in compliance with federal law and in to preserve federal special education funding.

The proposed rules are a product of the Department's intensive drafting work, and based on the significant discussions and contributions of a public stakeholder group that met several times between March 12th and May 1st, 2007. They also reflect the Department's incorporation of comments received from interested community members. A second workgroup met several times during the spring of 2007 to propose changes to the specific learning disabilities evaluation and identification rule. This second workgroup developed an initial draft of changes to Minnesota Rule 3525.1341. In addition, the Department presented these rules to the Special Education Advisory Panel (SEAP), which discussed the rules at its 2007 meetings; those discussions contributed to some of the decisions reflected in the final proposed rules. Throughout the rule drafting process, updated provisional drafts of the proposed rules were posted to the Department's website for interested parties to access and comment on; these comments also were considered and incorporated into the final proposed rules to the extent possible.

This rule process has resulted in amendments throughout Chapter 3525, Minnesota's special education rules. Many of those changes are minor, designed to reflect new federal laws or to improve a rule's clarity. The rules that have undergone the most change include: the behavioral intervention rules, which have been consolidated and clarified as required by *Minnesota Statutes*, section 121A.67; the specific learning disability evaluation and identification rule, which has been amended to comply with changes to federal special education law; the care and treatment rule, which has been revised to bring it into alignment with recent changes to *Minnesota Statutes*, section 125A.515, and to improve the clarity of the rule; the evaluation, re-evaluation, and development of individualized education plan rules, which have been revised to remove requirements that are

duplicative of federal law; and the criteria upon re-evaluation rule, which is a new rule proposed by the Department to address conflict within the state about what eligibility criteria must be used upon re-evaluation and to establish that upon re-evaluation, a child who continues to have a disability as provided by 34 C.F.R. § 300.8 and who continues to demonstrate a need for special education and related services is eligible for special education.

Statutory Authority

The Department's statutory authority to adopt the rules is set forth in *Minnesota Statutes*, section 125A.07, which provides:

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

In addition, the Department was directed by the legislature, by *Minnesota Statutes,* section 121A.67, to amend rules governing the use of aversive and deprivation procedures by school district employees or persons under contract with a school district.

> The commissioner, after consultation with interested parent organizations and advocacy groups, the Minnesota Administrators for Special Education, the Minnesota Association of School Administrators, Education Minnesota, the Minnesota School Boards Association, the Minnesota Police Officers Association, a representative of a bargaining unit that represents paraprofessionals, the Elementary School Principals Association, and the Secondary School Principals Association, must amend rules governing the use of aversive and deprivation procedures by school district employees or persons under contract with a school district. The rules must:
>
> (1) promote the use of positive behavioral interventions and supports and must not encourage or require the use of aversive or deprivation procedures;
>
> (2) require that planned application of aversive and deprivation procedures only be instituted after completing a functional behavior assessment and developing a behavior intervention plan that is included in or maintained with the individual education plan;
>
> (3) require educational personnel to notify a parent or guardian of a pupil with an individual education plan on the same day aversive or deprivation procedures are used in an emergency or in writing within two school days if district personnel are unable to provide same-day notice;
>
> (4) establish health and safety standards for the use of locked time-out procedures that require a safe environment, continuous monitoring of the child, ventilation,

adequate space, a locking mechanism that disengages automatically when not continuously engaged by school personnel, and full compliance with state and local fire and building codes, including state rules
on time-out rooms;
(5) contain a list of prohibited procedures;
(6) consolidate and clarify provisions related to behavior intervention plans;
(7) require school districts to register with the commissioner any room used for locked time-out, which the commissioner must monitor by making announced and unannounced on-site visits;
(8) place a student in locked time-out only if the intervention is:

(i) part of the comprehensive behavior intervention plan that is included in or maintained
with the student's individual education plan, and the plan uses positive behavioral interventions
and supports, and data support its continued use; or
(ii) used in an emergency for the duration of the emergency only; and

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

Furthermore, 2006 Minn. Laws, ch. 263, art. 3, sec. 16 directs the Department to amend the care and treatment rule, Minn. R. 3525.2325, to conform with *Minnesota Statutes*, section 125A.515.

These statutes provide the Department with the necessary authority to adopt the proposed rules. Moreover, recent changes to the federal special education regulations require the Department to amend its rules to ensure compliance with new federal law.

Alternative Format

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format. To make a request, contact Kelly Garvey at Minnesota Department of Education, 1500 Highway 36 West, Roseville, MN, 55113; phone: 651.582.8518; FAX: 651.582.8725. TTY users may call the Department at 651.582.8201.

Regulatory Analysis

Minnesota Statutes, section 14.131, sets out seven factors for regulatory analysis that must be included in the SONAR. Paragraphs (1) through (7) below quote these factors and then give the agency's response.

(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

The classes of persons affected by this rule include Minnesota children and their families, and school districts, including teachers, other school staff, and administrators.

(2) The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

The proposed rules do not create any additional costs to the Department. The Department is already staffed to provide training and support regarding the proposed rules, and staff assignments and resources will be reallocated accordingly, as necessary. In fact, it is anticipated that the guidance and clarification provided by these proposed rules will ease slightly the burden of the Department's oversight responsibilities by clarifying some areas of confusion that have led to repeated questions and complaints to the Department.

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

There are no less costly methods for achieving the purposes of the proposed rules. These proposed rules are required in order to conform Minnesota law with recent changes to federal regulations; respond to changes in Minnesota statutes; resolve questions raised by the field; and address issues raised during the performance of the Department's compliance oversight functions. The Department has the responsibility to ensure that Minnesota complies with federal laws regarding the provision of education to children with disabilities, so it is necessary to maintain and revise these rules to ensure the implementation of federal law and state statutes. These rules are also necessary to provide a uniform and legally sufficient statewide system of special education for children with disabilities. Furthermore, the proposed rules provide guidance to the field and eliminate some rules that conflict with state statute. Therefore, these changes will result in a more consistent application of the law. For all of those reasons, amending the proposed rules through the formal rulemaking process is the most appropriate method to achieve those goals and requirements.

Other than utilizing its statutory authority to amend the rules, the Department has no other satisfactory method by which to effectively incorporate into Minnesota's governance structures these significant changes in federal law. In addition, as discussed above, the Department was directed by the legislature to amend the rules governing the use of aversive and deprivation procedures by school districts and the care and treatment rule to comply with *Minnesota Statutes* § 125A.515. In order to change these rules as directed, and for these rules to have general

application and future effect, the Department must amend the rules through the formal rulemaking process.

Some members of the stakeholder group advocated for no rules that exceed federal law. However, the Individuals with Disabilities Education Act sets forth a general outline that requires states to implement their oversight authority by setting out a uniform system for statewide special education services. Furthermore, through experience, the Department has found that where there is lack of clarity in the field regarding application of federal law or state statute, these rules provide clarity, increase compliance, and reduce litigation. The rules also ensure that special education and related services are provided uniformly throughout the state rather then on a district by district basis.

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

The Department does not believe there are alternatives to the proposed rules. The rules ensure implementation of the federal law, and are one method by which the state demonstrates its compliance with federal law. Many of these rules need to be updated due to changes in federal law and state statute.

The Department did not consider drafting the proposed rules without utilizing the knowledge and practical experience of a stakeholder group. By using this method, the Department was able to ensure that many different viewpoints were heard and a broad range of feedback was obtained during the drafting process. No other alternative methods for achieving the purpose of the proposed rule were seriously considered by the Department.

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

The proposed rules are cost neutral. School districts are not likely to face increased costs to implement the rules. Districts will continue to implement the amended rules, as they do now with the current rules, and provide appropriate special education and related services to eligible Minnesota children as required by federal law. Any costs created by the implementation of these rules are already being borne by all entities involved. In fact, the proposed rules are intended to decrease controversy by providing clarification and result in fewer due process complaints and less litigation, which should decrease costs to districts and to the Department.

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

Many of the proposed changes in the rules reflect federal regulatory changes; therefore, the rule changes are necessary to bring Minnesota Rules into compliance with federal law. The Department risks loss of federal Part B funding if it does not make these changes. An additional consequence of

the rules not being compliant with the federal regulations, or being in conflict with state statutes, would be increased disputes and litigation.

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

One of the goals of this rulemaking process is to bring Minnesota's current rules into alignment with revised federal regulations to the extent possible. The SONAR provides a step-by-step analysis which addresses the applicable federal law in each instance. In addition, the Department has completed an assessment of the places in which state law exceeds the federal regulations. This assessment, contained in a document titled Federal Reporting Requirements Under IDEA 2004, Section 608, can be found on the Department website at:

http://education.state.mn.us/mdeprod/groups/Compliance/documents/Memo/008665.pdf.

Cost to Small Businesses and Small Cities

As required by *Minnesota Statutes*, section 14.127, the Department has considered whether the cost of complying with the proposed rules in the first year after the rules take effect will exceed $25,000 for any small business or small city. The Department has determined that the cost of complying with the proposed rules in the first year after the rules take affect will not exceed $25,000 for any small business or small city.

The Department has made this determination because the proposed rules will not result in additional costs to the districts. Districts are required to provide special education and related services to eligible Minnesota children regardless of the adoption of the proposed rules.

Consult with Finance on Local Government Impact

As required by *Minnesota Statutes*, section 14.131, the Department has consulted with the Commissioner of Finance. We did this by sending the Commissioner of Finance copies of the documents sent to the Governor's Office for review and approval by the Governor's Office prior to the Department publishing the Notice of Hearing. We sent the copies on October 3, 2007. The documents included: the Governor's Office Proposed Rule and SONAR Form; almost final draft rules; and almost final SONAR. The Department of Finance concluded that the proposed rules will have little fiscal impact on local units of government.

Performance-Based Rules

Throughout the development of the proposed rules and this SONAR, the Department made every attempt to develop rules that will be understandable for practitioners and families to ensure efficient and effective delivery of services while achieving positive results for children and youth with disabilities. Further, the Department proposes these amendments to make the rules clear in purpose and intent, flexible, and not overly prescriptive while allowing the state to fulfill its obligation of

ensuring that federal law is implemented and that children receive appropriate services and protections.

Additional Notice

Additional Notice

A Request for Comments was published in the *State Register* on April 23, 2007. The proposed rules and a Notice of Hearing will be published in the *State Register* on October 15, 2007. At that time, the Department will also make the proposed rules available and send the Notice of Hearing to the following parties:

> Individuals and organizations on the Department's registered rulemaking list;
> Education organizations list maintained by the Department;
> Advocacy organizations and disability-specific organizations;
> Attorney lists maintained by the Department;
> Individuals who participated in the informal stakeholder group for the Chapter 3525 amendments, and those who served on the workgroup for the revision of Minn. R. 3525.1341;
> Chairs of legislative committees with oversight of the Department;
> Minnesota superintendents, via the Department's weekly superintendents informational email;
> Minnesota directors of special education, via the Department's special education directors listserv;
> Low incidence regional facilitators and service cooperative units;
> Hearing Officers;
> Chairs of higher education departments;
> Department of Corrections superintendent and special education director;
> Other interested parties; and
> Posting on the Department's web site.

The Department will also send a press release outlining the date, time, and location of the public hearing and a description of the proposed rules to news outlets, including radio, television, and newspapers throughout the state.

The scheduled hearings, additional notices, and opportunities for comment comply with 34 C.F.R. § 300.100 and 300.165, which state:

> 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.

The Additional Notice Plan also includes giving notice required by statute. The Department has mailed the rules and Notice of Hearing to everyone who has registered to be on the Department's rulemaking mailing list, which is required by *Minnesota Statutes*, section 14.14, subdivision 1a. We will also give notice to the legislature per *Minnesota Statutes*, section 14.116.

List of Witnesses

If these rules go to a public hearing, the Department anticipates having the following witnesses testify in support of the need for and reasonableness of the rules:

1. Amy Roberts, Director, Division of Compliance and Assistance, Minnesota Department of Education will testify about the agency's rule development process and will provide an overview of the rules.

2. Barbara Troolin, Director, Special Education Policy, Minnesota Department of Education, will provide an overview of the rules.

3. Kathryn Olson, Rulemaking Coordinator, Minnesota Department of Education, will facilitate the Department's hearing process.

Rule-by-Rule Analysis

TERM CHANGES.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.0210 DEFINITIONS.

[For text of subpart 1, see M.R.]

Subp. 2. [See repealer.]

This repeal is necessary because the current definition of "Administrator or administrative designee" differs from its reference in 34 C.F.R. § 300.321(a) which states:

(4) A representative of the public agency who—
(i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
(ii) Is knowledgeable about the general education curriculum; and
(iii) Is knowledgeable about the availability of resources of the public agency.

This repeal is reasonable because this definition is not current and the requirement is already accurately reflected in the regulation. Guidance to the field will be clearer without the conflicting language of the current rule.

Subp. 3. [See repealer.]

Subp. 42a. **Supplementary aids and services.** "Supplementary aids and services" means aids, services, and other supports that are provided in regular education classes, or other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with Code of Federal Regulations, title 34, sections 300.114 to 300.116.

This change is necessary because the present definition of "Aids" differs both from its references throughout the Minnesota Rules and from 34 C.F.R § 300.42 which states: Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, or other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with §§ 300.114 through 300.116 (Authority: 20 U.S.C. § 1401(33)). A definition continues to be helpful as the term "supplementary aids and services" is used throughout the regulations and rules. The definition is reasonable because it reflects verbatim the current federal

language. This definition is inserted as Subp. 42a to maintain alphabetical order of the definition section.

[For text of subp 4, see M.R.]

Subp. 5. [See repealer.]

Subp. 6. [See repealer.]

Subp. 6a. **Child.** "Child" means child with a disability as provided by Minnesota Statutes, section 125A.02, subdivision 1.

While a distinction between the terms pupil and student used to exist in Minnesota Statutes, the distinction has not been maintained. Minnesota Statutes Chapter 125A uses the term "child with a disability" to refer to children with disabilities. The federal regulations also use the term "child with a disability." *See* 34 C.F.R. § 300.8. The State education statutes and rules are not consistent with respect to when pupil is used and when student is used. Therefore, it is necessary to change the references to pupil and student to child throughout these rules whenever child with a disability is used and add this definition. This is a reasonable addition to the rules because it results in clear and consistent terminology throughout.

Subp. 7. [See repealer.]

A more specific and complete definition of "Community based" programs is found at part 3525.2335, Subpart 2, Item B, Subitem (3). (Early childhood program services, alternatives, and settings.) It is reasonable to repeal this less comprehensive definition and to rely on the more complete description provided by the operational rule.

Subp. 8. [See repealer.]

Because this definition of "Conciliation conference" has operational requirements embedded in it, the Department proposes to move this definition into the operational rule, Minn. R. 3525.3700 (Conciliation conference.).

Subp. 9. [See repealer.]

Subp. 10. **Cultural liaison.** "Cultural liaison" means a person who is of the same racial, cultural, socioeconomic, or linguistic background as the ~~pupil~~ child, and who:

A. provides information to the IEP team about the ~~pupil's race~~ child's racial, cultural, socioeconomic, and linguistic background;

[For text of item B, see M.R.]

C. facilitates the ~~pupil's~~ child'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~~ child is not available, then a person who has knowledge of the ~~pupil's~~ child's racial, cultural, socioeconomic, and linguistic background may act as a cultural liaison.

The definition of cultural liaison is not required by federal or state law. The cost of cultural liaisons is a permitted use of funds. Therefore, the definition assists Department fiscal staff in determining if payments for this service are appropriate. The change of wording from "race" to "racial" in Item A was suggested in a stakeholder meeting as more appropriate wording and is more consistent with the rest of the Subpart. The Department proposes to incorporate this change.

Subp. 11. ~~**Days**~~ **Day**. "~~Days~~ Day" means ~~business day,~~ calendar day~~, or school day calendar day as defined in Code of Federal Regulations, title 34, section 300.9~~ unless otherwise indicated as a business day or school day.

A. "Business day" means Monday through Friday, except for federal and state holidays, unless holidays are specifically included in the designation of business day.

B. "School day" means any day, including a partial day, that children are in attendance at school for instructional purposes. It has the same meaning for all children in school, including children with and without disabilities.

"Day" is defined in federal law at 34 C.F.R. § 300.11. (Authority: 20 U.S.C. § 1221e–3) The Department proposes to mirror the more comprehensive federal definition of day by including language that explains the differences between calendar day, business day, and school day. Historically, the failure to thoroughly define the meaning of day has led to unnecessary conflict. This change is reasonable because using the federal definition assures consistency with the federal law. Also, a clear, thorough definition of day helps to avert disagreements. This change is necessary because Minn. Stat. § 125A.07(b)(3) requires the commissioner to adopt special education rules that reduce conflict.

[For text of subp 12, see M.R.]

Subp. 13. [See repealer.]

[For text of subp 14, see M.R.]

Subp. 15. **District.** "District" means any local education agency, charter school, or state agency that provides education services to ~~pupils~~ children.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

[For text of subp 16, see M.R.]

Subp. 17. [See repealer.]

Subp. 18. [See repealer.]

Minn. Stat. § 125A.08(a)(4) references federal law and specifically provides that an assessment or reassessment may be completed using existing data consistent with IDEA. 34 C.F.R. § 300.15 and 34 C.F.R. § 300.304-306 further define evaluation. The current definition of "Evaluation or reevaluation" language differs slightly from the federal language which is too complex to be contained in a definition. For clarity and completeness, it is necessary and reasonable to repeal this definition and use the federal standard for evaluations and reevaluations found in 34 C.F.R. § 300.300 to 300.306.

The Department proposes to retain the parts of Minnesota Rules regarding evaluations and reevaluations that are not duplicated in federal law or spelled out explicitly by state statute. The current draft of the proposed rules maintains existing rights for children while at the same time addresses concerns from the school districts that language duplicative of federal law, whether or not it is verbatim, creates two standards which can lead to confusion and increased litigation.

Subp. 19. **Extended school year (ESY) services.** "Extended school year (ESY) services" means special education instruction and related services for ~~pupils~~ children who demonstrate the need for continued service on days when school is not in session for all students as a necessary component of a free appropriate public education.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

[For text of subps 20 to 25, see M.R.]

Subp. 26. [See repealer.]

The Department proposes to repeal the definition of "Initial placement" because it is not complete or accurate and the topic is covered more thoroughly by federal law.

Subp. 27. **Indirect services.** "Indirect services" means special education services which include ongoing progress

reviews; cooperative planning; consultation; demonstration teaching; modification and adaptation of the environment, curriculum, materials, or equipment; and direct contact with the ~~pupil~~ child to monitor and observe. Indirect services may be provided by a teacher or related services professional to another regular education, special education teacher, related services professional, paraprofessional, support staff, parents, and public and nonpublic agencies to the extent that the services are written in the ~~pupil's~~ child's IEP and IFSP.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

Subp. 28. **Individualized family service plan or IFSP.** "Individualized family service plan" or "IFSP" means a written plan for providing early intervention services to a ~~pupil and the pupil's~~ child age birth to three years and to the child's family ~~through interagency agreements. Procedural and program requirements for the IEP also apply to the educational components of the IFSP~~.

This part mirrors the federal definition. 34 C.F.R. § 303.340(b). It is necessary to strike the last sentence because it creates confusion, as not all Part C eligible children will be eligible for Part B and the procedural requirements for an Individualized Education Program (IEP) do not apply to the educational components of an IFSP. For example, federal and state law do not require written progress reports four times a year for children age birth to three years with an IFSP. It is reasonable to keep the definition and reword it to be consistent with the statute to reduce conflict and provide clear expectations for service providers. *See* Minn. Stat. § 125A.07(b)(3) and (4).

Paula Goldberg of the PACER Center commented that there is no other place where the procedural safeguards for IFSP are detailed. IFSP has its own procedural safeguards, which flow from Part C, not from Part B. IFSP and IEP are not parallel; they do conflict. It is reasonable to keep the definition and reword it to be consistent with federal language. To maintain the definition as it is would lead to more conflict and confusion.

Subp. 29. [See repealer.]

Subp. 30. [See repealer.]

[For text of subp 31, see M.R.]

Subp. 32. **Nondiscrimination.** "Nondiscrimination" means a requirement that districts shall comply with chapter 3535 and Minnesota Statutes, chapter ~~363~~ 363A.

The change is necessary because Minnesota Statutes, chapter 363 was renumbered as 363A. The definition has served to ensure that districts understand their obligation to comply with the Human Rights Act. It is reasonable to maintain this definition to reduce conflict and provide clarity as required by Minn. Stat. § 125A.07(b)(3) and (4).

Subp. 33. **Paraprofessional.** "Paraprofessional" means a district employee who is primarily engaged in direct interaction with one or more ~~pupils~~ children for instructional activities, physical or behavior management, or other purposes under the direction of a regular education or special education teacher or related services provider.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

Subp. 34. **Parent.** "Parent" means:

A. a ~~natural~~ biological or adoptive parent of a child;

B. a guardian generally authorized by a court or by delegation of parental power to act as the child's parent, or authorized to make educational decisions for the child, but not the state if the child is a ward of the state;

C. ~~a person~~ an individual acting in the place of a biological or adoptive parent, ~~such as~~ including a grandparent ~~or,~~ stepparent, or other relative with whom the child lives, or ~~a person~~ an individual who is legally responsible for the child's welfare;

D. a surrogate parent who has been appointed ~~by the district~~ in accordance with part 3525.2440; or

E. a foster parent if:

(1) the ~~natural~~ biological or adoptive parents' authority to make educational decisions on the child's behalf has been extinguished under state law;

[For text of subitems (2) and (3), see M.R.]

(4) the foster parent has no interest that would conflict with the interests of the child.

Except as provided below, the biological or adoptive parent must be presumed to be the parent for purposes of this part when attempting to act as the parent under this part and when more than one party is qualified under items A through E to act as a parent, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

If a judicial decree or order identifies a specific party under items A through D to act as the "parent" of a child or to make educational decisions on behalf of a child, then such party shall be the "parent" for purposes of this part.

The federal definition is incorporated to assure compatibility between federal and Minnesota law. The definition has been reworded to make it easier to understand. The changes are necessary because the federal definition of parent has changed and a definition is necessary because the definition is implicated throughout the rest of the rules. *See* 34 C.F.R. § 300.30. The language regarding foster parents is taken directly from 34 C.F.R. § 300.20 (1999). It is maintained because it continues to be useful to provide guidance about when it is appropriate for foster parents to act as parents. Delegation of parental power is a process available in Minnesota that allows parents to delegate any or all of their parental authority to another person for periods of up to one year. *See* Minn. Stat. § 524.5-211. It is reasonable because it provides clarity and reduces conflict as required by Minn. Stat. § 125.A.07(b)(3) and (4).

Subp. 35. **Providing district.** "Providing district" means a district with the responsibility of providing special education services to a ~~pupil~~ child according to part 3525.0800.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

Subp. 36. [See repealer.]

The distinction between pupil and student, which used to exist in Minnesota law, has not been maintained. Historically, pupil meant a child in special education and student meant a child in regular education. For example – the Pupil Fair Dismissal Act and the pupil fee law refer to a pupil as "all students attending public school." Minnesota Statutes Chapter 125A uses the term "child with a disability." The federal regulations use the term "child with a disability." *See* 34 C.F.R. § 300.8. Because there is no consistency in the state education statutes or rules as to when pupil is used and when student is used, it is necessary to repeal the definition of "Pupil." It is reasonable to use the term "child with a disability" for clarity and consistency because both state and federal law use it.

Subp. 37. **Recognized professional standards.** "Recognized professional standards" means reasonable principles and concepts widely accepted by acknowledged experts that bear a direct relationship to the particular needs of the ~~pupil~~ child.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

Subp. 38. [See repealer.]

It is necessary to delete the definition of "Regular education program" because it is confusing, as children with disabilities may attend regular education classes and receive special education services in that environment. The least restrictive environment (LRE) requirement in Minn. R. 3525.0400 makes it clear that children with disabilities should be included in the regular classroom and in nonacademic activities with their nondisabled peers. Districts are required to ensure that children with disabilities are educated with nondisabled peers to the maximum extent appropriate. It is reasonable to delete this definition as the LRE provisions are addressed in Minn. R. 3525.0400.

Subp. 39. **Resident district.** "Resident district" means the district in which the ~~pupil's~~ child's parent, as defined by ~~part 3525.0800,~~ subpart ~~9,~~ 34 and Code of Federal Regulations, title 34, section ~~300.20~~ 300.30, resides. It does not mean the district in which a surrogate parent resides. If the parents of the ~~pupil~~ child are legally separated or divorced and both maintain legal rights to determine the ~~pupil's~~ child's education, but are living in different districts, the child's district of residence is ~~the district in which the pupil primarily resides for the greater part of the school year~~ determined by Minnesota Statutes, section 127A.47, subdivision 3.

In those situations when a ~~pupil~~ child is placed for care and treatment or foster care by an agency other than the school district, the district of residence is the district in which the ~~pupil's~~ child's parent resides or the district designated by the commissioner, as provided in Minnesota Statutes, sections 125A.03 to 125A.24. If the parents of the ~~pupil~~ child are separated or divorced and both maintain legal rights to determine the ~~pupil's~~ child's education, but are living in different districts, the district of residence is the district last responsible for education services when the ~~pupil~~ child resided with either parent.

The district of residence for a homeless child is as provided by Minnesota Statutes, section 127A.47, subdivision 2. A district must not deny free admission to a homeless child solely because the district cannot determine that the child is a resident of the district.

This part is necessary for funding purposes and for determining the responsibility for assuring that a child with a disability receives a free appropriate public education (FAPE). The citation for the definition of parent has changed. The deletion and insertion in the first paragraph reflect the new citation to the Minnesota Rules and the Code of Federal Regulations for the definition of parent.

For divorced parents, Minn. Stat. § 127A.47, subd. 3 governs the child's district of residence, so the Department proposes to insert language in the first paragraph to indicate that. That statute uses the term "legally separated" and so the term "legally" is inserted here to be consistent with the statute. To comply with federal law, this definition now contains residency guidelines for homeless children, inserted as the language in the last paragraph.

[For text of subp 40, see M.R.]

Subp. 41. **Significant change in program or placement.** "Significant change in program or placement" means:

[For text of items A and B, see M.R.]

C. there is a change in the type of site or setting in which the ~~pupil~~ child receives special education;

D. the amount of time a ~~pupil~~ child spends with nondisabled peers is changed;

E. the amount of special education to accomplish the goals or objectives needs to be increased or decreased; or

F. the team determines there is a need for a ~~conditional~~ regulated intervention ~~procedure~~.

The change in this Subpart from the term "conditional intervention procedure" to "regulated intervention" is proposed for consistency in terminology. Proposed rules 3525.0850 through 3525.0870 use the term "regulated intervention" to refer to the use of an aversive or deprivation procedure that is not otherwise prohibited.

Subp. 42. **Special education.** "Special education" means any specially designed instruction and related services to meet the unique cognitive, academic, communicative, social and emotional, motor ability, vocational, sensory, physical, or behavioral and functional needs of a ~~pupil~~ child as stated in the IEP.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

Subp. 43. **Surrogate parent.**

A. "Surrogate parent" means a person appointed by the providing district to intervene on behalf of a ~~pupil~~ child, to help ensure that the rights of the ~~pupil~~ child to a free and appropriate education are protected. The surrogate parent shall not be a person who receives public funds to educate or care for the child. However, a foster parent may serve as a surrogate parent if appointed as the surrogate parent and if no conflict of interest exists.

B. In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, street outreach programs, and other programs for homeless youth may be appointed as temporary surrogate parents until a surrogate can be appointed that meets the requirements in item A.

The definition is a useful summary of the federal requirements. It is necessary to revise this definition to accurately reflect the current federal standard in 34 C.F.R. § 300.519. Minn. R. 3525.2455 provides additional criteria for determining who is eligible to be a surrogate parent to a homeless child. These insertions are reasonable because they will reduce conflict and provide clarity as required by Minn. Stat. § 125A.07(b)(3) and (4).

Subp. 44. **Teacher.** "Teacher" means a person licensed under parts 8710.5100 to 8710.5800 by the Board of Teaching to ~~instruct pupils~~ provide specially designed instruction to children with specific disabling conditions. This includes highly qualified special education teachers, as determined by the Board of Teaching.

The definition is a useful summary of the federal requirements. It is necessary to revise the definition of teacher to accurately reflect the current federal standard in 34 C.F.R. § 300.18. The additions to the definition are reasonable because they should reduce conflict and provide clarity, by being more accurate and comprehensive, as required by Minn. Stat. § 125A.07(b)(3) and (4).

[For text of subp 45, see M.R.]

Subp. 46. [See repealer.]

Subp. 47. [See repealer.]

Subp. 48. **Vocational evaluation.** "Vocational evaluation" means an ongoing, comprehensive process used to assist the ~~pupil~~ child and the team to determine the ~~pupil's~~ child's strengths, interests, abilities, and needed support to be successful in ~~a vocational setting~~ paid or unpaid employment or for a career not

requiring a four-year college degree or advanced degree. A vocational evaluation is one component of the ongoing special education multidisciplinary evaluation described in ~~parts~~ part 3525.2550 and ~~3525.2710~~ Code of Federal Regulations, title 34, sections 300.300 to 300.306.

This change is necessary to reflect changes in federal law. 34 C.F.R. § 300.39(b)(5) defines vocational education as including organized education programs that are directly related to the preparation for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree. The added language is reasonable because it is intended to reduce conflict and provide clear expectations as required by Minn. Stat. § 125A.07(b)(3) and (4).

The reference to Minn. R. 3525.2710 is being stricken because the Department is proposing its repeal. The relevant sections of the Code of Federal Regulations are cited in place of Minn. R. 3525.2710.

REPEALER. Minnesota Rules, part 3525.0210, subparts 2, 3, 5, 6, 7, 8, 9, 13, 17, 18, 26, 29, 30, 36, 38, 46 and 47, are repealed.

In addition to the proposed repeal of Subparts 2, 3, 7, 8, 18, 26, 36 and 38, which have been discussed above, the Department proposes to repeal the definitions of aversive procedure, aversive stimulus, conditional procedures, deprivation procedure, emergency, manual restraint, mechanical restraint, time-out for exclusion, and time-out for seclusion in part 3525.0210, Subparts 5, 6, 9, 13, 17, 29, 30, 46 and 47 and replace them with more clear and updated definitions in the proposed behavioral intervention rules, Minn. R. 3525.0850 to 3525.0870. By placing the purpose, definitions and other matters pertaining to positive behavioral interventions and supports and other strategies in the operational rule, the Department is seeking to consolidate and clarify provisions related to behavior intervention plans as mandated by Minn. Stat. § 121A.67, subd. 1(5). The need for and reasonableness of each definition will be addressed in turn.

3525.0300 PROVISION OF FULL SERVICES.

~~Pupils~~ Children with disabilities who are eligible for special education services based on an appropriate individual evaluation shall have access to free appropriate public education, as that term is defined by applicable law.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.0400 LEAST RESTRICTIVE ENVIRONMENT.

To the maximum extent appropriate, ~~pupils~~ children with disabilities shall be educated with children who do not have

disabilities and shall attend regular classes. A regular education environment includes regular classes and participation in nonacademic and extracurricular services and activities. A ~~pupil~~ child with a disability 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~~ child will be better served outside of the regular program. The needs of the ~~pupil~~ child shall determine the type and amount of services needed.

This rule demonstrates Minnesota's efforts to comply with the federal requirements regarding LRE and provides evidence thereof. The federal corollary is 34 C.F.R. § 300.114-300.120. *See also* 34 C.F.R. § 300.321(a). The CFR states that the LRE requirements make it clear that the term "regular education environment" includes being educated with nondisabled peers in regular education classrooms as well as participating in nonacademic and extracurricular services and activities. 71 FR 46670. It is reasonable to add a more detailed definition of regular education environment and maintain this rule, because the Department has had to address confusion in the field regarding whether LRE applies to programs outside of the traditional classroom activities.

Related to this proposal, Mary Ruprecht, Director of Rum River Special Education, commented that, "extracurricular and non academic activities should not exceed the federal requirement." However, the comments to the regulations specifically state that "each public agency must ensure that, to the maximum extent appropriate, children with disabilities are educated with children who are nondisabled. Section 300.117, consistent with section 612(a)(5) of the Act, is clear that this includes nonacademic and extracurricular services and activities." 71 FR 46670. Furthermore, this is a current requirement of Minnesota Rules. *See* Minn. R. 3525.3010, subp. 3.

3525.0550 ~~PUPIL~~ IEP MANAGER.

The district shall assign a teacher or licensed related service staff who is a member of the ~~pupil's~~ child's IEP team as the ~~pupil's~~ child's IEP manager to coordinate the instruction and related services for the ~~pupil~~ child. The IEP manager's responsibility shall be to coordinate the delivery of special education services in the ~~pupil's~~ child's IEP and to serve as the primary contact for the parent. A district may assign the following responsibilities to the ~~pupil's~~ child'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 term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.0700 PARENTAL INVOLVEMENT.

Parents of ~~pupils~~ children with disabilities have a right to be involved by the school district in the education decision-making process by participating or being afforded the opportunity to participate at each IEP meeting to develop, review, or revise the IEP. At the time of contact, the district shall inform the parents of their right to bring anyone of their choosing to accompany them to the meeting. The district shall inform the ~~pupil's~~ child's parents about the alternatives and methods of instruction as described in Minnesota Statutes, section 125A.05.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.0750 IDENTIFICATION OF ~~PUPILS~~ CHILDREN WITH DISABILITIES.

School districts shall develop systems designed to identify ~~pupils~~ children with disabilities beginning at birth, ~~pupils~~ children with disabilities attending public and nonpublic school, and ~~pupils~~ children with disabilities who are of school age and are not attending any school.

The district's identification system shall be developed according to the requirement of nondiscrimination and included in the district's total special education system plan.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.0755 EXTENDED SCHOOL YEAR SERVICES.

Subpart 1. **Scope.** School districts are required to provide extended school year (ESY) services to a ~~pupil~~ child if the IEP team determines the services are necessary during a break in instruction in order to provide a free appropriate public education.

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

A. "Level of performance" means a ~~pupil's~~ child's progress toward annual IEP goals immediately prior to a break in instruction as seen in the progress measurements required by part 3525.2810, subpart 1, item ~~A, subitem (9)~~ C.

B. "Recoupment" means a ~~pupil's~~ child's ability to regain the performance of a skill or acquired knowledge to approximately the same level of performance just prior to the break in instruction.

C. "Regression" means a significant decline in the performance of a skill or acquired knowledge, specified in the annual goals as stated in the ~~pupil's~~ child's IEP, that occurs during a break in instruction.

D. "Self-sufficiency" means the functional skills necessary for a ~~pupil~~ child to achieve a reasonable degree of personal independence as typically identified in the annual IEP goals for a ~~pupil~~ child requiring a functional curriculum. To attain self-sufficiency, a ~~pupil~~ child must maintain skills consistent with the ~~pupil's~~ child's IEP goals in any of these skill areas:

[For text of subitems (1) to (8), see M.R.]

Subp. 3. **Determination of ESY entitlement.** At least annually, the IEP team must determine a ~~pupil~~ child is in need of ESY services if the ~~pupil~~ child meets the conditions of item A, B, or C.

A. there will be significant regression of a skill or acquired knowledge from the ~~pupil's~~ child's level of performance on an annual goal that requires more than the length of the break in instruction to recoup unless the IEP team determines a shorter time for recoupment is more appropriate;

B. services are necessary for the ~~pupil~~ child to attain and maintain self-sufficiency because of the critical nature of the skill addressed by an annual goal, the ~~pupil's~~ child's age and level of development, and the timeliness for teaching the skill; or

C. the IEP team otherwise determines, given the ~~pupil's~~ child's unique needs, that ESY services are necessary to

ensure the ~~pupil~~ child receives a free appropriate public education.

Subp. 4. **Sources of information for IEP team determination.** The IEP team must decide the basis for determining whether a ~~pupil~~ child is eligible for ESY services using information including:

A. prior observation of the ~~pupil's~~ child's regression and recoupment over the summer;

B. observation of the ~~pupil's~~ child's tendency to regress over extended breaks in instruction during the school year; and

C. experience with other ~~pupils~~ children with similar instructional needs.

Subp. 5. **Other factors to be considered.** In making its determination of ESY needs under subpart 3, item A, B, or C, the IEP team must consider the following factors, where relevant:

A. the ~~pupil's~~ child's progress and maintenance of skills during the regular school year;

B. the ~~pupil's~~ child's degree of impairment;

C. the ~~pupil's~~ child's rate of progress;

D. the ~~pupil's~~ child's behavioral or physical problems;

E. the availability of alternative resources;

F. the ~~pupil's~~ child's ability and need to interact with nondisabled peers;

G. the areas of the ~~pupil's~~ child's curriculum which need continuous attention; or

H. the ~~pupil's~~ child's vocational needs.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.0800 RESPONSIBILITY ~~FOR ENSURING PROVISION OF INSTRUCTION AND~~ PURCHASED SERVICES AND DISAGREEMENTS.

Subpart 1. [See repealer.]

Subp. 2. Purchased services. The district shall not purchase special educational services for a ~~pupil~~ child from a public or private agency when the service is available or can be made available and can be more appropriately provided as the least restrictive alternative within the district. Whenever it is appropriate for a district to purchase special education service for ~~pupils~~ children with disabilities who reside in the district, it continues to be the responsibility of the school district, consistent with Minnesota Statutes and parts 3525.0210 to 3525.4770, to assure and ascertain that ~~such pupils and youth~~ the children receive the education and related services and rights to which they are entitled.

Subp. 3. [See repealer.]

Subp. 4. [See repealer.]

Subp. 5. **Responsibility for disagreements.** The resident district is responsible for resolving disagreements between the ~~pupil's~~ child's parents and district, including conciliation and due process hearings when the placement has been made by the resident district. If the providing district, agency, or academy receives a request for a conciliation conference, mediation, or due process hearing from the parent, the providing district, agency, or academy must notify the resident district of the parent's request within one school day.

Subp. 6. [See repealer.]

Subp. 7. [See repealer.]

Subp. 8. [See repealer.]

Subp. 9. [See repealer.]

REPEALER. Minnesota Rules, part 3525.0080, subparts 1, 3, 4, 6, 7, 8, and 9, are repealed.

The Department proposes to repeal the confusing and duplicative portions of part 3525.0800 in Subparts 1, 3, 4, 6, 7, 8 and 9. Minnesota Statutes detail the responsibility for ensuring provision of

instruction and services for children with disabilities and some of these rules actually conflicted with the statutory language. *See* Minn. Stat. §§ 125A.03, 125A.05, 125A.11, 125A.12, 125A.13, 125A.15 and 125A.22, subd. 3. The two remaining Subparts are not addressed by either state statutes or federal law and the Department proposes to leave them intact.

Subpart 1, Pupil's district of residence, is addressed by Minn. Stat. §§ 125A.03, 125A.05 and 127A.47.

Subparts 3 and 4, Initial activities and Resident district responsibilities; district initiated out-of-district placement, are addressed by Minn. Stat. § 125A.05.

Subpart 6, Tuition rate appeal, is addressed by Minn. Stat. § 125A.11.

In Subpart 7, educational and financial responsibilities for children placed for care and treatment are detailed. This section is confusing as written and would more appropriately be located in part 3525.2325. The Department proposes to repeal this Subpart and draft a new Subpart 1a for part 3525.2325 which clearly refer to the applicable Minnesota Statutes.

Subpart 8, Pupils placed through education choice options, is addressed by Minn. Stat. §§ 125A.12 and 125A.13.

Subpart 9, Financial and legal responsibility for pupils age 18 through 21, is contrary to Minnesota law as written. This Subpart states that the student's resident district is determined by the residence of the parent, legal guardian, or conservator, even when the student serves as the parent. Current state statute indicates that unless a guardian or conservator has been appointed for a student over age 18, "parent" means the student. *See* Minn. Stat. § 120A.22, subd. 3. For a married student over age 18, the district of residence is the district where the student lives. *See* Minn. Stat. § 120A.22, subd. 3. This Subpart is a misstatement of state statutes and the Department proposes its repeal. Minn. Stat. § 120A.22, subd. 3 addresses the district of residence for disabled students over the age of 18. No commenters objected to these proposed changes.

3525.0850 ~~BEHAVIOR~~ POSITIVE BEHAVIORAL INTERVENTIONS AND SUPPORTS.

The relatively recent history of changes to the Department's rules pertaining to behavioral interventions highlights the importance and difficulty inherent in promulgating rules that simultaneously promote the implementation of positive behavior interventions and control the use of certain procedures that may be dangerous and are certainly controversial. In 1991, the Department's predecessor agency, the Minnesota State Board of Education (Board), adopted rules governing behavior interventions, including definitions and procedural requirements, a list of prohibited procedures, district regulated procedures and policies, and emergency procedures. Then, in 1994, the Minnesota Legislature directed the Board to propose rules based on a task force recommendation. The Board proceeded to propose and promulgate rules based on those recommendations in 1995. These rules scattered the existing rule provisions that governed behavioral interventions in numerous different places throughout Chapter 3525. In 2001, the

Department proposed behavioral intervention rules that were not pursued through to the end of the formal rulemaking process, in large part because of the concern generated regarding the total removal of locked time-out rooms. In 2003, the Department convened a stakeholder group to review the behavioral intervention rules. This group did not reach a decision on specific rule language, but made a series of recommendations regarding, among other things, training and review of locked time-out rooms. Many of these recommendations were subsequently implemented by the Department. Others were enacted in the 2005 legislation discussed below and are the focus of these proposed rules.

Finally, in 2005, the Minnesota legislature passed legislation requiring the agency to amend its rules governing the use of aversive and deprivation procedures. *See* Minn. Stat. § 121A.67. The resulting statute requires that those rules must, among other provisions, promote the use of positive behavioral interventions and supports and must not encourage or require the use of aversive or deprivation procedures. The statute also outlines requirements for when and how a planned intervention may be used, parental notification, and health and safety standards for certain allowed but regulated deprivation procedures. It directs the Department to develop a list of prohibited procedures and to clarify provisions related to behavioral intervention plans, and it requires school districts to meet certain reporting requirements, along with setting up internal district oversight committees. Consistent with the Department's general authority to promulgate special education rules, the rules also must provide standards for the discipline, control, management, and protection of children with a disability. *See* Minn. Stat. § 125A.07, subd. 1.

The Department proposes to modify the existing title at part 3525.0850, by adding the phrases "positive" and "and supports and other strategies" to the existing title "behavioral interventions." This modification is necessary to denote an emphasis in these rules in favor of positive behavioral supports over aversive and deprivation interventions. The proposed modification is consistent with current practice and philosophy around the state, and also consistent with Minnesota law, which requires the Department to amend these rules to "promote the use of positive behavioral interventions" and "not encourage or require the use of aversive or deprivation procedures." *See* Minn. Stat. § 121A.67. The modified title also is more consistent with federal law, which emphasizes "positive behavioral interventions and supports" in the cases of children whose behavior impedes the child's learning, or that of others . . .." 34 C.F.R. § 300.324(a)(2).

Subpart 1. **Scope.** Parts 3525.0850 to 3525.0870 apply to staff, contracted personnel, and volunteers in all education programs serving children with a disability under United States Code, title 20, chapter 33, sections 400 et seq. In education programs in facilities licensed by the Department of Corrections, parts 3525.0850 to 3525.0870 must be implemented except in emergency situations or where other agency rules apply to serve a compelling penological interest.

Proposed Subpart 1 establishes who must abide by the provisions of the proposed behavioral intervention and supports rules contained in 3525.0850 through 3525.0870. This Subpart is necessary to clarify that the proposed rules apply to all public agencies involved in the education of

children with disabilities, consistent with the 34 C.F.R. §§ 300.2 and 300.33. It also clarifies for districts, staff, and parents that the application of these rules is not limited to programs that serve children identified under the category of Emotional or Behavioral Disorders. Rather, the rule applies to any child who is eligible for special education and related services and has behavioral issues that must be addressed through a behavioral intervention plan (BIP). The proposed rule is reasonable and useful, as it explains to districts, facilities, and personnel not only who must conform with the rules, but also the scope of the behavioral intervention rules, which encompass several proposed consecutive rules within Chapter 3525.

The Department proposes to include rule language that extends application of these behavioral intervention rules to the Department of Corrections (DOC) except in emergency situations where other agency rules apply to serve a compelling penological interest. This proposed language is necessary to address the fact that in some circumstances, Corrections staff may be required to use behavioral interventions that are permitted by its statutes and rules but specifically prohibited by the Department's education rules. Under this rule, the DOC must incorporate positive behavioral interventions and supports into its IEPs, but is able to follow DOC behavior policies and procedures when necessary to address behavior. The Department consulted with DOC staff about this proposed language and its potential impact to ensure that these requirements align with other statutes and rules that govern DOC operations. This rule also is consistent with 34 C.F.R. § 300.324(d)(2), which allows for a broader scope of modifications when a child is convicted as an adult and is incarcerated in an adult prison.

Subp. 2. **Purpose.** ~~This policy is intended to encourage~~ The purpose of this part and parts 3525.0855 to 3525.0870 is to require districts to use ~~of~~ positive ~~approaches to~~ behavioral interventions~~. The objective of any behavioral intervention must be that pupils~~ and supports necessary for children to acquire appropriate behaviors and skills and to prevent the misuse of aversive and deprivation procedures. ~~It is critical that behavioral intervention programs focus on skills acquisition rather than merely behavior reduction or elimination~~ When a behavioral intervention plan is necessary to address a child's behavior, the plan must be developed in consideration of the child's developmental, functional, communication, and academic needs, must promote the use of positive behavioral interventions and supports and must not encourage the use of aversive or deprivation procedures, and it must ensure the child's right to placement in the least restrictive environment. Regulated interventions may be included in the child's behavioral intervention plan only if the requirements of this part and parts 3525.0855 to 3525.0870 are followed. Behavioral intervention policies, programs, or procedures must be designed to enable ~~a pupil~~ children to benefit from an appropriate, individualized educational program as well as

develop skills to enable them to function as independently as possible in their communities.

The existing Minn. R. 3525.0850 consists of a purpose statement that explains the Department's policy of encouraging positive approaches to behavioral intervention. Proposed Subpart 2 amends that purpose statement. The revised purpose statement is consistent with Minn. Stat. § 121A.67, subd. 1(1), which directs the Department to establish rules that "promote the use of positive behavioral interventions and supports and must not encourage or require the use of aversive or deprivation procedures." It also is consistent with the Findings in IDEA, 20 U.S.C. § 1400(c)(5), which provides:

> Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by … (F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children.

(Emphasis added.) Finally, it comports with 34 C.F.R. § 300.324(a)(2)(i), which provides:

> The IEP team must – (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

The proposed language is necessary to acknowledge that although positive interventions and supports are required, other behavioral strategies may be necessary under some circumstances. When aversive or deprivation procedures are used, the purpose statement requires that a district consider the specific rights and needs of the individual child, that it must promote positive behavioral interventions and supports, and that it must not encourage the use of aversive or deprivation procedures.

The Department received significant input on the language in Subpart 2 from its informal stakeholders group, comments received from the field during the informal drafting process, and comments received during the Request for Comments period. The language contained in the proposed Subpart 2 reflects several changes to the rule that were made, based on these comments and input.

The Department received some comments about the proposed language that would require school districts to use positive behavioral interventions and supports, rather than simply encourage that use. Mary Ruprecht, representing the Minnesota Administrators for Special Education (MASE), commented that this requirement appears to be an attempt to regulate positive behavioral interventions and supports, and that regulating positive behavioral interventions and supports exceeds the mandate of Minn. Stat. § 121A.67 and the Department's authority. Several others made the same comment, including Howard Armstrong, an autism consultant with Rum River, and Paul Norrgard, who did not identify with an organization or entity. Scott Hare, Goodhue Education

Director, and Jeffrey Borchardt, with Rum River, expressed concern that the proposed language will lead to overregulation of positive behavioral interventions and supports . Howard Armstrong also commented that regulating positive behavioral interventions and supports is unnecessary, and that positive behavioral interventions and supports do not always sufficiently eliminate challenging behavior, so requiring positive behavioral interventions and supports for all is "mistaken."

Conversely, this requirement has been supported by others. Dan Stewart, representing the Minnesota Disability Law Center (MDLC) and a member of the informal stakeholder group, expressed a desire for this requirement at the stakeholder group meetings and shared language with the Department from Washington State that has a similar requirement for the use of positive behavioral interventions and supports before aversive and deprivation procedures are used. Other members of the stakeholder group, including Jacki McCormack representing Arc Greater Twin Cities, also expressed that positive interventions should be used before regulated interventions are used.

The Department disagrees with those who have commented that a requirement for positive interventions exceeds legislative mandate or agency authority. Statutory authority requires the agency to develop rules that simultaneously promote positive behavioral interventions and supports but do not encourage the use of aversive or deprivation procedures. Minn. Stat. § 121A.67. In addition, the Department's general authority to promulgate special education rules provides that the agency must adopt rules that "provide standards for the discipline, control, management, and protection of children with a disability" (emphasis added). Minn. Stat. § 125A.07. In order to protect children while also providing standards for their discipline, control, and management, and in order to promote positive behavioral interventions and supports while also not encouraging the use of aversive or deprivation procedures – however necessary those procedures may be in some situations with some children – the Department asserts that it is reasonable to require the use of positive behavioral interventions and supports whenever a child with a disability's behavior is to be managed as part of a regular BIP. Requiring districts to use positive behavioral interventions and supports does not mean that the agency intends to overly regulate positive behavioral interventions and supports ; rather, in its regulation of aversive and deprivation procedures, the Department recognizes that these procedures are to be used only to the extent necessary, that they should not be used lightly, and that they should be part of a spectrum of approaches designed to address behavioral change rather than as isolated practice. The Department understands that there may be instances in which aversive and deprivation procedures must be used in order to protect children, staff, and other students. However, given the national and statewide trend toward limiting the use of restraint and seclusion practices in schools and other facilities, it is reasonable to require schools to use positive interventions for every child. In order to properly regulate aversive and deprivation procedures, the Department must require that positive behavioral interventions and supports also be a part of a child's BIP.

The informal stakeholder group also discussed the role of positive behavioral interventions and supports at some length during its meetings, however, that group did not concentrate on the "requirement" aspect of positive behavioral interventions and supports so much as the timing of positive behavioral interventions and supports in relation to the use of regulated interventions and supports, and emergency situations. Several stakeholders, in particular those representing advocacy

organizations, indicated during discussions that positive behavioral interventions and supports should always play a role in working with children who have behavioral needs, and that generally positive behavioral interventions and supports should be used before staff turn to the use of regulated interventions. Some members of the stakeholder group discussed the possibility of two types of plans – a positive BIP and a crisis or emergency plan, while others stressed that regulated interventions do not have a place in a positive intervention plan. These ideas were channeled into a restructuring of the rule in order to improve clarity and organization.

The Department also received comments suggesting the inclusion in the purpose statement of a provision that districts are required to "prevent the misuse of aversive and deprivation procedures." This provision was added to the proposed rule after stakeholder group discussions, and has not been the subject of significant comment from the field. The Department agrees that this provision is an important part of the purpose statement, which emphasizes that although aversive and deprivation procedures may sometimes be necessary, they should be used with care and deliberation in order to protect children and staff, and to achieve the greatest benefit through the use of behavioral intervention.

Several comments suggested that when a BIP is necessary, it must be developed in consideration not only of the child's developmental needs, but also the child's functional, communication, and academic needs. MDLC suggested adding "functional" and "academic" because this is consistent with federal regulations that require the IEP team to consider these needs during IEP development. Jacki McCormack, representing Arc Greater Twin Cities, and Mary Powell, Director of the Autism Society of Minnesota, also supported this addition. The Department believes that the addition of "functional, communication, and academic" to its proposed rule language will enhance the rule's application, and its alignment with federal law. Behavioral issues, and solving those issues through behavioral interventions, have an impact on a child's academic performance. Functional skills and communication needs are particularly important when addressing behavioral issues, because functional skills and communication are often an important component of behavioral problems.

The Department also added proposed language to the rule requiring that a BIP must promote the use of positive behavioral interventions and supports, because the Department believes that even when regulated interventions must be used to address a child's ongoing behavioral issues, positive interventions should be used whenever possible. This does not mean that in every single instance when a regulated intervention is used, a positive intervention must first be used. Rather, it means that the overall plan for a child's behavioral intervention should emphasize the use of positive interventions as an initial intervention whenever possible, and that the use of positive interventions should be a goal for each child. This proposed language is consistent with Minn. Stat. § 121A.67, which requires behavioral intervention rules that promote the use of positive interventions and supports.

Several members of the stakeholder group, along with several practitioners who submitted comments, expressed concern about the inclusion in these proposed rules of language requiring that the BIP "must not encourage the use of aversive or deprivation procedures." Mary Ruprecht, representing MASE, along with Howard Armstrong, a Rum River autism consultant and Mary Ruprecht via separate comments in her role as Director of Special Education at Rum River, worry

that this language could be interpreted as making illegal the planned use of regulated interventions pursuant to an IEP and BIP. Some stakeholder group members, including Peter Martin, expressed similar concerns.

This proposed language does not make regulated aversive or deprivation procedures illegal. By including this requirement, the Department emphasizes that BIPs may include regulated aversive or deprivation procedures, but must not encourage them. Furthermore, Minn. Stat. § 121A.67 specifically requires the Department to promulgate rules that "must not encourage or require the use of aversive or deprivation procedures." In developing these proposed rules, the Department believed it was important to include the statutory language in the rules themselves to emphasize that regulated aversive or deprivation interventions are not the goal or the default behavioral intervention, but are part of a plan that emphasizes positive approaches whenever possible. An entire rule is devoted to addressing the regulation of aversive or deprivation procedures, and it is clear that certain of these procedures are allowed when practiced in compliance with the regulated interventions rule, but that they are not encouraged.

Subp. 3. **Definitions.**

A. "Contingent observation" means an unregulated intervention and involves instructing the child to leave the school activity during the school day and not participate for a period of time, but to observe the activity and listen to the discussion from a time-out area within the same setting. Contingent observation time-out is not governed by this chapter.

B. "Exclusionary time-out" means an unregulated intervention and involves instructing the child to leave the school activity during the school day and not participate in or observe the classroom activity, but to go to another area from which the child may leave. Exclusionary time-out is not governed by this chapter.

C. "Positive behavioral interventions and supports" means strategies used to improve the school environment and teach children skills likely to increase their ability to exhibit appropriate behaviors. Positive behavioral interventions and supports are evaluation-based, individualized behavioral interventions or supports for children with challenging behavior. Positive behavioral interventions and supports focus on proactive approaches to address a child's target behaviors by teaching appropriate replacement behaviors, making environmental modifications, increasing skill performance, and using positive consequences.

D. "Target behavior" means a behavior that is identified by the IEP team for change and described in observable and measurable terms.

In an earlier draft of the rules that was shared with the informal stakeholder group and with the public via the agency's website, the definition section contained definitions of several additional practices, including aversive procedure; aversive stimulus; behavioral intervention plan; deprivation procedure; emergency; functional behavioral assessment; locked or locking mechanism; manual restraint; mechanical restraint; prevented from leaving; prohibited procedure; regulated intervention; specially designed isolation room; locked time-out; and time-out for seclusion. The definitions of these terms have been moved to the specific rules that govern those concepts, namely: the BIP rule, proposed Minn. R. 3525.0855, which governs functional behavioral assessments in addition to behavioral intervention plans; regulated interventions in proposed Minn. R. 3525.0860; prohibited procedures in proposed rule 3525.0865; and emergency procedures in proposed rule 3525.0870. The Department believes that placing these definitions in their respective operative rules is necessary and reasonable for two reasons. First, with the definitions of key terms embedded in the rules that most specifically govern those subjects, practitioners and other readers of the rule will be more likely to access the definitions of important and in some cases controversial aspects of the special education system. This will improve the overall effectiveness of and compliance with the rule. Second, many of the definitions by necessity include functional requirements that practitioners will need to implement. Therefore, it is more appropriate for these definitions to be located in the operational rule, since they apply requirements that must be followed in order for districts to be in compliance with the rules.

The remaining definitions in this proposed rule did not receive significant comment from the informal stakeholder group or from individuals and organizations that submitted written comments. It is important to include definitions of contingent observation and exclusionary time-out in the proposed rule, even though those practices are not governed by these rules. Both practices are often used by districts; they are acceptable forms of intervention, and are not regulated or prohibited procedures. To make it clear that these practices are not regulated or prohibited, and to differentiate them from the regulated and prohibited procedures that are defined and governed by these rules, definitions of the interventions are included here. Contingent observation and exclusionary time-out are defined by statute and are reproduced verbatim in these rules. *See* Minn. Stat. § 121A.66, subd. 7.

The Department has been directed by legislation to promulgate rules relating to aversive and deprivation procedures that specifically promote the use of positive behavioral interventions and supports. To that end, proposed Minn. R. 3525.0850 requires districts to use positive behavioral interventions and supports as a necessary element for helping children to acquire appropriate functional behaviors. The definition of positive behavioral interventions and supports provides guidance to help districts meet that requirement by describing the nature and purpose of positive behavioral interventions and supports. The definition includes language from the definition of positive behavioral interventions and supports found at Minn. Stat. § 121A.66, subd. 6, and also includes additional explanatory language adapted from current research and publications regarding

positive behavioral supports. This language is consistent with federal law. *See* 34 C.F.R. § 300.320(a)(4).

The Department received one comment, from MDLC, suggesting an addition to this definition: "Positive behavioral interventions and supports are not regulated interventions, and focus on proactive approaches to address a child's target behaviors . . ." The Department does not believe this provision is necessary, because regulated interventions are fully defined and explained in proposed Minn. R. 3525.0860, and the structure of these rules make it clear that positive interventions and supports are separate from the regulated interventions that may only be used in accordance with these rules.

Finally, a definition of target behaviors is necessary because this term is used throughout the behavioral intervention rules, and has a unique meaning in the field of behavioral intervention. The definition will provide clarity for users of these rules about how this term is used within the context of the behavioral intervention rules.

Subp. 4. **Training.** The district must ensure that all district staff, contracted personnel, and volunteers who are permitted to use regulated interventions are trained in the use of positive behavioral interventions and supports; methods and techniques to prevent or de-escalate an emergency; and the use of regulated interventions. The training must comply with the district's behavioral management policy under part 3525.1100, subpart 2, item F.

Training for the district staff who use behavioral interventions is necessary to ensure that the staff members who must enforce regulated interventions also are well-versed in the use of positive behavioral supports, so that these positive supports are applied whenever possible, consistent with these proposed rules and with statutory directive. Furthermore, training in the use of regulated interventions is critical to the safety and well-being of children, other students, and staff. All districts and other local education agencies have ongoing responsibility for training under Minn. R. 3525.1100, subp. 2, Item F, which requires that the district have a policy describing its procedures for implementing the use of regulated interventions with children. Ongoing personnel development that both promotes positive approaches and provides a comprehensive awareness of the use of aversive and deprivation procedures is a required component of that policy. It is important to include a reference to that rule here so that all districts and other LEAs are aware of the need to develop personnel development policies as part of the required regulated intervention policies.

Sue Abderholden, Executive Director of the National Alliance on Mental Illness of Minnesota (NAMI), commented that the rules should require that staff who use regulated interventions have received special training.[1] Abderholden pointed out that the regulated interventions – addressed in

[1] Specifically, Abderholden suggested that staff training include: de-escalation methods, how to avoid power struggles, documentation standards, time limits for restrictive procedures, the proper use of restrictive techniques, thresholds for employing restraint or seclusion, the physiological and psychological impact of restraints and seclusion, how to monitor and respond to the student's physical sins of distress, and symptoms and interventions for positional asphyxia. She also

greater detail in the SONAR discussion of proposed rule 3525.0860 – may cause harm to the student if used incorrectly. Attorney Amy Goetz of the School Law Center similarly suggested that the rules should specify the advanced training required to utilize any regulated procedure.

The Department agrees with these commenters that staff should be appropriately trained in the regulated procedures they use, as well as alternatives including positive interventions and de-escalation techniques – as is required by the proposed rule. However, the Department does not believe that additional specificity in the rules is necessary in order to ensure that staff are fully trained. Rather, each district's training policy as described in the TSES plan will provide that specificity, and the district oversight committee's involvement along with regular announced and unannounced monitoring conducted by the Department will serve to highlight areas where training may need to be improved.

Subp. 5. **Registration.** The district must register with the commissioner any room used for locked time-out or seclusion.

This Subpart is consistent with Minn. Stat. § 121.67, subd. 1(7), which directs the Commissioner to promulgate rules that "require school districts to register with the commissioner any room used for locked time-out . . . ." Registration will facilitate monitoring of locked time-out and seclusion rooms, which is also required by Minn. Stat. § 121.67, subd. 1(7), and by these proposed rules.

The Department's proposed language also requires districts to register rooms used for seclusion, an inclusion that initially was suggested by MDLC. The Department agrees that rooms used for seclusion should be registered along with rooms used for locked time-out. In many districts, the same room is used for both locked time-out and seclusion – and it is only the use of the locking mechanism that determines whether the room is a locked time-out room or a seclusion room at any given time. In other districts, a student may be prevented from leaving a room but a locking mechanism is not used, and districts may be unsure about whether these rooms must be reported. In order to avoid confusion and enhance consistency of application of this rule, the Department proposes to require registration for rooms used for either locked time-out or for seclusion.

MDLC also suggested that the Department require registration of mechanical restraint devices. The Department does not propose to extend registration to mechanical devices. The authorizing statutory language is clear that registration is required for locked time-out, but the Department does not believe it has the authority to extend that registration to mechanical restraints, given the succinct language used by the statute's drafters.

Finally, MDLC suggested that all registrations must be made prior to use of the room or device. The Department also declines to include the suggested language that registration must be made prior to use of the room. The Department believes that most if not all school districts will, in good faith, attempt to register their locked time-out and seclusion rooms prior to use for restraint purposes. In addition, the Department's current registration and reporting system may need to be updated in

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suggested training to help staff understand how age and developmental considerations can impact the students response to interventions, and the affect of a history of sexual or physical abuse.

order to facilitate ongoing, real-time reporting and registration by districts, because currently it only allows districts to register their rooms for certain designated months of the year.

Subp. 6. **Monitoring.** The commissioner must monitor any room used for locked time-out or seclusion by making announced and unannounced on-site visits. The commissioner must provide a report to the district's superintendent and special education director on the department's monitoring activities following announced and unannounced visits. The commissioner must develop an annual report on the department's overall monitoring activities that outlines the number of locked time-out rooms and the number of seclusion rooms reported by each district.

Minnesota Statutes § 121.67, subd. 1(7) directs the Department to promulgate rules that establish a monitoring program by which the commissioner monitors registered locked time-out rooms via announced and unannounced site visits. This proposed Subpart establishes the required monitoring program. The informal stakeholder group considered the possible results of these monitoring visits, and sought clarity about how the Department could use the monitoring visits to assist individual school districts as well as to gain more general information about the use of these methods of behavioral intervention around the state. As the MDLC pointed out in its comments on the draft rules, a "system of monitoring, registration, reporting, data collection, and data analysis is an absolutely critical priority to ensure child and staff safety and to ascertain the extent, scope, and appropriate use of regulated interventions in Minnesota schools."

The Department believes that districts, students, and the general public will benefit from a clear statement about how the monitoring required by Minn. Stat. § 121.67 will be used by the agency. It is necessary and reasonable to explain to those who will be impacted by this rule how it will be applied, in order to promote governmental transparency and clear expectations.

Therefore, the proposed language directs that whenever the agency conducts a monitoring visit, either announced or announced, it will provide the school district that was subject to the monitoring with a report outlining the results of the monitoring visit. Districts may choose to use those monitoring visits to improve their behavioral modification programs. The MDLC suggested in its comments that the proposed rule language should require the Department to report its monitoring to the district's special education director, oversight committee, and school board. During the rule drafting period, the Department added this suggested language to the rule but, after further consideration, ultimately removed this requirement from the proposed rule. The Department determined that submitting its monitoring reports to the school district is sufficient communication between the state agency and the local school district. Individual districts can and should determine to whom within their districts to distribute the report.

In addition, the proposed rule language directs the commissioner to develop an annual summary report, outlining the results of its statewide monitoring and including the number of locked timeout rooms and seclusion rooms maintained by each district. This summary report may be used by individual districts to better understand how peer districts use these deprivation procedures and

refine their own internal behavioral intervention practices. It also may be used by parents, advocates, educators, and policymakers to further improve the practice of behavioral intervention throughout Minnesota.

Subp. 7. **Oversight committee.** The district or cooperative must establish an oversight committee composed of at least one member with training in behavioral analysis and other appropriate education personnel to annually review aggregate data regarding the use of aversive and deprivation procedures.

Minnesota Statutes § 121.67, subd. 1(9) requires the Department to develop rules that establish a district or cooperative oversight committee. The proposed rule language is taken directly from that statute, which adequately defines the oversight committee and its minimal functions. The Department believes that this language reasonably guides districts regarding the purpose and function of the oversight committee, so that each district can implement an oversight committee that both fulfills the statutory and rule requirements, and also best serves the needs of that individual district.

Chris Sonenblum, Director of Student Services at Roseville Area Schools, suggests that this oversight committee requirement adds a layer of bureaucracy to a system that is already required to submit reports on the use of regulated interventions. The Department is aware of the many paperwork burdens faced by school staff. However, the establishment of district oversight committees is a statutory requirement. § 121A.67, subd. 1(9). As districts begin to utilize these oversight committees, they may play an important role in helping each district internally assess the district's overall behavioral intervention program, and may be a useful resource for improving the overall program that ultimately leads to fewer staff burdens.

At the informal stakeholder group meetings, the group discussed the possibility of adding further requirements to this Subpart, such as requiring the oversight committee to meet at least twice annually; to report back to the school board on an annual basis; and to include at least one member not paid by the district in order to ensure objectivity. These suggestions were supported by written comments received from the MDLC, Mary Powell of the Autism Society of Minnesota, and Jacki McCormack of Arc Greater Twin Cities. Sue Abderholden, Executive Director of NAMI, also commented that the oversight committee should be required to draft an annual report. Abderholden and Paula Goldberg, Executive Director of the PACER Center, both commented that the required membership of a district's oversight committee should include a parent, with Abderholden also suggesting the inclusion of a licensed mental health professional in each committee's membership.

The Department agrees that the intent of the legislation in requiring an oversight committee is to promote school district-level review and monitoring of district practices on an ongoing basis. However, the Department does not agree that this intent needs to be codified into a rule that outlines specific operating procedures that must be followed by every oversight committee around the state. Each school district in Minnesota has a different operating culture, and a different approach to providing a quality education environment to its students and staff. So long as districts

convene an oversight committee that annually reviews the school district's use of aversive and deprivation procedures, it is up to each district to determine how its oversight committee can operate to most effectively improve education and behavioral intervention services in that district.

MDLC and Mary Powell, Director of the Autism Society of Minnesota, also suggested that documentation about the use of regulated interventions, which is required to be collected by proposed rule 3525.0860, subp. 3, discussed below, should be reported to the school administration or the oversight committee, and to the Department. They contend that these serious interventions should be carefully evaluated, and that such reporting would provide critical information about regulated intervention use across the state. As required by this proposed rule, the oversight committee must review aggregate data, but school districts may choose to expand the scope of their oversight committees to evaluate documentation of specific instances of regulated intervention use, if they determine that this would be an effective role for the oversight committee. Furthermore, while the Department agrees that more information about regulated intervention use is necessary, it does not agree that every regulated intervention use should be reported to the Department. The Department does not need that detailed level of information in order to assess the overall use of regulated interventions around the state, nor could it effectively collect, process, analyze, and respond to that information. These behavioral intervention rules include a variety of checks and balances that will provide the Department with necessary information about the most critical practices used in schools around the state. Districts are required to register with the Department every room that is used for locked time-out and seclusion, *see* proposed 3525.0850, subp. 4, and they are required to report to the Department whenever a prohibited procedure has been used, *see* proposed 3525.0865, subp 3. Finally, the Department's monitoring role is enhanced by these proposed rules; the Department will now monitor the use of locked time-out and seclusion during both announced and unannounced visits, and will prepare annual reports about the statewide use of these procedures.

3525.0855 BEHAVIORAL INTERVENTION PLANS.

The Department proposes language at Part 3525.0855 that will govern when and how an FBA must be conducted; the development of a BIP; and parental consent. This rule also consolidates and clarifies provisions related to BIPs, as required by Minn. Stat. § 121A.67, subd. 1(6).

Subpart. 1. **Evaluation.** A district must conduct an IEP meeting within five school days to review or revise a child's IEP and determine the need for a functional behavioral assessment, as defined in subpart 2, or other additional evaluation when:

A. the district continually or repeatedly uses any element of its discipline policy to respond to the child's behavior;

B. a regulated intervention is used in an emergency twice within 90 days or is considered for use or before

inclusion in the IEP or is used as part of the program in which the child is placed; or

C. a peace officer restrains or removes the child from a classroom, school building, or school grounds at the request of a school administrator or a school staff person during the school day twice in a 30-day period.

This Subpart outlines those situations in which school staff must conduct a meeting to consider whether an FBA and a BIP are necessary for an individual child. Under the proposed language, whenever one of the three trigger events established by this rule arises, staff must conduct an IEP meeting within five school days of the trigger event. This timeline is reasonable, because the events addressed by this proposed Subpart are serious indications that the child's behavior will benefit from or require strategic intervention and support strategies. In many cases, the occurrence of one of these three trigger events could indicate that the child's existing IEP does not contain satisfactory strategies for working with that individual child, and that changes are necessary to ensure the safety and well-being of the child, staff, and other students, as well as to ensure that the child and other students have appropriate access to education services. The timeline is derived from current rule, which requires districts to convene an IEP team meeting as soon as possible, but no later than five days, after an emergency procedure is used. Minn. R. 3525.2900, subp. 5(C).

The proposed language establishes that during the required IEP meeting, the IEP team must review or revise the child's IEP, and determine whether an FBA should be conducted. An FBA need not necessarily occur every time one of these events arises; rather, the events described in Subpart 1 are indications that the IEP team needs to reconsider the existing approach to a child's behavioral intervention plan, and may need to develop new strategies for that individual child.

Proposed Subpart 1, Item A requires the IEP team to meet and consider the need for an FBA when the district continually or repeatedly uses any element of its discipline policy in response to the child's behavior. This language is adapted from current Minn. R. 3525.2900, subp. 5(B). The Department proposes to repeal Subpart 5 of 3525.2900, which addresses regulated and prohibited procedures and BIPs, and move the substantive content of that Subpart to these new proposed behavioral intervention rules. This proposed change is consistent with Minn. Stat. § 121A.67, subd. 1(6), which directs the agency to consolidate and clarify provisions related to behavioral intervention plans.

The Department received a few comments that this provision is "subjective and so broad as to potentially be construed as requiring an IEP meeting in response to repeated verbal reprimands for running in halls or in-class time-outs . . .." Mary Ruprecht, Rum River Special Education Director; Howard Armstrong, Rum River Autism Consultant, and Mary Ruprecht representing MASE also made substantially similar comments. These comments point out that several protections already exist that would make this requirement unnecessary, including the Rule 3525.2900 language that is being repealed and move to this proposed rule. Chris Sonenblum, Director of Special Services at Roseville Area Schools, also commented that this provision will add to confusion and could lead to multiple interpretations of state law.

The Department does not believe that this provision is confusing or will lead to multiple interpretations. A similar provision, requiring that "[c]ontinued and repeated use of any element of a district's discipline policy must be reviewed in the development of the individual pupil's IEP," has existed in Chapter 3525 of the Minnesota Rules for many years and the Department has received only a few complaints regarding the issue.[2] Nor does the Department believe that the language is overly subjective. To the contrary, the language is designed to be flexible, and not force one standard requirement to fit the many disciplinary elements that exist within each school district and around the state. The severity of the behavior and the disciplinary response; the frequency of the behavior; and the pattern of the behavior all must be considered.

For similar reasons, the federal regulations that address change of placement due to disciplinary removal, found at 34 C.F.R. § 200.536, do not apply a rigid standard, but instead require districts to consider a variety of factors and make determinations on a case-by-case basis. This proposed rule must be applied with the same flexible, case-by-case standard in order to be reasonable and effective.

Proposed Subpart 1, Item B requires the district to convene an IEP team meeting whenever a regulated intervention is used in an emergency two times in 90 days, or is considered for use or inclusion in the IEP, or is used as a regular part of a program into which a child is placed. This proposed language is a change from the draft language that was shared with the stakeholder group and with the public. The previous language required a team meeting whenever a regulated intervention was used in an emergency. However, after consideration of the purpose of the rule, the balance between the views of districts and advocates, and the problems with an existing rule that is the foundation of this language, the Department determined that a more effective and reasonable requirement would be to require a team meeting whenever an emergency occurs two times in 90 days.

The current special education rules include a requirement which mandates that "[i]f an emergency intervention is used twice in a month . . . a team meeting must be called to determine if the pupil's IEP is adequate, if additional evaluation is needed and, if necessary, to amend the IEP." Minn. R. 3525.2900, subp. 5(C). This current rule attempts to establish a reasonable pattern that would indicate a need for an IEP meeting. It recognizes that requiring a meeting after the first emergency instance would result in districts being forced to respond to "incidental" emergencies that do not present a potential need for a change to a child's IEP or BIP, but rather are only isolated events, such as a response to a change in the child's placement or environment. However, the current rule is not protective of children whose behavior over time results in multiple emergency uses of a regulated intervention, but do not happen to occur in the tight timeframe of twice in one month. A child could have several incidents occurring once per month over a period of several months that result in the need for emergency use of a regulated intervention, but the current rule would not apply to require an IEP team meeting for review of the situation. Regulated interventions carry their own safety and well-being concerns if they are not used appropriately, preferably based on planning and consideration of the child's unique needs. Therefore, given the serious nature of the use of regulated interventions, an IEP team meeting is necessary when they are used on an emergency basis

[2] *See, e.g.,* Complaint Decision No. 1449, Feb. 14, 2002.

twice within 90 days, so that the team can consider changes to the child's IEP, a revision to the BIP, or development of an FBA and BIP if they do not already exist.

In addition, pursuant to state statute, districts may not institute the planned application of a regulated aversive or deprivation procedure until an FBA and a BIP are developed. Minn. Stat. § 121A.67, subd. 1(2). Therefore, the Subpart 1B language requiring a team review whenever a regulated intervention is used as part of a program placement, or is considered for use or inclusion in the child's IEP, is necessary to ensure that districts are compliant with state law. Subpart 1B will prevent school districts from continued use of regulated interventions such as time-out, seclusion, manual restraint, and mechanical restraint without conducting the appropriate evaluations to determine whether these procedures are effective for an individual child. When a child's behavior has escalated to the point that a regulated intervention is necessary, it is critical that the IEP team meet to determine why positive interventions and supports have failed.

Finally, Subpart 1, Item C requires an IEP meeting when a peace officer restrains or removes the child from a classroom, school building, or school grounds at the request of a school administrator or a school staff person during the school day twice in a 30-day period. This proposed rule language is mandated by Minn. Stat. § 121A.67, subd. 2. Subpart 1, Item C does not restrict or limit the district's use of law enforcement. Rather, because the involvement of a peace officer may be a serious indicator of unaddressed behavioral issues, it is necessary to ensure that when peace officers are used, that the child's IEP team meets to consider whether or how the child's IEP may be modified to avoid law enforcement intervention in the future. When drafts of this rule were shown to the stakeholder group and shared with the public via the Department's website, it included language requiring an IEP team meeting not only when the peace officer acted at the request of school staff, but also when the peace officer acted independently in response to the child's behavior on school grounds. Several members of the stakeholder group observed that schools sometimes do not have control over when a peace officer is at the school site, or is acting based on the officer's independent reasons – such as the officer's suspicion that crime has been committed. In those cases, the stakeholder group members suggested, the peace officer's interaction should not trigger an IEP meeting. The Department agrees that when the school has not acted to involve the peace officer, the school should not automatically be required to take the additional administrative steps required by this Subpart, and that this is consistent with the intent behind Minn. Stat. § 121A.67, subd. 2. Therefore, the proposed rule language was redrafted to exclude this application.

Subp. 2. **Functional behavioral assessment; reporting requirements.** "Functional behavioral assessment" or "FBA" means a process for gathering information to develop and utilize positive behavioral interventions and supports and other strategies. When a district conducts a functional behavioral assessment, it must prepare a written report including the following information:

Proposed Subpart 2 outlines the requirements for an FBA, which may be conducted pursuant to an IEP team review as triggered by one of the events described in Subpart 1 arises, or in preparation for a BIP if an FBA is required under Subpart 3 of this rule.

This proposed Subpart begins with a definition of an FBA. The current rules contain this same definition, "a process for gathering information to develop and utilize positive behavioral interventions and supports and other strategies," at Minn. R. 3525.0210, subp. 22. The Department proposes to place the definition of FBA here because the current definition contains requirements that school districts must follow when conducting an FBA; these program requirements are better suited to an operational rule. In addition, including the basic definition of an FBA here, along with the required elements of that FBA, will provide a common clarity for practitioners.

A. a description of the target behaviors and their frequency, severity, and duration;

Proposed Item A can be found in the current Chapter 3525 at rule 3525.2900, Subp. 5(A)(1)(a). As part of the process of consolidating behavioral intervention rules, consistent with Minn. Stat. § 121A.67, subd. 1(6), the Department proposes to repeal that Subpart and move all of the relevant rule provisions, including this one, to the new proposed behavioral intervention rules. This is a reasonable FBA requirement because, in order to assess a particular behavior, that behavior first must be described.

B. a description of the events, times, and situations that predict the occurrence and nonoccurrence of the target behaviors;

C. a description of the antecedents, consequences and other reinforcers that maintain the target behaviors;

D. a description of the apparent functions of the target behaviors and possible appropriate replacement behaviors;

Items B through D are currently required by Minnesota rule, and are found at Minn. R. 3525.0210, subp. 22, which contains the definition of an FBA. Because these elements are program requirements that school districts must include in their FBAs in order to be in compliance with Minnesota law, the Department proposes to place them here, in the behavioral intervention rules.

These elements are necessary and reasonable because they are based on observations of the individual child in order to understand the factors that cause, contribute to, or explain the functions of – or reasons for – a child's existing behaviors, known as the "target" behaviors.[3] Once these factors are known to the best of the IEP team's and staff's ability, then the IEP team has more information to draw on for development of a BIP that will help the child develop more appropriate behaviors, and ultimately achieve more success in the school setting.

[3] "Target behavior" is defined in the proposed rules at 3525.0850, subp. 3D.

E. documentation that the team has considered other treatable causes for the target behaviors, including a mental or physical health condition;

Item E is contained in the current Chapter 3525 at Rule 3525.2710, subp. 4(F), which requires the IEP team to "document that it has ruled out any other treatable cause for the behavior, for example, a medical or health condition, for the interfering behavior." This requirement will move to the FBA rule under these proposed rule amendments, as one of the factors that may contribute to a child's behaviors and thus should be included in an FBA. As with the other elements of an FBA, this factor can inform the IEP team's choices and decisions as it develops a BIP or implements other, more informal, behavioral supports, in order to help the individual child develop more appropriate behaviors.

F. a description of positive behavioral interventions and supports and other strategies used in the past and the effectiveness of each;

Item F is contained in the current Chapter 3525 at Rule 3525.2900, subp. 5(A)(1)(b), which requires the IEP team to "identify at least two positive interventions implemented and the effectiveness of each" before a regulated intervention may be used. In these proposed rules, the Department has removed the specific requirement that at least two positive interventions be used before a regulated intervention is used. Educators and behavioral specialists generally agree that positive interventions and supports are an effective method for achieving a necessary behavioral change, and the Department anticipates that districts will attempt to use positive interventions, when possible, before resorting to regulated interventions. Furthermore, the FBA is more likely to be an effective tool for the IEP team to use in developing a child's BIP when it contains more, rather than less, information. Having said that, the Department believes that it is up to the school district's trained staff to determine the needs of each individual student who demonstrates a need for behavioral intervention. The Department does not believe it is necessary or advantageous to impose a requirement for a specific number of positive interventions before school staff may turn to regulated interventions, so long as the FBA requirements are fulfilled and staff works to tailor the FBA and the BIP to the specific, individualized needs of the child.

G. summary statements and hypotheses about the purposes of the target behaviors that will assist in the development of the child's behavioral intervention plan;

Item G currently is required by Minnesota rule, and is found at Minn. R. 3525.0210, subp. 22, which contains the definition of an FBA. The Department proposes some changes to the requirement in the current definitional rule, which provides that the FBA must "include a variety of data collection methods and sources that facilitate the development of hypotheses and summary statements regarding behavioral patterns." The amended rule would require that the FBA contain "summary statements and hypotheses about the purposes of the target behaviors that will assist in the development of the child's behavioral intervention plan."

Under this proposed language, it is presumed that the summary statements and hypotheses would be based on any and all of the other data collected as part of the FBA, and also would derive from staff and IEP team expertise and insights. While behavioral patterns may emerge, as suggested in the existing rule language, the goal of proposed Item G would be to analyze all of the other information contained in the FBA and develop guiding statements or hypotheses that could form the foundation of the BIP. Item G will not exist in isolation, but will act as an analytical bridge between FBA data and development of the BIP.

H. a description of any other evaluation data, if available, that assists in the development of an appropriate behavioral intervention plan for the child; and

Item H does not derive from existing rule language, but asks the IEP team to consider whether any other data exists that may assist in the development of an appropriate BIP. This provision is necessary and reasonable, because it gives the IEP team the freedom and authority to incorporate into the FBA other data about an individual child that may not be captured by the FBA elements required in this proposed rule, but that may be useful and informative for that particular child.

I. an evaluation of any proposed regulated intervention to determine that it is not contraindicated for mental or physical health reasons. In this evaluation, the IEP team must consider the appropriateness of regulated interventions with regard to the severity of the target behavior, the effect of current medications, available medical and psychiatric history, the child's chronological and developmental age, physical size, and available personal history, including any history of physical or sexual abuse, in order to determine whether the regulated intervention is contraindicated.

Item I derives from an existing requirement found in Minn. R. 3525.2900, subp. 5(D)(2), which directs the IEP team to determine whether time-out for seclusion is contraindicated for psychological or physical health reasons. The Department proposes to extend this requirement to all regulated interventions: time-out, seclusion, mechanical restraint, and manual restraint. While these regulated interventions may be both effective and necessary in extraordinary circumstances, they can also be dangerous to the child and to others if used when contraindicated or without proper training. Similarly, these interventions may lose their effectiveness if used when contraindicated. For those reasons, it is critical that regulated interventions be used only after it is determined that they are not contraindicated for the individual child.

After stakeholder group discussions and consideration by Department staff, the Department proposes to add language to this rule that would further explain the specific factors that must be considered in determining whether a regulated intervention is contraindicated. Those factors include the severity of the target behavior; the child's current medications; available medical and

psychiatric history; chronological and developmental age; physical size; and available personal history. Because the meaning of "contraindicated" is varied and vague, the Department believes this additional language, explaining the ways in which regulated interventions may be contraindicated for a child, will clarify for IEP teams the factors that they need to consider when assessing whether a regulated intervention is contraindicated.

Overall, the comments received by the Department related to proposed rule 3525.0855 did not focus on the required elements of an FBA, but instead focused on when an FBA is required rather than permissive, which is addressed below in the discussion of proposed Subpart 3(B). Mary Powell, Director of the Autism Society of Minnesota, commented that this proposed Subpart will help convince educators to conduct FBAs, although she commented that teachers may avoid FBAs if the written requirements are too long. Similarly, Howard Armstrong, of Rum River, commented that excessive reporting requirements will discourage the use of FBAs in addressing challenging behaviors. Many of the elements contained in this proposed Subpart are already required by Minnesota rule, and all of them are important elements of a sound FBA. To address the concern that too much administrative work will cause teachers to avoid FBAs, which are critical to quality BIPs, the Department has removed a previously proposed FBA requirement – that the FBA include "a description of the changes in the environment in which the target behaviors occur that may reduce the frequency of the behaviors" [previously Item G in early informal rule drafts]. This requirement was inherent in other components of the FBA and the BIP, so requiring staff to document this as a separate element was unnecessary and potentially burdensome. In addition, the Department has made a change to its proposed BIP requirements in Subpart 3 that will result in fewer required FBAs. In this way, the Department hopes to express that it recognizes the many administrative and paperwork burdens faced by Minnesota's teachers, and that it does not seek to increase those burdens unless it is absolutely necessary to do so.

Subp. 3. **Behavioral intervention plan.** "Behavioral intervention plan" means a written statement of the positive behavioral interventions and supports and other strategies a district will use to teach a child appropriate behaviors and skills and to respond to the child's target behaviors. Under the circumstances in part 3525.0855, subpart 1 or in the case of a child whose pattern of behavior impedes the child's learning or that of others, the child's IEP team must develop a behavioral intervention plan through the IEP process under Code of Federal Regulations, title 34, section 300.324. The behavioral intervention plan must:

The Department proposes this Subpart to establish a common definition of what a BIP is, when it must be developed, and what required elements it must contain. This Subpart is consistent with Minn. Stat. § 121A.67, subd. 1(2) and (6). Under proposed Subpart 3, a BIP must be developed in one of four situations:

- When any element of the district discipline policy is continually or repeatedly used to respond to the child's behavior;

- When a regulated intervention is used in an emergency, twice within 90 days, or when a regulated intervention is considered for use or inclusion in the child's IEP or is used as part of the program in which the child is placed;

- When a peace officer restrains or removes the child at school or staff request twice in a 30-day period; or

- When the child's behavior impedes his own learning or that of others.

The first three situations are described in proposed Subpart 1 of this rule, which requires an IEP team review. As discussed above, these three situations may be indications that the child's behavior needs strategic intervention and support strategies – or a revision to such strategies, if they already exist. Furthermore, whenever a regulated aversive or deprivation intervention is used in a planned manner, as is the case when a regulated intervention is used as part of a program or is considered for use or inclusion in the child's IEP, state statute requires that it must be used in accordance with an FBA and a BIP. Minn. Stat. § 121A.67, subd. 1(2).

The fourth situation would require development of a BIP whenever a child's behavior impedes the child's learning or that of others. The BIP may include only positive interventions and supports, or both positive and regulated interventions. This is consistent with federal policy, as outlined in 34 C.F.R. § 300.324:

> In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

§ 300.324(a)(2)(i). It also is consistent with the mandate in Minnesota statutes that the Department's rules must "promote the use of positive behavioral interventions and supports and must not encourage or require the use of aversive or deprivation procedures." Minn. Stat. § 121A.67, subd. 1(1). It is reasonable for the Department to require BIPs whenever the child's behavioral issues rise to the level that they impede learning and need intervention and support; this is true even when the BIP anticipates only positive interventions and supports. This interpretation is consistent with the federal Department of Education's proactive approach to behavioral interventions:

> [T]he Act emphasizes a proactive approach to behaviors that interfere with learning by requiring that, for children with disabilities whose behavior impedes their learning or that of others, the IEP Team consider, as appropriate, and address in the child's IEP, "the use of positive behavioral interventions, and other strategies to address the behavior." (*See* section 614(d)(3)(B)(i) of the Act). This provision should ensure that children who need behavior intervention plans to succeed in school receive them.

34 C.F.R. § 300.530(f) cmts. at 71 F.R. 46721.

The Department received comments from Mary Ruprecht, Director of Special Education at Rum River, and Paul Norrgard, who gave no title or affiliated entity, stating that the Department exceeds its authority to regulate where it requires BIPs when only positive interventions and supports are anticipated. However, the Department views the situation somewhat differently from these commenters; it looks first to the situation facing the child and staff and the need for planned interventions based on the seriousness of the child's behavioral issues, rather than whether those anticipated interventions will be positive or aversive and deprivation procedures. As demonstrated, there is ample state and federal support for requiring BIPs when the situation is serious enough to impede learning, lead to the peace officer involvement, or result in repeated use of the school's discipline policy. Therefore, in those situations, along with situations where a regulated intervention is planned, these rules propose to require the development of a BIP.

A. be in writing and included in the child's IEP;

A BIP anticipates regular intervention, and is individualized to a child. Therefore, whenever a BIP is developed, it must be documented in the child's IEP (Individualized Education Plan). 34 C.F.R. § 300.320(a)(4), requires a statement of the special education and related services and supplementary aids and services to be provided to the child. Furthermore, it is reasonable to require that whenever a systematic approach to behavioral interventions and supports is to be implemented for a child, it be recorded in writing and included in the IEP.

B. be based on the functional behavioral assessment report described in subpart 2 when the behavioral intervention plan is a result of a subpart 1 event;

The Department proposes language requiring that the BIP be based on the functional behavioral assessment (FBA) described in Subpart 2 if the FBA and resulting BIP results from a Subpart 1 IEP team review. This includes situations where the school's discipline policy is used repeatedly; where peace officer intervention is used at the school's request; where regulated interventions have been used in response to emergencies; and where a regulated intervention is used or is proposed. It does not, however, include situations where the BIP is developed because the child's behavior impedes his own learning or that of others; that situation does not require an FBA. This language is a change from the draft that was presented to stakeholders and the public during the Request for Comment period. That draft language required that every BIP be based on an FBA.

The Department firmly believes that an FBA is a valuable part of the behavioral intervention process, because the FBA compels staff and the IEP team to consider the individual child's unique situation, needs, behaviors, triggers, personality, and approach to the learning environment. However, the Department also recognizes that the FBA process requires additional staff training, paperwork, and administrative time that some districts simply may not be able to spare if an FBA is required for every child with a BIP. Although the Department believes that an FBA is valuable in all cases where the child's behavior is at issue, an FBA is not as necessary in less critical situations, when a child' behavioral issues can be managed and redirected with less aggressive interventions such as positive behavioral interventions and supports . Therefore, balancing the benefits of the FBA against the significant burdens placed on districts and staff, the Department determined that

this provision would be most effective if it was only required for the more serious behavioral events that trigger Subpart 1 of this proposed rule.

The Department received several comments about the draft rule language that required an FBA for every BIP. Howard Armstrong, Jeffrey Borchardt, Carissa Jivery and Lynn Schutte, and Mary Ruprecht, Rum River River Special Education Cooperative, all submitted comments expressing the concern that if an FBA were required for every BIP, the result would be fewer positive BIPs. Mary Ruprecht, Director of Special Education at Rum River, went on to state that educators avoid FBA training due to the intimidating nature of the due process requirements emphasized in that training, and that these continued excessive requirements are the major reason staff decide to leave the field of education.

The Department hopes that this change to its proposed rules will also demonstrate to districts that it recognizes the heavy paperwork burden associated with special education as currently practiced in Minnesota. Similarly, the Department hopes that this change will emphasize the Department's intent to encourage, rather than discourage, quality BIPs developed by trained and involved staff members. By making this change that reduces the documentation and paperwork requirements for districts, the Department hopes that the result will be more BIPs and more positive interventions for children.

C. be based on the child's present levels of performance, needs, goals, and objectives;

This proposed language is based on existing rule language at Minn. R. 3525.2900, subp. 5(A)(1)(c), which requires that the IEP team must "design and implement regulated interventions based on present levels of performance, need, goals and objectives, and document in the IEP." The Department has not received comments on this language.

D. identify positive behavioral interventions and supports necessary for the child to acquire appropriate functional behaviors and skills;

Every BIP requires positive behavioral intervention and supports, *see* SONAR discussion above. In addition, positive interventions and supports are already required by Minnesota law before a district may utilize a regulated procedure. *See* Minn. R. 3525.2900, subp. 5(A)(1)(b). Therefore, this provision is not a new requirement.

The Department emphasizes that, although it recognizes that situations exist where regulated aversive and deprivation procedures must be used, those are procedures called for only in extraordinary circumstances. All children whose behavior necessitates intervention and support should be receiving positive intervention whenever possible, even if those children also sometimes need regulated interventions.

Mary Powell, Director of the Autism Society of Minnesota, suggested that language be added to this proposed Subpart that would require monthly adaptation as behavior changes. Powell explains that this language is important because when positive behavior supports are used, the intervention is

ongoing, and will need additional analysis and adaptation. However, the Department believes that other requirements contained in this proposed Subpart, in particular Item F below, emphasize the need to check in at a later date in order to monitor the effectiveness of the BIP. Therefore, the Department does not believe this additional suggested language is necessary, and could contribute to confusion or frustration on the part of staff seeking to comply with the rule.

E. identify any reasonable modifications to the school discipline policy necessary for the child;

Proposed Item E is not a new rule requirement. The current special education rules require that "all behavioral interventions not covered in the IEP must be consistent with the district's discipline policy." Minn. R. 3525.2900, subp. 5(C). The Department proposes to incorporate this existing requirement into these consolidated behavioral intervention rules. At the same time, the requirement has been drafted using more straightforward language in order to make the requirement easier for districts to follow. This requirement is necessary because a free appropriate education (FAPE), based on an individualized education plan, must be available to all children in Minnesota. *See* 34 C.F.R. §§ 300.17, 300.102(a), 300.320(a).

Chris Sonenblum, Director of Special Services at Roseville Area Schools, commented that this language is "alarming: because it appears to ask the IEP team to possibly excuse a child from the district's behavior policies, and "[t]o exempt some students from these policies could lead to confusing and inconsistent practices that could then be considered discriminatory." The Department does not believe that this rule provision is discriminatory toward students who are not on IEPs that modify the consequences of the district's behavior and discipline policies. This rule provision is also not discriminatory towards the students for whom the policies may be modified since but for their disability they would not require the modification. The purpose is to make sure that school discipline policies may be modified in a way that ensures equal access to education and at the same time permits schools to maintain safety and order. This provision does not change the district's standing policies, but only the application of it to an individual child. In other words, the child remains subject to the discipline policy, but its application may be somewhat different to accommodate the child's individualized needs. This is consistent with the requirements of federal special education laws, which require an IEP for children who receive special education and services, in order to ensure that they receive FAPE.

F. monitor the effectiveness of the child's behavioral intervention plan at least as often as the progress monitoring required by part 3525.2810, subpart 1, item C;

The Department proposes Item F in order to ensure that districts continue to monitor the BIP once it has been established. This language differs from the proposed language that was shared with stakeholders and with the public in earlier rule drafts. The earlier drafts required a process and timeline for monitoring, not to exceed 90 days. At the stakeholder meetings and in comments received from MDLC and the Autism Society of Minnesota, advocacy organizations stressed that monitoring is important to ensure that the BIP remains targeted and effective, and to ensure that it is adapted as the child's behaviors change. On the other hand, Mary Ruprecht, representing MASE, stated in her comments that this requirement is unreasonable and overly prescriptive. After

considering these comments, the Department changed its proposed rule in order to maintain the monitoring requirement but to reduce additional burden on districts. The monitoring requirement now coincides with an existing Minnesota Rules requirement that districts monitor the child's progress toward annual goals and make periodic reports on that progress. *See* Minn. R. 3525.2810, subp. 1(C). The revised requirement to monitor the effectiveness of the child's BIP now fits easily into overall monitoring of the child's progress, which will reduce the administrative demands placed on districts but continue to ensure that districts evaluate the appropriateness and effectiveness of a child's BIP in light of the child's existing behavioral needs.

In proposed drafts of the rule, Subpart 3 included an additional Item that required districts to also identify a process for monitoring the number of times each regulated intervention is used, and specific criteria for determining the effectiveness of each use. This Item was included in the rules in response to past concerns from advocates and others about the need to monitor not only the effectiveness of the BIP as a whole, but also the specific regulated intervention use. However, after receiving comments from the field and from some members of the stakeholder group, and after considering the behavioral intervention rules as a whole, the Department has removed that proposed requirement. As Mary Ruprecht, representing MASE, pointed out in her comments, determining the effectiveness of each use of a regulated intervention could lead to a wrong conclusion about the overall effectiveness of using a particular regulated intervention to change a child's behavior.

Furthermore, that requirement was not necessary because this proposed rule already requires monitoring of the plan's ongoing effectiveness, which should include the ongoing effectiveness of the regulated interventions included in that plan. In addition, proposed rule 3525.0860, which governs the use of regulated interventions, requires districts to thoroughly document each time a regulated intervention is used. That documentation can and should be used when the district reviews the ongoing effectiveness of the overall BIP. Given all of the documentation and monitoring already required in these proposed rules, and elsewhere in state and federal laws governing special education, the Department believes that appropriate checks and balances exist to ensure that districts continue to evaluate regulated interventions as part of a child's BIP.

G. identify the regulated intervention, if any, to be used to address the child's target behavior;

This requirement is similar to an existing rule requirement found in 3525.2900, subp. 5(A). Item G proposes to require that each BIP identify the regulated intervention, if any, used to address the child's target behavior. Regulated interventions may only be used if they are included in a BIP, so it is reasonable and necessary to require that the BIP list the regulated interventions that will be used to address the target behavior. The final proposed rule language represents a slight change from draft rule language, which required that the plan identify the target behavior and specifically identify any regulated intervention used to address that target behavior. The final proposed language is substantively similar, but presents a more streamlined requirement in a straightforward manner, which will make the rule easier for districts to follow.

In earlier drafts of the proposed rules, this Subpart included an Item that required each BIP to identify "any regulated intervention necessary to respond to the child's targeted behavior, ensure the intervention is the least intrusive possible, and ensure the intervention is not contraindicated for mental or physical health reasons" [Item E of early rule drafts]. The Department received comments from MDLC and from Mary Powell, Director of the Autism Society of Minnesota, suggesting that this Item, which requires the plan to identify any regulated intervention proposed to be used in response to a target behavior, include additional language that (1) references proposed rule 3525.0860, and (2) specifies that regulated interventions only be used after positive behavioral interventions and supports have failed or in emergency situations under proposed rule 3525.0870. The Department also received comments from Mary Ruprecht, representing MASE, stating that these rules should not require staff to use the least intrusive intervention possible, because this may limit more effective interventions. Ruprecht commented that the effectiveness of the intervention needs to be considered when the team determines whether a regulated intervention is necessary.

After much deliberation of the comments and of the purpose of the rules, the Department removed the requirement that a regulated intervention must be "the least intrusive possible" except in emergency situations. *See* proposed rule 3525.0870, subp. 2(A) This language originally was included in the rules to ensure that districts not simply use the most convenient intervention, but that they consider the child's needs and behavior, and use the intervention that would be least intrusive for the child and for the situation. The Department believes that considering the situation and the individual child, and then applying the least intrusive intervention for the child in that situation, is the appropriate approach to using regulated interventions. However, after serious consideration about how this standard could be applied as law, the Department determined that it would be impossible to apply this standard fairly and uniformly. The least intrusive intervention is not only highly subjective, but also different for each child and sometimes for each situation. Therefore, because the requirement would not create a workable legal standard, it was removed from the final proposed rule.

The final proposed rules continue to require a determination that the regulated intervention is not contraindicated; however, that determination is included in the FBA which must be prepared before development of a BIP that includes regulated interventions. *See* proposed Subpart 2, Item J, discussed above.

H. identify specific criteria for release from the regulated intervention and for returning the child to the child's routine activities and educational setting, including during a fire drill, lock down, tornado, or other building-wide emergency; and

MDLC originally proposed this rule language, explaining that the BIP should be clear about when and why a child will be released from a regulated intervention in all situations, and should include steps to ensure student safety in crisis situations. Other comments received on this proposed language, from the Autism Society of Minnesota and from Arc Greater Twin Cities, generally have supported this provision. The Department has not received comments expressing a concern about this proposed Item.

When Item H was first inserted into the proposed rule, it included language stating that the plan must not only identify criteria for release, but also communicate those criteria to the child. However, Jacki McCormack of Arc Greater Twin Cities and Mary Powell of the Autism Society of Minnesota commented that a child engaging in challenging behavior typically cannot understand staff communications about the criteria. After consideration, the Department agrees that this requirement would not be effective, and could result in districts performing extra duties without a corresponding benefit, so it has been removed from the proposed rule.

I. identify a method for informing the child's parent when the regulated intervention is used as part of the child's behavioral intervention plan including when the documentation required by part 3525.0860, subpart 3 will be provided to the child's parents.

This proposed language is necessary to ensure that parents are informed when a regulated intervention is used, so they may take an active role in monitoring the use of regulated interventions and determining whether the interventions are effective. MDLC and Mary Powell, Director of the Autism Society of Minnesota, both commented that a requirement for reporting and documenting to parents is an important element of these behavioral intervention rules.

Subp. 4. **Consent.** A district must obtain written parental consent prior to implementing a behavioral intervention plan that includes the use of any regulated intervention. The consent is valid until withdrawn. As a part of and prior to obtaining parental consent, the district must demonstrate the use of any mechanical restraint, show the parent the room used for locked time-out or seclusion, and if applicable, demonstrate the locking mechanism.

Proposed Subpart 4 requires the parents' prior written consent before a district implements any BIP that includes a regulated intervention; clarifies that the consent remains valid until withdrawn; and establishes that the consent must be accompanied by a demonstration of the mechanical restraint or room, and locking mechanism if one is to be used. Due to the serious nature of regulated interventions, parental consent is an important component of the BIP development process, particularly when that plan will include a regulated intervention. Parents need to be aware when a regulated intervention plan is necessary for working with their children, and need to be allied with the IEP team and school staff so that these interventions have the best chance for success without added risk of safety or other consequences to the child, staff, or others.

These final proposed rules include new language, which provides that "the consent is valid until withdrawn." This language was not in the draft rules that were shared with the stakeholder group and with the public, but was added by the Department to clarify for districts and for parents that once given, the consent remains valid until withdrawn.

Subpart 4 is consistent with federal regulations that require informed parental consent before the initial provision of special education and related services. *See* 34 C.F.R. § 300.300(b). In addition, the current state rule already provides for immediate cessation of a regulated procedure as soon as the parent withdraws consent for the BIP. Minn. R. 3525.2900, subp. 5(E). Given that withdrawal of consent is specifically anticipated and provided for in Minnesota rules, it is reasonable to conclude that parental consent is required in order to practice the regulated procedure. However, although withdrawal of consent is addressed in the current Chapter 3525, there is no corresponding provision specifically requiring consent, or describing the nature of that consent. Therefore, this rule is necessary so that districts and parents have a common understanding of what consent is required in order to properly use a regulated intervention pursuant to a BIP.

MDLC suggested the inclusion of the requirement that parental consent must be accompanied by a demonstration of the use of the regulated intervention. The suggestion is based on a Wisconsin guideline,[4] which requires that use of a regulated intervention be included in the IEP so that it can be discussed, defined, and demonstrated with parents and staff. After consideration of this proposal, the Department agrees that this provision will result in more informed consent on the part of parents, which in time will reduce conflicts between parents and school districts when regulated interventions are used as part of BIPs. Advocacy groups represented at the stakeholder group, including PACER Center and Arc Greater Twin Cities, commented that this would be helpful because parents often do not know what they are consenting to when the IEP team develops a BIP that includes a regulated intervention. With greater parent knowledge, the district can increase parent support of the BIP and at the same time avoid future conflicts. The Department views this provision as protective for both parents and school districts because it ensures that when consent is given for a regulated intervention it is completely informed.

The Department has not received any comments indicating a concern with requiring parental consent before implementing a BIP that includes a regulated intervention.

Subp. 5. **Withdrawal of consent.** A parent may withdraw consent for a regulated intervention at any time by submitting a written or oral statement to that effect to the district. Upon notification of the parent's withdrawal, the district must:

A. immediately stop implementing the regulated intervention for which consent was withdrawn, and immediately notify the parent of its actions in writing;

B. conduct an IEP team meeting to review the child's IEP and behavioral intervention plan within five school days; and

C. continue implementing all other components of the child's IEP and behavioral intervention plan.

[4] Wisconsin Department of Public Instruction, *Guidelines for the Appropriate Use of Seclusion and Physical Restraint in Special Education Programs*, at page 8, item 4 (Sept. 2005).

This proposed Subpart incorporates an existing rule provision, currently found at 3525.2900, subp. 5(E), governing withdrawal of consent into the proposed behavioral intervention rules. Pursuant to Minn. Stat. § 121A.67, which directs the Department to consolidate its behavior intervention rules, the Department proposes to repeal Subpart 5 and move its existing consent withdrawal provisions to this rule.

In addition, the proposed rule makes some changes to the existing withdrawal of consent provisions. The current rule provides that:

> 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.

Minn. R. 3525.2900, subp. 5(E). The first changes in the proposed rule allows a parent to withdraw consent for a regulated intervention at any time, whereas the existing rule only allows a parent to withdraw consent for the entire BIP. This proposed change will allow the BIP to remain intact, only removing from use the particular regulated intervention that the parent no longer supports. The new language will improve the consistency and application of BIPs, reducing disruption to overall work with the child on behavior issues while the district responds to the parent's concerns about the particular regulated intervention.

Second, the proposed language clarifies that either written or oral notification is satisfactory for purposes of withdrawing consent pursuant to this rule. The existing rule language also is sufficient to allow for either written or oral notification, but it is less clear and could lead to districts and parents interpreting the scope of the rule in different ways. The proposed language's clarity eliminates this possibility, and reduces the possibility for conflict.

Third, the proposed language continues to require that once consent is withdrawn, the district must immediately stop using the regulated procedure with that child, and must notify the parent of this fact. However, the proposed language removes an existing requirement that the district simultaneously request parental signature acknowledging this notification, and document their effort if the signature cannot be obtained. This requirement is superfluous, because the parent has already proactively withdrawn consent, and needlessly increases the district's paperwork burden.

Fourth, the existing rule requires the district to contact parents within three days to determine the need for an IEP meeting and to consider a change of placement, whereas the proposed rule requires the district to hold an IEP meeting within five days after parental consent is withdrawn. The proposed language is more realistic, in that it gives the district more time in which to respond to the parent's consent withdrawal. It also is more concrete, in that it requires the district to convene a

meeting whenever consent is withdrawn, rather than simply contacting the parent to determine the need for a meeting. This new language will result in more a consistent application of the rule following parental withdrawal of consent. Given the importance of sound, responsive BIPs for the children who need them, this language is a necessary provision to ensure that parents and districts discuss the impact of a consent withdrawal on the remaining elements of the BIP.

The Department has not received public comment on this proposed Subpart.

3525.0860 REGULATED INTERVENTIONS.

The Department proposes language at part 3525.0860 that will define regulated interventions; define the scope of those procedures that are considered regulated interventions; outline the requirements for appropriately applying those procedures; and establish documentation requirements. At the same time, the Department proposes to repeal existing rule language that governs conditional procedures, found at part 3525.2900, subp. 5.

Subpart 1. **In general.**

A. "Regulated intervention" means the use of an aversive and deprivation procedure that is not prohibited. The use of regulated interventions is authorized only when included in the child's behavioral intervention plan or in response to an emergency.

Subpart 1 contains the definition of a regulated intervention, which is the use of an aversive or deprivation procedure that is not prohibited, and that is used only in accordance with the child's BIP or in response to an emergency. Aversive and deprivation procedures are also defined below in this Subpart. In early drafts of the rules, the requirement that an intervention is only an authorized intervention if it is used in accordance with the child's BIP or in response to an emergency was included in a separate Subpart titled "Limitations. " However, because these interventions are in fact prohibited interventions if they are used in any other situation, this requirement has been moved to the definition in order to give districts better notice of this fact, and a clearer understanding of the scope of regulated interventions. Correspondingly, the separate "Limitations" Subpart was eliminated from the proposed rule.

Drafts of these rules that were shared with the informal stakeholder group and with the public also included the requirement that a regulated intervention used in accordance with a BIP must be the least intrusive possible. After much deliberation, the Department removed the requirement that a regulated intervention must be "the least intrusive possible." This language originally was included in drafts of the rules in an effort to ensure that districts not simply use the most convenient intervention, but that they consider the child's needs and behavior, and use the intervention that would be least intrusive for the child and for the situation. The Department believes that considering the situation and the individual child, and then applying the least intrusive intervention for that child in that situation, is the appropriate approach to using regulated interventions. However, after serious consideration about how this standard could be applied as a law, the

Department determined that it would be impossible to apply this standard fairly and uniformly. The least intrusive intervention is not only highly subjective, but also different for each child and sometimes for each situation. Therefore, because the requirement would not create a workable legal standard, it was removed from the final proposed rule.

MDLC made two additional suggestions in its comments to the proposed rule. First, MDLC suggested that this rule should include language specifying that regulated interventions are not positive behavioral interventions and should only be used when necessary for safety, to protect the child or others, or when positive interventions have failed. The subject of positive behavioral interventions is fully addressed in proposed rule 3525.0850. The Department does not agree that the suggested language is necessary in order to clarify the definition of "regulated intervention." If anything, adding more language to the definition runs the risk of creating a standard that is difficult to understand and apply, because positive behavioral interventions are defined and addressed elsewhere.

Second, MDLC proposed to make these regulated intervention requirements consistent with similar requirements maintained by the Department of Human Services (DHS) for programs serving the cognitively disabled, and found at Minn. R. 9525.2750. MDLC commented that it would be useful to have consistent standards across all settings. While the Department does not disagree that consistent standards can be helpful, it also acknowledges that there are significant differences between schools and the other settings that serve people with behavioral challenges. The Department believes it is critical to develop independent regulations that specifically address the needs of Minnesota's school districts and the children they serve.

B. Regulated interventions include:

(1) manual restraint,

(2) mechanical restraint consistent with a written order from a licensed physician,

(3) locked time-out, and

(4) seclusion.

The Department has the authority to promulgate rules that "provide standards for the discipline, control, management, and protection of children with a disability." Minn. Stat. § 125A.07, subd. 1. Furthermore, Minn. Stat. § 121A.67 requires the Department to amend its rules governing the use of aversive and deprivation procedures. Pursuant to that authority, proposed Item B simply lists the regulated restraints that are allowable in Minnesota schools, if practiced pursuant to the requirements outlined in the definition and the specific requirements for each regulated intervention.

Several advocacy organizations, including MDLC, NAMI, the Autism Society of Minnesota, PACER Center, Arc Greater Twin Cities, and parents' attorney Amy Goetz of the School Law Center, have

argued that certain of these practices should be prohibited procedures rather than regulated procedures. These advocates argued that, at the very least, the procedures should be subject to much stricter requirements than those laid out in Subparts 4 through 8 of this rule. Goetz argued that manual and mechanical restraints are "barbaric" and do not have a place in Minnesota schools. She also argued that the Department's statutory authority "provides ample justification to expand protections from overuse, abuse, and incompetent use of these inherently dangerous interventions," and commented that the Department should require specific training for each of the regulated interventions in order to assure staff competency in their application.

Similarly, MDLC commented that "[t]here is a growing national, legal, therapeutic, and educational belief that restraint and seclusion should be used only as a last resort in cases of imminent danger to the child or to others." It pointed to investigative reports and research showing that restraint and seclusion results in disproportionately high death rates,[5] and urged the Department to move toward the gradual elimination of restraint and seclusion in Minnesota's schools. NAMI stated that it believes mechanical restraints should be prohibited in schools, or that at a minimum, more serious restrictions and protections should be placed on the use of mechanical restraints in schools. Conversely, many school district representatives argued that these proposed rules place requirements on districts that are too restrictive, and do not allow districts adequate discretion to apply behavioral interventions. They argued that regulated interventions, used properly, are safe interventions that can improve the ability to create positive behavioral change on the part of an individual child.

Throughout these behavioral intervention rules, the Department has strived for balance between the opposing views on the very sensitive subject of behavioral interventions, and regulated interventions are at the center of that opposition and controversy. There are heated passions on both sides of the issue, about whether regulated interventions have a role to play in the behavioral intervention strategies used by schools to help children develop better behaviors and receive greater benefit from their educational environment. These proposed rules establish parameters that are consistent with the Department's statutory authority, that provide sufficient guidance to schools and parents, and that take into account to the greatest extent possible the views of those on both sides of this debate.

Subp. 2. **Definitions.**

A. "Aversive procedure" means the application of an aversive stimulus.

B. "Aversive stimulus" means an object that is used or an event or situation that occurs immediately after a target behavior in order to suppress that behavior.

[5] Specifically, MDLC referenced a 1998 Hartford Courant investigative report, which was based on a study commissioned by the Harvard Center for Risk Analysis. It also referenced a 2005 report by the National Association of Protection and Advocacy Systems. *See Minnesota Disability Law Center Comments to Proposed Minn. R. 3525.0850-0870,* p. 7 (April 17, 2007).

C. "Deprivation procedure" means the delay or withdrawal of goods, services, or activities that the child would otherwise receive.

Definitions for the terms "aversive procedure," "aversive stimulus," and "deprivation procedure" currently are found in the general definitions rule of Chapter 3525. *See* Minn. R. 3525.0210, subps. 5, 6, and 13. The Department proposes to repeal those Subparts, and to move the definitions for these behavioral intervention procedures here. These terms are only used in reference to whether they are regulated procedures – addressed in this proposed Subpart – or prohibited procedures pursuant to proposed part 3525.0865. The terms are not used elsewhere in Chapter 3525, so their placement here will make them more accessible to practitioners and other rule users who are specifically concerned with behavioral interventions.

The proposed definition for "aversive stimulus" remains identical to the current definition. The proposed definitions for "aversive procedure" and "deprivation procedure" have been redrafted slightly. First, the current definitions refer to the "planned application" of an aversive procedure or the "planned delay or withdrawal" of goods, services, or activities that constitutes a deprivation procedure. The proposed definitions remove the term "planned" from the rule language, because these procedures are sometimes applied in unplanned emergency situations. Second, the current definitions state that aversive and deprivation procedures limit these terms to use pursuant to an IEP, or in an emergency situation. This language has been removed from the proposed rule because both regulated procedures and prohibited procedures – which can never be used, even if anticipated in an IEP or in an emergency situation – are aversive and deprivation procedures.

Early drafts of these rules also included the definitions of locked and locking mechanism in this definitions section. Those definitions have been incorporated into Subpart 6, which governs locked time-out, because the definitions are specific to the locked time-out procedure.

Subp. 3. **Frequency; documentation.** Each time a district uses a regulated intervention as part of a child's behavioral intervention plan or in response to an emergency, the district must document:

This proposed Subpart outlines the documentation that districts must collect each time a regulated intervention is used. Because regulated interventions are serious procedures meant to be used only in extraordinary circumstances, this documentation is critical data that district staff and IEP team members need to best evaluate the child's overall behavior needs. This documentation also details the role of regulated interventions in responding to those needs. By collecting this information, the district may decide to develop new intervention strategies for a child, or to modify the child's BIP in response to the circumstances surrounding the regulated intervention use.

Parents also will benefit from this information. Advocacy organizations have stated that parents often do not understand what regulated interventions are, or how they are applied. Having access to this type of information will make parents better-informed partners to the schools that work to educate their children.

MDLC suggested that this documentation should be gathered not only when the regulated intervention is used as part of the child's BIP, but also when it is used in an emergency. The Department agrees that any regulated intervention use – either in accordance with a BIP or in an emergency situation – should be followed up with documentation and data gathering that can then be used by the district to evaluate the child's behavioral intervention needs and make program adjustments, if needed.

A. the antecedent to the behavior that resulted in the use of the regulated intervention;

B. the behavior that resulted in the use of the regulated intervention, including a description of the positive behavioral interventions or supports that were implemented but were not effective, and whether law enforcement was contacted;

C. the consequence the child sought and a description of the regulated intervention used to address the behavior;

Preliminary drafts of the rule required documentation of a description of the regulated intervention, but later drafts added the further requirements that the district document the antecedent to the behavior, a description of the behavior itself, and the consequence the child sought through use of the behavior. This change was suggested by Mary Ruprecht, representing MASE, who stated that "[c]ontinued antecedent, behavior, consequence (ABC) data collection will promote and encourage more responsive behavior programs." The Department agrees that this data is critical to helping districts develop better programs and individualized BIPs. Therefore, the Department added these documentation elements to the proposed rule. Because school staff who work in behavioral intervention are trained to be comfortable with referring to this as the "ABC" approach – antecedent, behavior, consequence – these terms have been included in the proposed rule language.

MDLC proposed the additional language that this documentation should include which positive behavioral interventions and supports were used that were not effective. The Department agrees that this added information would contribute to understanding how to refine the behavioral intervention program and individual BIP.

During the drafting process of these rules, the requirement that districts must document whether law enforcement was contacted was added to proposed Item B. This documentation is useful data for the evaluation process, and originally was included in proposed rule 3525.0870 that addresses emergencies and use of peace officers. However, the provisions of that proposed rule have been revised in response to concerns that districts may not always have full knowledge or control of the situation when law enforcement becomes involved, particularly when law enforcement becomes involved independently rather than at the district's request. Therefore, in order to ensure that districts document law enforcement involvement in those situations where the district has requested that involvement, law enforcement involvement has been added to this documentation section.

D. the length of time the regulated intervention was used, including the time the intervention began and the time it ended;

A similar requirement currently exists in the Department's rules, at part 3525.2900, subp. 5(D)(5), where it applies particularly to time-out procedures. The Department proposes to move that requirement to these consolidated behavioral intervention rules, and to extend it to all four of the regulated intervention procedures. Reporting the length of time that a regulated intervention is used will help districts determine, in some cases over a period of time rather than after one or a few instances, the efficacy of the regulated intervention that was used. As with the other required documentation elements, this will help districts refine their behavioral intervention strategies. MDLC proposed that this report should include the time that the intervention began, and the time it ended, because the additional information would contribute to the parental notification process. The Department agrees that this information will add accuracy and clarity to the district's documentation, and will be informative not only to parents, but also to staff and to the district's oversight committee. Therefore, it has been added to the final proposed rule.

The Department has not received any other comments on this proposed Item.

E. the number of times the regulated intervention was used in each school day and by whom;

This requirement already exists in the Department's rules, at part 3525.2900, subp. 5(D)(5) where, as with the length of time requirement found at proposed Item D above, it applies particularly to time-out procedures. The Department proposes to move the requirement that districts document the number of times the intervention is used in a day to these consolidated behavioral intervention rules, and to extend it to all four of the regulated intervention procedures.

Item E also requires the district to document who – what staff member or other school representative – used the regulated intervention. This language is consolidated from an Item that was included in informal drafts of the rule and required the district to separately document "the individuals involved in using the regulated intervention." Such data is useful for evaluation purposes, because it can help districts determine appropriate staffing and with whom to consult about changes to a child's behavioral interventions when needed.

The Department has not received comments on this proposed Item.

F. the child's response to the regulated intervention;

Item F requires the district to document the child's response to the regulated intervention. In early informal drafts of the proposed rules, Item F was accompanied by a separate Item that required the district to also document the response of the individual, such as the staff member, who used the intervention. Mary Ruprecht, representing MASE, commented that this information is subjective and vague, and therefore of little value to evaluating a behavioral intervention program. In addition, Ruprecht asserted that it implies that the intervention will harm the child, and that staff uses the

intervention because they like it. Paul Norrgard, who did not provide a title or affiliation, commented that post-facto notes about the child's response could be unreliable.

After considering these comments, balanced against the use of the two proposed data elements in evaluating a behavioral intervention program, the Department concluded that documenting the child's response to the regulated intervention does contribute significant information that may assist districts in their evaluation processes. This data can help the district determine whether the intervention is working – either in a specific instance or, in some cases, over a period of time. It can help the district determine whether changes need to be made to the child's BIP or to the method in which the regulated intervention is used. It need not be subjective, but rather can and should be an objective record of the child's observed response to the intervention. Combined with the other documentation gathered by the district, it presents a rounded picture of how the regulated intervention is working for the individual child.

However, the Department agrees with Ruprecht that data regarding the response of the individual using the intervention will not provide enough objective information to determine whether the regulated intervention is an effective technique for responding to a specific child's behavioral concerns. Furthermore, this data is likely to be highly subjective in nature. After that Item was removed from the draft rules, MDLC commented that the response of the individual who used the intervention should be re-inserted into the proposed rules, because it will help determine whether the intervention is appropriate, and how to avoid it in the future. The Department does not agree with MDLC that this data element is likely to provide useful information that will help the district refine a child's BIP. Therefore, the Department has left it out of the final proposed rules.

G. the procedure used to return the child to the child's routine activities and educational setting;

Item G is based on a suggestion from Mary Ruprecht, representing MASE. Ruprecht suggested that this information, along with information about the frequency and duration of each regulated intervention use and ongoing data about the function of the behavior would promote and encourage a more responsive behavior program. The Department agrees that collecting data about the return to routine activities will assist districts in the development of more effective behavioral intervention program for individual children.

H. a description of any physical injuries sustained by the child or staff; and

Item H directs the district to include in its intervention documentation a description of any physical injuries sustained by the child or staff. The Department added this proposed Item during the informal drafting process, based on a comment received from MDLC and supporting comments from Arc Greater Twin Cities and PACER, as well as stakeholder group discussions. The Department agrees that this is necessary information that districts should be sure to document. This requirement will help districts ensure the overall safety of their behavioral intervention programs, and will allow them to intervene to ensure that interventions are being performed correctly to minimize risk to both children and staff. Furthermore, by documenting this information, districts can keep parents better informed about what is happening at school.

I. the date the parent was notified.

Proposed Item I, requiring that the documentation include the date that the parent was notified, was suggested by advocacy groups, including MDLC and Jacki McCormack representing Arc Greater Twin Cities. The Department agrees that the date of parental notification is important information, not only to ensure that schools notify parents when and how regulated interventions are used, but also to protect schools should conflicts arise.

Subp. 4. **Manual restraint.** "Manual restraint" means an intervention intended to restrict a child's movement by using physical contact as the only source of restraint. Manual restraint does not include physical contact or a physical prompt used to facilitate completion of a task or to redirect a child's behavior when the child does not resist or the child's resistance is minimal. When using manual restraint:

Proposed Subpart 4 contains a definition of manual restraint as a behavioral intervention. This definition is similar to an existing definition of manual restraint, found in Minn. R. 3525.0210, subp. 29. The proposed definition has been revised somewhat to clarify the scope of manual restraint that is covered by this rule. It goes on to describe the requirements for using manual restraint as a regulated intervention in compliance with these rules. Those requirements are described and discussed below.

A. efforts to lessen or discontinue the restraint must be made at least every 15 minutes, unless contraindicated. The time each effort was made and the child's response to the effort must be noted in the child's record;

B. the child must be given an opportunity for release from the restraint and for motion and exercise of the restricted body parts for at least ten minutes of every 60 minutes; and

Proposed Items A and B were added based on suggestions made by MDLC, and supporting comments were received from PACER, Arc Greater Twin Cities, and the Autism Society of Minnesota. These two requirements are identical to manual restraint requirements maintained by DHS that govern programs for cognitively disabled individuals. *See* Minn. R. 9525.2750, subp. 1(H)(2)-(3). Item A requires the district to try to lessen or discontinue the restraint at least every 15 minutes, in recognition of the fact that manual restraints are serious interventions and should not be used any longer than necessary to address a child's behavior. Regardless of whether the district is able to lessen or discontinue the restraint, Item B simultaneously requires that the child must be given opportunity for release from the restraint for motion and exercise of the restricted body parts for at least 10 of every 60 minutes. Research reports and federal government documents have indicated that injuries and deaths are a real, known risk during and following the application of

manual and mechanical restraints.[6] Therefore, the release periods required by Items A and B are necessary in order to protect health, safety, and well-being of the child when manual restraint is applied.

C. if manual restraint is imposed upon a child whose primary mode of communication is sign language or an augmentative mode, the child shall be permitted to have his or her hands free of restraint for brief periods, unless the trained individual determines that such freedom appears likely to result in harm to the child or others.

Item C requires that for a child whose primary mode of communication is sign language or an augmentative mode, the child must be permitted to have hands free from restraint for brief periods in order to communicate. This requirement is important for the child's safety and well-being.

This proposed rule language initially was suggested by MDLC, and the Department agrees that it is an important addition to the rule, because it protects the needs of children who have no alternative way of communicating their needs to the individuals applying the restraint. However, based on consideration of the stakeholder group discussion of this issue, the Department also added an exception to the rule, allowing the district to assess the situation and refrain from making a release for communication purposes if necessary to protect the child or others.

MDLC suggested similar rule language for the use of mechanical restraints, which is addressed below in proposed Subpart 5. However, the proposed rules require that in order for mechanical restraints to be used, the child must have a written order from a physician that describes the circumstances in which the restraint is used. The Department anticipates that the physician's order will address the need for release in order for the child to communicate.

Early drafts of proposed Subpart 4 included two additional requirements: First, that the district must comply with 3525.0855, subp. 3, Behavioral Intervention Plan; and second, that the restraint must be applied by a trained individual. Both of these proposed requirements were removed because they were duplicative of requirements that are found elsewhere in these rules. All regulated interventions that are not used in an emergency situation must comply with 3525.0855, subp. 3. And, all individuals who apply a regulated intervention to a child must be trained, not only in regulated interventions, but also de-escalation techniques and positive interventions and supports. *See* proposed Minn. R. 3525.0850, subp. 4.

[6] The Harvard Center for Risk Analysis, commissioned by the *Hartford Courant* during a 1998 investigative report, estimated that between 50 and 150 deaths each year occur as a result of restraint. Eric Weiss, *Deadly Restraint: A Hartford Courant Investigative Report*, Hartford Courant, March 11-15, 1998. Similarly, in a 1999 report to the United States Congress, the General Accounting Office reported a minimum of 24 deaths related to restraint and seclusion in fiscal year 1998, and specifically cited three deaths of children due to improper restraint. United States General Accounting Office, Improper Restraint or Seclusion Use Places People at Risk (1999). Press reports also have highlighted individual instances of injury and death to children as a result of improper restraint. *See* Kevin Harter, *Wisconsin clinic fined $100,000 in girl's death; employee gets 60 days jail*, Pioneer Press, March 7, 2007; Robert Tomsho, *When Discipline Starts a Fight*, Wall Street Journal Online, July 9, 2007, http://online.wsj.com/public/article_print/SB118375070827459396.html.

Subp. 5. **Mechanical restraint.** "Mechanical restraint" means an intervention intended to restrict a child's movement by using devices as the source of restraint. Mechanical restraint does not include an adaptive or protective device recommended by a physician or therapist, or safety equipment used as intended, for example, seat belts. When using mechanical restraint:

Subpart 5 defines the regulated intervention of mechanical restraint. This definition replaces an existing definition found at Minn. R. 3525.0210, subp. 30. The final proposed rule includes additional language in this definition to clarify that mechanical restraint interventions do not include safety equipment when used as intended, nor do they include adaptive protective devices that are recommended by a physician or therapist. The first addition, exempting safety equipment from the definition, was added in response to stakeholder discussions and comments expressing concern that this would include seat belts used on buses, and that the requirements of the mechanical restraint Subpart would be too onerous for bus drivers to comply with them. The second addition was added to make clear the intention of the rule: that adaptive or protective devices used as recommended by a medical professional are not considered mechanical restraint for purposes of behavioral intervention. However, if the adaptive or protective device is used in a manner not recommended by a medical professional, then its use would be governed by this rule. These language changes emphasize the Department's intent; it does not intend this rule to apply to mechanical restraints used for safety or adaptive purposes, but rather to mechanical restraints used specifically as an intervention that responds to behavioral problems.

Several advocacy organizations, including MDLC, the Autism Society of Minnesota, and PACER commented suggesting stricter requirements for mechanical restraints used as interventions. Amy Goetz, an attorney with the School Law Center, requested that the Department eliminate altogether school authority to use mechanical restraints. The National Alliance for Mental Illness of Minnesota (NAMI) commented that they are "very concerned that these would even be used in a school since they are rarely used in licensed mental health programs. . . . At a minimum . . . even more restrictions and protections should be included." School district representatives, including Mary Ruprecht of MASE, commented that mechanical restraint should remain a behavioral intervention option for schools. The Department considered all of these concerns and comments during the development of the rule. However, governing legislation directs the Department both to provide standards that protect children with disabilities and also to regulate the use of aversive and deprivation procedures. Minn. Stat. § 125A.07(a), Minn. Stat. § 121A.67, subd. 1 (1)-(2). After balancing all of these factors, the Department drafted a mechanical restraints rule that allows use of this behavioral intervention, but imposes somewhat stronger requirements on it in order to ensure that schools take all the steps necessary to preserve the child's safety, health, and well-being.

A. the child must have a written order from a licensed physician that describes the restraint and its purpose and specifies the duration and circumstances under which the restraint may be used;

Item A requires a written order from a licensed physician that describes the restraint and its purpose and specifies the duration and circumstances under which the restraint may be used. This requirement recognizes not only the serious nature of using mechanical restraints in schools, but also the trend toward more restricted use of mechanical restraints. For example, DHS prohibits the use of mechanical restraint, such as tying, in child care centers. *See* Minn. R. 9503.0055, subp. 3(G), and Minn. R. 9525.2750, subp. 1(I). A DHS rule permitting the use of mechanical restraint with cognitively disabled individuals imposes strong restrictions and requirements when mechanical restraints are employed, including the requirement of a physician consult to determine whether use of mechanical restraint is contraindicated. Minn. R. 9525.2750, subp. 1(I). In addition, the federal Children's Health Act of 2000 prohibits the use of mechanical restraints in psychiatric facilities and in non-medical, community-based facilities for children and youth, except when used for medical immobilization, adaptive support, or medical protection. 42 U.S.C. 290jj(b)(3)(B) and (c)(1). States also have started to place limits on the use of mechanical restraints in special education settings, including California and Pennsylvania, which has proposed new regulations that would limit the use of mechanical restraints.[7]

Given the nature of mechanical restraints, which are highly invasive interventions and can be dangerous if misused, perhaps even more so than manual restraints, locked time-outs, and seclusion, the Department believes it is reasonable to require a physician's order before they may be used as a behavioral intervention in schools. This will ensure that safety considerations, individual health and well-being needs, and other factors are explicitly considered before the mechanical intervention is applied. Furthermore, unlike the other regulated interventions, there are no standards that the Department can turn to for guidance about implementing standards. Manual restraints are subject to their own set of implementing standards, as established by independent, private authorities such as the Crisis Prevention Institute. Locked time-out and, by extension, seclusion are expressly permitted by a statute that also establishes guidelines for the regulation of those interventions. Minn. Stat. § 121A.67, subd. 1. There are no statutory or independent authorities that establish standards for mechanical restraint. Therefore, it is reasonable to require that schools obtain input and an order from the child's physician before a mechanical restraint may be used as a regulated intervention.

MDLC commented that the proposed Subpart also should make the use of manual restraint, locked time-out, and seclusion without a physician's order a prohibited procedure. The Department disagrees that a physician's order should be required for manual restraint, seclusion, and locked time-out. For the reasons discussed above, mechanical restraints may be qualitatively different even from the other regulated interventions, and are not subject to standards – either imposed by statute or by an independent authority – outside these rules. In light of that fact, and given the highly invasive nature of this intervention as well as the risks associated with its use, the Department believes it is reasonable to apply this requirement to mechanical restraints, but not to manual restraint, locked time-out, or seclusion.

[7] California's Code of Regulations prohibits mechanical restraints that simultaneously immobilize all four extremities, although the procedure known as prone containment may be used as an emergency intervention. 5 CAL. CODE REGS. § 3052 (l)(5) (2007). Pennsylvania's proposed regulations would limit the use of mechanical restraints and would prohibit the use of prone restraints without a physician's order. 37 Pa. Bull. 2961, proposed § 14.133, found at http://www.pabulletin.com/secure/data/vol37/37-26/1146.html.

The Department received several comments which stated that requiring a physician's order is unnecessarily restrictive, and would only serve to delay programming. Jeffrey Borchardt, with Rum River North, commented that this requirement would delay programming and that input from physicians often is minimal. Borchardt also commented that this would give physicians, who he says are not trained or experienced in the area of mechanical restraint as a behavioral intervention, rather than schools control over what interventions are used. Mary Ruprecht, representing MASE and in separate comments as Director of Special Education at Rum River, further commented that this requirement is excessively restrictive because schools rarely use mechanical restraints except during transportation to and from school (on buses). Howard Armstrong, Rum River Autism Consultant, made similar comments.

As discussed above, the Department has exempted safety equipment from the rule provision, including seat belts and similar transportation restraint devices, when it is used as intended. Therefore, districts need not secure a physician's order or follow the other requirements of this mechanical restraint Subpart when using a seatbelt as intended on a school bus. However, the Department does not agree with the commenters that a physician's order is unnecessarily restrictive. For children who need the use of a mechanical restraint, a physician's order will provide valuable information about how the restraint may safely be used, medical or psychological contraindications to consider, and other individualized health information that would ensure safe application of the restraint.

B. the child must be continuously observed by a trained individual who is not applying the restraint;

Item B requires that the child be continuously observed by a trained individual who is not applying the restraint. This requirement is crafted to ensure that the school staff has in place an individual who can observe the child's response to the intervention, and who can report if health or safety becomes an issue. This individual must be someone other than the individual applying the restraint in order to ensure that the observer has full attention placed on the child at all times, and is not distracted by the equally important job of applying the restraint.

The Department has not received comments on this proposed requirement.

In previous drafts of the rule, Subpart 5 also included two additional requirements: First, that the district must comply with 3525.0855, subp. 3, Behavioral intervention plan; and, second, that the restraint must be applied by an individual trained to apply it. Both of these proposed requirements were removed because they were duplicative of requirements that are found elsewhere in these rules. All regulated interventions that are not used in an emergency situation must comply with 3525.0855, subp. 3. These behavioral intervention rules also contain a training provision at proposed 3525.0850, subp. 4, which requires that anyone who applies an intervention described in these rules must be fully trained not only in regulated interventions, but also in de-escalation techniques and positive interventions.

C. the trained individual must lessen or discontinue the restraint at least every 15 minutes to determine whether the

child will stop or control the target behavior without the restraint or in accordance with the physician's order; and

D. the child must be given an opportunity for release from the restraint for at least ten minutes out of every 60 minutes the restraint is used or in accordance with the physician's order.

Proposed Items C and D were added based on suggestions made by MDLC, and supporting comments were received from PACER, Arc Greater Twin Cities, and the Autism Society of Minnesota. These two requirements are identical to manual restraint requirements maintained by DHS that govern programs for cognitively disabled individuals. *See* Minn. R. 9525.2750, subp. 1(I)(2)(b)-(c). Item A requires the district to try to lessen or discontinue the restraint at least every 15 minutes, in recognition of the fact that mechanical restraints are serious interventions and should not be used any longer than necessary to intervene with a child's behavior. Regardless of whether the district is able to lessen or discontinue the restraint, Item B simultaneously requires that the child must be given opportunity for release from the restraint for motion and exercise of the restricted body parts for at least 10 out of every 60 minutes. Research reports and federal government documents have indicated that injuries and deaths are a real, known risk during and following the application of manual and mechanical restraints.[8] Therefore, the release periods required by Items C and D are necessary in order to protect health, safety, and well-being of the child when manual restraint is applied.

Subp. 6. **Locked time-out.** "Locked time-out" means a regulated intervention that involves removing the child involuntarily from the school activity during the school day and placing the child in a specially designed and continuously supervised isolation room that the child is prevented from leaving. A child is prevented from leaving by a locking mechanism which must be one that disengages automatically when not continuously engaged by school personnel.

Subpart 6 contains the definition of the locked time-out regulated intervention. Minnesota Statutes § 121A.67, subd. 1(4) expressly requires the Department to promulgate rules that establish health and safety standards for the use of locked time-out procedures. The definition in this proposed Subpart, combined with the requirements in Subpart 8 for both locked time-out and seclusion, complies with that legislative requirement. In recent years, research and practice has demonstrated a

[8] The Harvard Center for Risk Analysis, commissioned by the *Hartford Courant* during a 1998 investigative report, estimated that between 50 and 150 deaths each year occur as a result of restraint. Eric Weiss, *Deadly Restraint: A Hartford Courant Investigative Report*, Hartford Courant, March 11-15, 1998. Similarly, in a 1999 report to the United States Congress, the General Accounting Office reported a minimum of 24 deaths related to restraint and seclusion in fiscal year 1998, and specifically cited three deaths of children due to improper restraint. United States General Accounting Office, *Improper Restraint or Seclusion Use Places People at Risk* (1999). Press reports also have highlighted individual instances of injury and death to children as a result of improper restraint. *See* Kevin Harter, *Wisconsin clinic fined $100,000 in girl's death; employee gets 60 days jail*, Pioneer Press, March 7, 2007; Robert Tomsho, *When Discipline Starts a Fight*, Wall Street Journal Online, July 9, 2007, http://online.wsj.com/public/article_print/SB118375070827459396.html.

trend toward increased restrictions on locked time-out in order to ensure that it is used appropriately, and only when necessary to ensure the safety and well-being of the child, staff, or other students. Some states do not allow locked time-out,[9] while others place strict restrictions on the amount of time a child may be placed in locked time-out.[10] Some research suggests that seclusionary practices such as locked time-out should only be used when safety is at issue.[11] In addition, other Minnesota agencies also place boundaries on the use of locked time-out.[12] The comments received on these proposed rules further indicate that there are varying views within Minnesota about the role of locked time-out in school-based behavioral interventions. MDLC commented that "[t]he use of locked rooms must be highly regulated, even where Minnesota's statutory provision contemplates the use of locked rooms." Conversely, Mary Ruprecht, Director of Special Education at Rum River, and Howard Armstrong, Rum River Autism Consultant, commented that locked time-out is "research-based, highly effective, and safe." Having considered all of those factors and viewpoints, therefore, although the Department recognizes that locked time-out is sometimes a necessary and effective behavioral intervention that should be available to school districts, the Department also finds it reasonable to clearly define locked time-out and establish requirements for its proper use.

The definition in this proposed Subpart is nearly identical to the statutory definition of locked time-out found at Minn. Stat. § 121A.66, subd. 7(3). This proposed rule definition includes the additional language that in a locked time-out situation, a child is prevented from leaving by a locking mechanism which must automatically disengage when not continuously engaged by school personnel. This definition establishes the critical difference between locked time-out and seclusion, which is addressed in proposed Subpart 7. It also ensures that schools will be compliant with fire and safety codes regarding the use of locked rooms. *See* Minn. R. 7511.1008, subp. 3.

Subp. 7. **Seclusion.** "Seclusion" means a regulated intervention that involves removing the child voluntarily or involuntarily from the school activity during the school day and placing the child in a specially designed isolation room or similar space that the child is prevented from leaving by means other than a locking mechanism.

[9] For example, California, *see* 5 CAL. CODE REGS. 3052(l)(6); Nevada, *see* NEV. REV. STAT. §§ 388.5215 and 388.5265 (2007); New York, *see* 8 N.Y.COMP. CODES R. & REGS. § 200.22(c)(1)(i); Texas, *see* TEX. EDUC. CODE § 37.0021. Michigan and Kentucky guidelines also indicate children should not be placed for time-out in locked settings. *See* Kentucky Dept. of Ed., *Effective Use of Time-Out*, p. 6 (2000), Michigan State Bd. Of Ed., *Supporting Student Behavior: Standards for the Emergency Use of Seclusion and Restraint*, p. 8 (2004).

[10] Colorado, Kentucky, and Wisconsin all recommend in guidelines that time-outs be limited to one minute for each year of age, with maximum limits from 12 to 15 minutes. *See* Colorado Dept. of Ed., *Guidelines for the Use of Time-Out* (2000), Kentucky Dept. of Ed., *Effective Use of Time-Out*, p. 6 (2000), Wisconsin Dept. of Public Instruction, *Guidelines for the Appropriate Use of Seclusion and Physical Restraint in Special Education Programs*, p. 6 (2005).

[11] United States General Accounting Office, *Report to Congressional Requestors: Improper Restraint or Seclusion Use Places People at Risk*, (Sept. 1999).

[12] Minnesota Rule 9525.2750, subp. 1(G), sets time limits, release parameters, and other requirements on the use of time-outs for cognitively disabled individuals in programs governed by the Department of Human Services. The Child Health Act of 2000 also places restrictions on the use of seclusion in psychiatric facilities and in non-medical, community-based facilities for children and youth. *See* 42 U.S.C. § 290jj(b)(1).

The Department proposes to include as a regulated intervention the procedure known as "seclusion." It is defined here in Subpart 7, and the requirements for its use are outlined in Subpart 8. As was pointed out in comments by Mary Ruprecht, representing MASE, the definitions of locked time-out and seclusion are substantially similar. The primary difference between seclusion and locked time-out is that seclusion involves isolating a child and preventing the child from leaving the isolated space by a means other than a locking mechanism. The Department believes that seclusion must be addressed in these rules precisely because it is so similar to the practice known as locked time-out. Currently, districts around Minnesota practice removal and isolation of children in various rooms and other isolated spaces, and with various types of locks or other methods to prevent the child from leaving the room. If the Department were to promulgate a rule governing the use of locked time-out but did not address the related practice of seclusion, the rules could be interpreted to inadvertently allow seclusions that were in effect locked time-out, with the same effect on the child but in an unregulated manner. Similarly, the rules could be interpreted to exclude appropriate locked time-out practices because of confusion about the scope of locked time-out as compared to seclusion. In order to prevent this confusion, and to ensure that all districts practice both locked time-out and seclusion in a safe manner that complies with statutory intent and with rule, the Department proposes to govern both seclusion and locked time-out in this rule. This requirement will comport with the legislative requirement that the Department promulgate rules governing the use of aversive and deprivation procedures, including any time-out that involuntarily removes the child and places the child in an isolation room that the child is prevented from leaving.[13]

Mary Powell, Director of the Autism Society of Minnesota, commented in response to early rule drafts that the definition of seclusion proposed in those early drafts would enable districts to continue to use any kind of room to confine children. She suggested altering the rule, pointing out that locked time-out is a regulated intervention but that in practice schools use seclusion and a staff person holds the door shut, a practice that would circumvent the rule if the Department did not define and regulate seclusion. Because Powell's concern was similar to the reason that the Department decided to define seclusion – to prevent children from being placed in seclusion so as to avoid regulation – the Department reconsidered its definition of and requirements for seclusion. In response to Powell's concern, the final proposed rule imposes the same requirements on districts when they use seclusion as when they use locked time-out. Those requirements are contained in proposed Subpart 8.

Subp. 8. **Requirements for locked time-out and seclusion.** When using locked time-out or seclusion:

Proposed Subpart 8 establishes the requirements for proper application of locked time-out and seclusion. As discussed above in the preceding paragraphs, this Subpart was added to the rules

[13] Minn. Stat. § 121A.66, subd. 7(3), defines locked time out as a regulated intervention that involves involuntarily removing the child from the school activity during the school day and placing the child in a specially designed and continuously supervised isolation room that the child is prevented from leaving. The Department's definitions of locked time-out and seclusion are both consistent with this definition, because they both involve removing and isolating the child and preventing the child from leaving the isolated area. However, locked time-out involves preventing the child from leaving by using a locking mechanism, and seclusion involves preventing the child from leaving by any other means.

midway through the drafting process. In early drafts of the rules, certain of these proposed requirements applied only to locked time-out, and not to seclusion.

A. the child's behavioral intervention plan must address the length of time the child may remain in locked time-out or seclusion;

Item A requires that for locked time-out and seclusion used pursuant to a BIP, the plan must address the length of time the child may remain in locked time-out or seclusion. This requirement anticipates that the response to and effectiveness of seclusion and locked time-out will be different for each child. Therefore, the length of time that a child may remain in seclusion or locked time-out should be determined on a case-by-case basis by the child's IEP team. The appropriate length of time should be considered ahead of time, based on the individual child's needs and behaviors, and documented in the BIP.

Mary Ruprecht, representing MASE, commented that to require that the BIP specify the amount of time the child is placed in seclusion or locked time-out would result in an unethical, ineffective, and counter-productive use of time-out. After considering these arguments, the Department continues to believe that these concerns are outweighed by the importance of having the IEP team and school staff consider ahead of time the needs of the individual child, the behavioral goals associated with using time-out or seclusion with that child, and the amount of time spent in seclusion or locked time-out that would be safe and effective for that child. To the extent possible, this decision should be made with forethought and not in the heat of the moment.

B. the child must be released from locked time-out or seclusion as soon as the behavior ceases, but the length of time must not exceed 15 minutes. If the trained individual enforcing the regulated intervention reasonably believes that releasing the child will result in physical injury or serious property damage, then part 3525.0870 applies;

Proposed Item B requires that the child must be released from locked time-out or seclusion as soon as the behavior ceases, and imposes a maximum time limit of 15 minutes that a child may remain in locked time-out or seclusion. It includes an exception for situations where the trained individual applying the intervention believes it would be dangerous to release the child from locked time-out or seclusion, allowing the time-out or seclusion to continue, but requiring the district to treat the situation as an emergency and follow the emergency requirements of proposed rule 3525.0870. Item B combines the requirements of two Items that were circulated in early drafts of the proposed rules. The Items were combined because their provisions were to be applied simultaneously: The child should be released as soon as the triggering behavior ceases, and in any case the maximum length of time in locked time-out or seclusion is 15 minutes, unless the district determines that the situation constitutes an emergency.

After consideration of rules governing time-out and seclusion in other states, the role of locked time-out and seclusion in the behavioral intervention framework, research into the effectiveness of locked time-out and seclusion, and the needs of both children and districts, the Department

determined that a maximum time limit of 15 minutes is appropriate. The proposed time limit is longer than that enforced in some other states, where the most common time limit is one minute for every year of age with a maximum limit of 12 to 15 minutes.[14] However, the Department believes that its maximum time limit, combined with the requirement that the child must be released from seclusion or time-out as soon as the behavior ceases, will operate similarly to the age-related time limits maintained in other states.

Advocates, including MDLC, Arc of Minnesota, and some members of the stakeholder group, argued that a much tighter time limit should be imposed. In contrast, some district representatives, argued that there should be no time limit at all for the use of locked time-out. Those who argue for no time limit state that a time limit will make the use of locked time-out and seclusion less effective, because students will figure out the time limit and tailor their behavioral responses to take advantage of the time limit. Instead, they argue, that release should be based on a demonstration of the appropriate behavior. These comments were received from Howard Armstrong, Rum River Autism Consultant, Jeffrey Borchardt, Rum River North; Scott Hare, Goodhue Education Director; Carissa Jivery and Lynn Schutte, Rum River; Paul Norrgard, who did not provide an affiliation or title; and Mary Ruprecht, both as a representative of MASE and in her capacity as Director of Special Education at Rum River.

In response to those commenters who argue that release from time-out or seclusion should be strictly behavior-dependent, with no maximum time limit, the Department notes that such a standard would create an unworkable law. In order for the rule to be applied consistently around the state, it must include a concrete and definable measure for release of every child placed in seclusion or locked time-out. A strictly behavior-dependent standard would not provide that concrete and definable release measure, because staff in different districts may determine the measure differently – every district may apply a different measure of what constitutes appropriate behavior, or how much appropriate behavior is enough to allow the child release from seclusion. Some children could simply be kept in locked time-out or seclusion indefinitely, and the Department seeks to avoid such a result from its behavioral intervention rules. Therefore, the Department determined that a release measure which combines a behavior-dependent model with a maximum time limit was the most reasonable alternative.

During the informal drafting process, some commenters and stakeholders expressed the concern that some children simply will not be ready for release after 15 minutes. In those cases, releasing the child from seclusion or locked time-out could lead to a serious safety risk for the child or for staff. The Anoka-Hennepin Special Education Administrative Staff submitted a useful comment, suggesting that in those cases the child could remain in locked time-out or seclusion for longer than 15 minutes, and then school staff would be required to review the child's BIP and data with the oversight committee identified in proposed rule 3525.0850, subp. 7. The Department felt that this suggestion would work very well in some districts, but other districts may not set up oversight committees in such a way to make this a universally reasonable approach. Therefore, after consideration of the stakeholder discussions and of this comment, the Department proposed that in

[14] For example, Wisconsin and Colorado. *See* Colorado Dept. of Ed., *Guidelines for the Use of Time-Out* (2000), Wisconsin Dept. of Public Instruction, *Guidelines for the Appropriate Use of Seclusion and Physical Restraint in Special Education Programs*, p. 6 (2005).

cases where the child needs to remain in locked time-out or seclusion for longer than 15 minutes, the district may extend the time limit, but then the emergency requirements of proposed rule 3525.0870 would apply. This is a reasonable exception, because the primary concern over the maximum time limit involves the safety of the child and staff. If safety reasons require that the child must remain in locked time-out or seclusion for longer than 15 minutes, then this situation is a legitimate emergency, and the emergency documentation and review procedures appropriately apply.

The Department received comments from Howard Armstrong and Mary Ruprecht of Rum River, arguing that this emergency exception would result in unproductive paperwork or bureaucracy. Scott Hare, Goodhue Education Director, also commented that it "might lead to other complications." The Department disagrees with these commenters that to require emergency procedures when the district wishes to exceed the maximum time limit is unproductive bureaucracy. The Department believes that when a child must be kept for longer than 15 minutes in a secluded and in some cases locked room for the safety of the child and the staff, that fact indicates that a need for documentation, review, and possible change to the child's BIP is in order.

Proposed Item C also provides that release from locked time-out or seclusion must occur as soon as the child has ceased or controlled the behavior that led to the intervention, and that release must occur as soon as the behavior ceases or abates. The Department added this requirement to the proposed rules in response to much discussion and commentary from the stakeholder group, advocates, and school district representatives. MDLC specifically proposed the inclusion of this requirement, which aligns with the behavior-dependent model for release argued for by several school districts. Because the purpose of locked time-out or seclusion is to calm a child and change a negative behavior pattern into a positive one, this release requirement is appropriate.

C. the child must be continuously monitored by a trained individual; and

Proposed Item C satisfies the statutory mandate that the Department's rules governing locked time-out and seclusion include a requirement for continuous monitoring of the child. Minn. Stat. § 121A.67, subd. 1(4). Notwithstanding the statutory mandate, this requirement is critical to ensure the safety and well-being of the child who has been removed and placed in isolation. Based on that inherent reasonableness, the Department has not received any comments to this proposed Item.

This requirement already exists in the current rules, at part 3525.2900, subp. 5(D)(3). Because the Department proposes to repeal Subpart 5 of that rule and incorporate its provisions into these consolidated behavioral intervention rules, the requirement in Subpart 5(D)(3) would move to this proposed Item C.

D. the specially designed room or similar space must:

The Department was directed by legislation to promulgate rules that establish health and safety standards for the use of locked time-out and seclusion procedures. Minn. Stat. § 121A.67, subd. 1(4). Proposed Item D outlines the health and safety standards governing the room or space in which the child is to be isolated.

(1) be a clean, safe environment where all fixtures are tamper proof, the walls and floors are properly covered, and control switches are located immediately outside the room;

(2) contain an observation window or other device to permit a trained individual to continuously monitor the child;

(3) be at least five feet by six feet or substantially equivalent to these dimensions and large enough to allow the child to stand, stretch the child's arms, and lie down;

(4) be well-lighted, well-ventilated, and adequately heated; and

(5) comply with all applicable fire and building codes.

These requirements mandate that every child placed in locked time-out or seclusion must isolated in a clean, safe environment, with an observation window or other method of permitting staff to continuously monitor the child in compliance with statute and these rules; that the space be of a minimum size and large enough for the child to stand, stretch and lie down; that the room be lighted, ventilated, and heated; and that it comply with fire and building codes. These provisions establish reasonable minimum expectations for child safety and welfare, and comport with the statutory mandate that the Department's rules

> establish health and safety standards for the use of locked time-out procedures that require a safe environment, continuous monitoring of the child, ventilation, adequate space, a locking mechanism that disengages automatically when not continuously engaged by school personnel, and full compliance with state and local fire and building codes, including state rules on time-out rooms.

Minn. Stat. § 121A.67, subd. 1(4).

These proposed requirements are substantially similar to provisions that already exist in Chapter 3525, at Minn. R. 3525.2900, subp. (5)(D)(6)-(10). The Department proposes to repeal Subpart 5 of that rule, and to incorporate its requirements in these consolidated behavioral intervention rules.

The Department received only a few comments on this proposed Item. MDLC commented to express its support of the health and safety standards, and in particular the provision establishing minimum room dimensions. MDLC also commented that air conditioning should be required, but

the Department believes the requirement that the room be well-ventilated is adequate to ensure the child's health and safety while in seclusion or locked time-out.

Mary Ruprecht, representing MASE, commented on a proposed requirement that was included in early drafts of the rule, which would have included the additional requirement that children placed in seclusion or locked time-out have adequate access to drinking water and bathroom facilities. Ruprecht commented that this requirement was unclear, because when children and students are in class there are restrictions on their access to these facilities. However, the Department decided to remove that requirement, because two corresponding requirements in the proposed prohibited procedures rule, at 3525.0865, make it a prohibited procedure to withhold water or regularly scheduled meals, or to deny a child access to bathroom facilities. *See* proposed Minn. R. 3525.0865, subp. 2(H)-(I), discussed below.

Amy Goetz, attorney with the School Law Center, suggested that the rules should specify provisions for evacuation of children in seclusion or other forms of exclusion in the event of an emergency. These proposed behavioral intervention rules require the IEP team to include in the BIP specific information about how the child will be removed from the intervention in the event of an emergency. Because each child, each intervention, and each school environment will contribute unique factors to an emergency evacuation if the need for one occurs, the Department believes that it is more appropriate to require the district to establish individualized plans for evacuation. In addition, because these rules require the district to comply with all applicable fire and building codes, the district's evacuation plans and procedures must at minimum be in compliance with those codes.

3525.0865 PROHIBITED PROCEDURES.

The Department proposes language at Part 3525.0865 that will govern those aversive and deprivation procedures which are prohibited and cannot be used by a school district in any circumstance, in contrast to the aversive and deprivation procedures which may sometimes be used and are regulated by proposed rule 3525.0860.

These prohibited procedures derive from an existing rule, 3525.2900, subp. 5(A)(2). The Department proposes to repeal the existing rule at 3525.2900, subp. 5, and to move the rule provisions to this prohibited procedures rule, as part of the consolidation of behavioral intervention rules. At the same time, the Department proposes to clarify the current prohibited procedures, to ensure that districts around the state have a common understanding of those practices that cannot be used in any circumstances because they are dangerous or demeaning procedures.

Subpart 1. **Definition.** "Prohibited procedures" means aversive and deprivation procedures that must not be used under any circumstances.

This proposed definition is adapted from the existing definition of a prohibited procedure found at 3525.2900, subp. 5(A)(2). The current rule simply defines a prohibited procedure as an intervention that is prohibited from use in schools by school district employees, contracted personnel, and volunteers. In order to provide clarity and consistency when comparing prohibited procedures with

the regulated aversive and deprivation procedures outlined in proposed part 3525.0865, the Department proposes to define prohibited procedures as "aversive and deprivation procedures that must not be used under any circumstances" – in contrast with a regulated intervention, which is "the use of an aversive and deprivation procedure that is not prohibited." Aversive and deprivation procedures are defined by Minn. Stat. § 121A.66, subds. 2 to 4, and in proposed Minn. R. 3525.0860, subp. 2. Consistent with the requirements of Minn. Stat. § 121A.67, all aversive and deprivation procedures are regulated by these proposed rules, either as regulated procedures that may be used in some situations, or as prohibited procedures that cannot be used in any circumstance.

Subp. 2. **Prohibited procedures.** Prohibited procedures include:

Minn. Stat. § 121A.67, subd. 1(5), requires the Department to promulgate rules that contain a list of prohibited procedures. This proposed Subpart lists the procedures that are prohibited to be used as behavioral interventions in Minnesota schools.

A. corporal punishment as defined in Minnesota Statutes, section 121A.58;

B. requiring a child to assume and maintain a specific physical position, activity, or posture that induces physical pain;

C. the presentation of intense sounds, lights, or other sensory stimuli;

Minnesota Rules, 3525.2900, subp. 5(A)(2)(a)-(c), currently prohibit the aversive and deprivation procedures proposed to be prohibited by Subpart 2, Items A through C. The Department proposes to repeal Subpart 5 of part 3525.2900, and to move these Items to the proposed prohibited procedure rule. These procedures continue to be detrimental, punitive aversive and deprivation procedures that should not be used in schools as behavioral interventions under any circumstances.

D. the use of smell, taste, substance, or spray as an aversive stimulus;

Minnesota Rules, 3525.2900, subp. 5(A)(2)(d), currently prohibits the use of noxious smell, taste, substance, or spray as an aversive stimulus. The Department proposes to remove the term "noxious" from this existing rule language, and to move the rule provision to the proposed rule governing regulated procedures. The draft rules were presented to the stakeholder group and to the public without the term "noxious" throughout most of the informal drafting process, although one late draft did reincorporate the term noxious into the rule. This reintroduction of the term drew comment from MDLC, which stated that it strongly urged the Department to return to prior drafts and to remove the term noxious. As MDLC pointed out, "[t]he use of any type of smell, substance or spray as an aversive procedure should be a prohibited procedures as it has no place in positively dealing with behaviors or as a reaction to more serious and potentially dangerous behaviors."

In addition, the subject of whether the term noxious should remain in the proposed rule language was discussed at length during the June 2007 meeting of the Special Education Advisory Panel (SEAP), where the general agreement of SEAP members in attendance called for removing the term "noxious" from the proposed rule. SEAP members spoke of needing clarity about what substances the rule prohibits, and provided examples of substances that are not noxious but are highly aversive, such as water sprays and other stimuli that are aversive in unique situations when used with an individual child.

Based on those comments and discussions, the Department reviewed its existing rule and agreed that the term "noxious" should be removed from the proposed rule language. This will clarify that the use of any smell, taste, substance, or spray as an aversive, is prohibited. The Department emphasizes that the key to this prohibition is the use of the stimulus as an aversive. A noxious substance or stimulus is always prohibited by this proposed rule, because by its nature it is aversive. However, water and other benign substances are prohibited by this rule only when they are used as an aversive.

The Department did not receive any comments about this proposed rule provision relating to drafts that proposed to remove the term "noxious." The only comments related to this provision, as discussed above, focused on the draft that included the term "noxious," and all of these comments supported removal of the term from the proposed rule language.

E. restricting a child's access to equipment or devices, including hearing aids and communication boards, that facilitate the child's functioning except when access is temporarily restricted to prevent a child from destroying or damaging the equipment or devices;

F. faradic skin shock;

Minnesota Rules, 3525.2900, subp. 5(A)(2)(e) and (f) currently prohibit the aversive and deprivation procedures proposed to be prohibited by Items E and F. The Department proposes to repeal Subpart 5 of part 3525.2900, and move the rule language relating to prohibited procedures to these consolidated behavioral intervention rules.

It is universally understood that these practices should not be used as behavioral intervention methods, and the Department has not received any comments about their inclusion in the proposed rules.

G. totally or partially restricting a child's auditory or visual sense, not including the use of study carrels as an academic intervention;

The prohibited procedure contained in proposed Item G already exists in Minnesota rule, at part 3525.2900, subp. 5(A)(2)(g). The language in proposed Item G is identical to the language in the existing rule.

The Department received comments on this proposed language from Mary Ruprecht, representing MASE and also in her capacity as Director of Special Education at Rum River; Jeffrey Borchardt, of Rum River; and Howard Armstrong, Rum River Autism Consultant. All of these comments asserted that the use of a study carrel as a behavioral intervention is a contingent observation, and therefore should not be prohibited or otherwise subject to regulation.

Contingent observation is defined in Minnesota statutes, and is proposed to be added to these behavioral intervention rules, in order to clarify those practices that are not regulated by the rules. A contingent observation is "not a regulated intervention, and involves instructing the pupil to leave the school activity during the school day and not participate for a period of time, but to observe the activity and listen to the discussion from a time-out area within the same setting." Minn. Stat. § 121A.66, subd. 7(1). Another practice which may be used as a behavioral intervention and is not subject to regulation under these rules is exclusionary time-out, which "involves instructing the pupil to leave the school activity during the school day and not participate in or observe the classroom activity, but to go to another area from which the pupil may leave." Minn. Stat. § 121A.66, subd. 7(2), *see also* proposed Minn. R. 3525.0850, subp. 3.

The Department agrees with those who submitted comments that, in some cases, the use of a study carrel is a contingent observation not subject to regulation as a prohibited procedure. Using a study carrel as it is intended to be used does not implicate Item G or qualify as a prohibited procedure. However, when a study carrel is used in a manner that goes beyond the function and purpose of a study carrel, then the use of the study carrel is no longer a contingent observation or an exclusionary time-out, but is a prohibited procedure under Item G. For that reason, the Department does not intend to add the suggested language to the proposed rule. The current rules and statutes sufficiently outline the appropriate use of a study carrel as a behavioral intervention that does not trigger regulation under this proposed rule. Therefore, the Department proposes to leave intact the existing rule provision, and simply move it to this prohibited procedure rule.

H. withholding water or regularly scheduled meals;

I. denying a child access to bathroom facilities;

Minnesota Rules, 3525.2900, subp. 3900, subp. 5(A)(2)(h) and (i) currently prohibit the aversive and deprivation procedures that would be prohibited by 3525.0865, Items H and I. The Department proposes to repeal 3525.2900, subp. 5, and move the rule language that relates to prohibited procedures to the proposed rule. It is universally understood that these demeaning and abusive practices should not be used as behavioral interventions with children in schools, and the Department has not received any comments on these provisions.

The draft rules which were shared with the stakeholder group and with the public included a proposed Item that made "treatment of a demeaning nature" a prohibited procedure. During the preparation of these final proposed rules, the Department removed that Item. It does not exist in the current prohibited procedures rule, found at 3525.2900, subp. 5(A)(2). And while the Department believes that school staff should not engage with children in a demeaning fashion, it also determined that this addition to the rules was inappropriate and unfeasible from a regulatory

perspective. To attempt to regulate this type of non-physical behavior goes beyond the Department's statutory mandate to regulated what are essentially physical interventions. Furthermore, the standard for determining what is "treatment of a demeaning nature" is unclear at best, and would be impossible to apply in a uniform manner. For those reasons, the Department removed the provision from the final proposed behavioral intervention rules.

J. the use of mechanical restraint without, or contrary to, a written order from a licensed physician; and

Proposed Item J is not contained in the current prohibited procedures rule at 3525.2900, subp. 5(A)(2). However, the Department believes that this is an important addition to the prohibited procedures rule because, as discussed in the SONAR for proposed part 3525.0860, subp. 5, Mechanical restraint, there is a clear trend toward more restricted use of mechanical restraints. DHS prohibits the use of mechanical restraints, such as tying, in child care centers, and only permits the use of mechanical restraints with persons who are cognitively disabled in very limited circumstances. *See* Minn. R. 9503.0055, subp. 3(G), and Minn. R. 9525.2750, subp. 1(I). The DHS rule permitting the use of mechanical restraint with cognitively disabled individuals imposes strong restrictions and requirements when mechanical restraints are employed, including the requirement of a physician consult to determine whether use of mechanical restraint is contraindicated. Minn. R. 9525.2750, subp. 1(I). In addition, the Children's Health Act of 2000 prohibits the use of mechanical restraints in psychiatric facilities and in non-medical, community-based facilities for children and youth, except when used for medical immobilization, adaptive support, or medical protection. 42 U.S.C. 290jj(b)(3)(B) and (c)(1).

The National Association on Mental Illness (NAMI) of Minnesota commented that mechanical restraints are rarely used in licensed mental health programs, and that they should be fully prohibited in schools. In the alternative, NAMI Minnesota suggested that if mechanical restraints are not prohibited, they should be subject to "even more restrictions and protections" than those contained in these proposed rules. Conversely, Mary Ruprecht commented that this provision should be removed from the prohibited procedures rules, stating that the requirement of a physician's order is excessively restrictive. Given the seriousness of using mechanical restraints in any setting, and given the national trend in research and law toward restricting or outright prohibiting the use of mechanical restraints, the Department believes it is reasonable to make the use of mechanical restraints without a physician's order a prohibited procedure. This does not mean that schools which need to use mechanical restraints in the extraordinary circumstance of a child who truly needs or will benefit such a restraint may never do so. Rather, it means that districts must ensure a physician consult and order before employing this type of restraint.

MDLC commented that the proposed Subpart also should make the use of manual restraint, locked time-out, and seclusion without a physician's order a prohibited procedure. The Department disagrees that a physician's order should be required for manual restraint, seclusion, and locked time-out. As suggested by NAMI's comment above, the use of mechanical restraint is simply qualitatively different, even when compared to the other regulated interventions. Mechanical restraints are highly invasive interventions, perhaps even more so than manual restraints, locked time-out, and seclusion. Furthermore, unlike the other regulated interventions, there are no standards that the Department

can turn to for guidance about implementing standards. Manual restraints are subject to their own set of implementing standards, as established by independent, private authorities such as the Crisis Prevention Institute. Locked time-out and, by extension, seclusion are expressly permitted by a statute that also establishes guidelines for the regulation of those interventions. Minn. Stat. § 121A.67, subd. 1. There are no statutory or independent authorities that establish standards for mechanical restraint. In light of that fact, and given the highly invasive nature of this intervention as well as the risks associated with its use, the Department believes it is reasonable to apply this prohibition to mechanical restraints, but not to manual restraint, locked time-out, or seclusion.

K. any regulated intervention that:

(1) places a child's face down or places pressure on the child's back;

(2) obstructs the airway of a child or otherwise impairs breathing.

When the Department first introduced drafts of these proposed rules, proposed Item K listed as prohibited procedures the following practices:

Any regulated intervention that:

1. is implemented by personnel not trained in that procedure;
2. is implemented but not in the child's IEP and not in response to an emergency.

After stakeholder group discussions, and the submission of comments by Linda Bonney of MDLC, the Department added additional language to the proposed rules, so that later drafts of Item K prohibited the following practices:

Any regulated intervention that:

1. is implemented by personnel not trained in that procedure;
2. is implemented but not in the child's IEP and not in response to an emergency;
3. places a child's face down or places pressure on the child's back;
4. obstructs the airway of a child or otherwise impairs breathing;
5. obstructs the staff's view of the child's face; or
6. restricts the child's ability to communicate.

Bonney commented that this proposed language is supported in general by a number of sources, and particularly by the Advocates Coalition for the Appropriate Use of Restraints, which is comprised of several national disability organizations that include the National Disability Rights Network, the National Alliance on Mental Illness, National Mental Health Association, The Arc of the United States, and the Bazelton Center. Other advocacy groups, including Arc Greater Twin Cities, PACER, and the Autism Society of Minnesota submitted comments that supported these and other rule modifications that were submitted by MDLC.

In response to these additions, Mary Ruprecht, representing MASE, commented that all of proposed Item K – with the exception of the prohibition against procedures that obstruct the airway of a child or otherwise impair breathing – should be removed, because regulated procedures are by definition regulated, and not prohibited. Ruprecht observed that the procedures listed in 1. and 2. above, prohibiting any regulated intervention implemented by personnel not trained in that procedure or not in the child's IEP and not in response to an emergency, are already prohibited under other parts of these proposed behavioral intervention rules. Proposed part 3525.0860, subp. 1, provides that regulated interventions are only authorized when they are included in the child's BIP or in response to an emergency. Proposed part 3525.0855, subp. 4, requires staff, contracted personnel, and volunteers who use regulated interventions to be trained in their use. Therefore, the Department agrees that the practices prohibited by 1. and 2. are already fully addressed by other portions of these proposed behavioral intervention rules. They do not also need to be included in the prohibited procedures rule.

Ruprecht also commented that the Department should remove proposed Subitems 3, 5, and 6, which would prohibit a regulated intervention if it placed a child's face down or placed pressure on the child's back, obstructed the staff's view of the child's face, or restricted the child's ability to communicate. She commented that these provisions would prohibit certain safe and effective Crisis Prevention Institute (CPI) methods, such as the team control procedure, and that these procedures "may be necessary for students who are seriously out of control." Howard Armstrong, Rum River Autism Consultant; Paul Norrgard, who gave no entity or title; and Mary Ruprecht commenting separately in her role as Director of Special Education at Rum River, also submitted comments arguing that these provisions could prohibit safe and effective CPI holds, particularly the team control procedure.

After consideration of these comments and the proposed rule language, the Department removed the proposed Subitems 5 and 6 that would prohibit procedures which obstruct the staff's view of the child's face, or restrict the child's ability to communicate. However, the Department proposes to retain as Subitem (1) the prohibition against placing a child's face down or placing pressure on the child's back. This prohibited procedure, combined with other requirements in these proposed behavioral intervention rules, should address any concerns related to obstructing staff's view of the child's face during a regulated intervention. As for concerns about the child's ability to communicate, proposed part 3525.0860, subp. 4, requires that when manual restraint is used, the child whose primary mode of communication is sign language or an augmentative mode be permitted to have his or her hands free for brief periods. Likewise, a mechanical restraint may only be used with a physician's order, and concerns about the child's ability to communicate during a mechanical restraint should be addressed by the child's physician.

However, the Department declines to remove what has now become proposed Subitem (1), which prohibits placing a child face down or applying pressure to the child's back. Numerous research studies, government reports, and stories in the press have demonstrated that procedures involving these techniques are dangerous; they have caused injury and even death to children in other states,

and continue to cause injury to adults who are subjected to these procedures.[15] In fact, CPI informational materials state that "some restraints are more dangerous than others," and that by choosing safer restraint techniques, the risk of injury or even death can be reduced.[16] Their materials go on to state that in order to avoid these risks, "[i]n particular, you should avoid positions that can lead to restraint-related positional asphyxia." According to CPI, restraint-related positional asphyxia occurs when a person being restrained is placed in a position in which he cannot breathe properly, and that "[e]specially dangerous positions include face-down floor restraints, or any position in which a person is bent over in such a way that it is difficult to breathe." CPI's informational materials indicate that techniques placing a child in these positions should not be used because they can be fatal.

MDLC submitted comments after the rule changes described above were made, strongly urging the Department to include all six prohibited practices in Item K. However, since the four removed items contained requirements that are covered elsewhere in the proposed behavioral intervention rules, the Department believes it is more effective to leave Item K as succinct and brief as possible, in order to ensure that the most dangerous practices which are not covered elsewhere are covered here, and are accessible to the practitioners who will access these rules.

Sue Abderholden, Director of NAMI Minnesota, also suggested that these rules should prohibit four point restraints, any intervention likely to cause pain, and any intervention which precludes adequate supervision. The Department believes these concerns are already adequately addressed by the behavioral intervention rules. Specific interventions likely to cause pain are prohibited, see especially proposed Items A, B, F, J, and K of this proposed rule. Proposed rule 3525.0860 places restrictions on the use of manual and mechanical restraint in order to ensure that a child has relief during the application of these regulated interventions, and proposed rule 3525.0855 requires the district to take into account a child's age, background, contraindications, and other factors when developing a BIP that includes regulated interventions. All of those rule provisions combine to restrict districts from using an intervention that may cause a child unnecessary pain. In regards to training, these behavioral intervention rules already require training for anyone applying a regulated intervention, and the regulated interventions each include requirements for supervision. *See* proposed rule 3525.0850, subp. 4.

Subp. 3. **Reporting.** The district must report any use of prohibited procedures pursuant to Minnesota Statutes, section 626.556.

This proposed Subpart was added in response to draft rule comments received, and to stakeholder group discussions. Several members of the stakeholder group felt that reporting of prohibited procedures was a critical aspect of the rules. MDLC proposed that a reporting requirement be

[15] *See* Eric Weiss, *Deadly Restraint: A Hartford Courant Investigative Report*, Hartford Courant, March 11-15, 1998 (estimating that between 50 and 150 deaths occur each year as a result of restraint); United States General Accounting Office, *Improper Restraint or Seclusion Use Places People at Risk* (1999) (reporting at least 24 deaths in 1998 due to restraint); *Preventing Restraint Deaths*, Sentinel Event Alert (Joint Commission on Accreditation of Healthcare Organizations), November 18, 1998 (based on a review of 20 patients deaths related to physical restraint, found that asphyxiation was the cause of death in 40% of cases).

[16] *Risks of Restraints: Understanding Restraint-Related Asphyxia*, ed. Crisis Prevention Institute, Inc.

added to the rule, requiring districts to report the use of a prohibited procedure within 24 hours of becoming aware of it. After consideration of these comments and discussions, the Department agrees that a requirement mandating districts report the use of prohibited procedures is a reasonable and necessary one. These procedures are prohibited because they are harmful and dangerous to children, and in some cases to staff or other students. They should not be used under any circumstance; if they are used, then districts have a responsibility not only to address that use within their own district administrative procedures, but also to report that use to the Department. These reports can then be used by the Department during the monitoring process, to track the use of prohibited procedures statewide, and to determine whether further consequences should occur as a result of a specific prohibited procedures incident.

MDLC also proposed adding a penalty subpart to the rule, which would outline the consequences for violating proposed part 3525.0865. As MDLC explained in its comments, the use by a district of a prohibited procedure is a serious concern, which goes beyond violations of other Chapter 3525 provisions. For that reason, MDLC believes it is important to establish sanctions specific to prohibited procedures violations, in order to emphasize the serious nature of these violations, and to impress upon districts and staff the importance of avoiding these practices in all circumstances. Specifically, MDLC proposed the following rule addition:

> **Penalties.** For any violation of prohibited procedures, the commissioner may 1. order immediate cessation of regulated intervention use until compliance issues are resolved to the satisfaction of the commissioner; 2. order any corrective action available under IDEA; 3. refer the violation to the board of teaching or the maltreatment of minors division; 4. initiate a targeted school- or district-wide monitoring; 5. report violations to the district's oversight committee and school board; and/or 6. impose fiscal sanctions.

The Department does not believe that a penalties provision is necessary for enforcement of the prohibited procedures rule. However, during its consideration of MDLC's comments, the Department redrafted this proposed reporting requirement in order to make the reporting process and consequences more clear. Earlier drafts of this rule simply required districts to "report any use of prohibited procedures to the department within 24 hours of becoming aware of this use." This language does not give districts clear direction about how or where to file such a report, nor does it explain for districts the possible ramifications of a prohibited procedures report. The final proposed rule requires districts to report the prohibited procedures pursuant to Minn. Stat. § 626.556, the Maltreatment of Minors reporting statute. This reporting mechanism gives additional guidance to districts regarding the reporting mechanisms, because § 626.556 outlines the timeline and other reporting requirements. It also establishes for districts the potential result of a prohibited procedures report, including a possible maltreatment investigation by the Department and, depending on the result of that investigation, additional involvement by law enforcement authorities, the Board of Teaching, or the Board of School Administrators. Not only does this rule language provide clearer requirements and expectations for districts and other users of the rule, it also responds to concerns that the use of these prohibited procedures are a serious violation of law that requires state-level follow-up.

3525.0870 EMERGENCY AND NOTICE OF PEACE OFFICER INVOLVEMENT.

The Department proposes rules in this part that will govern emergency situations as well as the use of peace officer involvement by school personnel.

Subpart 1. **Definition.** "Emergency" means any situation in which the immediate use of a regulated intervention or other procedure is necessary to protect a child or other individual from physical injury or to prevent serious property damage.

The current Chapter 3525 contains a definition of emergency in the definitions rule, 3525.0210, subp. 17. Minnesota Statutes also define emergency. *See* Minn. Stat. § 121A.66, subd. 5. The Department proposes to move the rule's definition of emergency to this proposed Subpart and to conform that definition with the statutory definition of emergency. Placing the definition here will contribute to the consolidation of the behavioral intervention rules, will improve the effectiveness of this proposed rule, and will make it easier for district staff and others who consult the rule to find and apply the definition. This definition of emergency is specific to behavioral intervention circumstances, so maintaining it in the general definitions rule is not necessary, and could contribute to confusion if those who access the behavioral interventions rules do not also consult the general definitions rule. Furthermore, the existing definition contains prescriptive rule language that requires districts to follow certain practices and procedures in the face of a behavioral intervention-related emergency. These practices and procedures belong in an operative rule, and are contained in the other Subparts of this proposed rule.

Subp. 2. **District responsibility.** If a district must use a regulated intervention to respond to a child's behavior in an emergency situation, the district must:

A. use the least intrusive intervention possible to reasonably react to the emergency situation;

This requirement already exists in the current special education rules, at Minn. R. 3525.0210, subp. 17. The provision is necessary and reasonable because it recognizes that, in an emergency situation, the absolute least intrusive intervention may not be a safe and effective response to the emergency. However, the proposed rule requires the district to consider and use the least intrusive intervention possible to reasonably react to the emergency situation, rather than allowing the district to resort to an "any means necessary" response to the emergency situation. In previous drafts of the rule that were shared with stakeholders and with the general public, this rule provision required districts to use "the least intrusive intervention available for the emergency situation." After further consideration of the rule provision, however, the Department redrafted this rule language to make the final proposed rule more clearly state that in an emergency, the district must use the least intrusive intervention possible to reasonably react to the situation – in other words, the district's level of response must be similar or equal to the threat posed by the child's behavior.

In previous drafts of the proposed rules, this requirement was found at Item B, and Item A contained the additional requirement that the intervention be used only after positive behavioral

interventions and supports and other de-escalation techniques have failed. Several stakeholder group members, including Peter Martin, representing the Minnesota School Boards Association (MSBA), and Darren Kermes, representing MASE, commented that this requirement may not be realistic or achievable by districts faced with a dangerous emergency that threatens the safety of the child and others. The Department also received comments to this effect. Mary Ruprecht, representing MASE, proposed that this requirement should be eliminated to protect students and staff from injury, because "students do engage in assaultive or dangerous behavior with little or no warning. It is not always possible to use positive supports prior to emergency intervention." Peter Martin, an attorney who represents MSBA, submitted written comments expressing the concern that this requirement is impractical, and stating that deference should be afforded to school personnel in an emergency situation.

After considering these comments, and the stakeholder discussion, the Department determined that the provision requiring the district to first attempt positive interventions and other de-escalation techniques before turning to regulated interventions in an emergency situation will not be an effective rule if school districts are unable to apply it in true emergency situations. This reality is balanced with the continuing need to protect children who are subject to behavioral interventions, even when their behavior rises to the level of an emergency. The Department concluded that the remaining provisions in this rule, combined with the requirements of the other behavioral intervention rules, will protect the safety and well-being of a child during an emergency situation. Furthermore, the decision about how best to handle an emergency situation should be decided on an individual, case-by-case basis and relying on the unique factors of each situation. Therefore, the Department removed from the final proposed rule language the requirement that districts use positive interventions and other de-escalation techniques before using a regulated intervention in an emergency.

B. use the intervention for no longer than is necessary to protect the child or other individual from physical injury or to prevent serious property damage;

This provision requires the district to limit its use of a regulated intervention during an emergency situation for only as long as is necessary to protect the child or others from physical injury, or to prevent serious property damage. As soon as the emergency situation abates, the district must stop using the regulated intervention. This is an important protective requirement for a child, who should not be subjected to a regulated intervention once the threat of the emergency has passed. This requirement balances the district's need to adequately respond to a true behavior-related emergency situation with the recognition that regulated interventions are serious interventions that could pose their own safety and well-being concerns, and thus should only be used in extraordinary circumstances.

C. not exceed reasonable force as defined in Minnesota Statutes, section 121A.582;

Minnesota Statutes § 121A.582 applies a reasonable force standard to all disciplinary actions in a school environment. It is reasonable to require that school staff be allowed to use the same level of reasonable force – but not more – when they are dealing with an emergency behavioral intervention.

The existing emergency rule, at Minn. R. 3525.0210, subp. 17, contains a similar reasonable force requirement.

D. notify the child's parent or guardian of the use of the intervention on the same day the intervention is used or in writing within two school days if district personnel are unable to provide same-day notice; and

Minnesota law requires educational personnel to notify a parent or guardian of a child with an IEP on the same day aversive or deprivation procedures are used in an emergency, or in writing within two school days if district personnel are unable to provide same-day notice. Minn. Stat. § 121A.67, subd. 1(3). Proposed Item D complies with this directive. This requirement also is an important measure to ensure that parents and guardians are informed, and are included in the process whenever the behavior of their children reaches the level of an emergency. An emergency is likely an indication that changes need to be made in a child's school and/or home situations.

E. conduct an IEP team meeting when a regulated intervention is used to respond to an emergency twice within 90 days.

The existing rules, at Minn. R. 3525.2900, subp. 5(C), require that if an emergency is used twice in a month, an IEP team meeting must be called to determine whether the child's IEP is adequate, if additional evaluation is needed and, if necessary, to amend the IEP. Proposed Subpart 1 of 3525.0855 contains a similar requirement, directing districts to convene the IEP team to review the IEP and determine whether an FBA is needed when regulated interventions are used to respond to an emergency twice within 90 days; this rule provision corresponds with that 3525.0855 requirement. The proposed language is a change from the draft language that was shared with the stakeholder group and with the public. That language required a team meeting whenever a regulated intervention is used in an emergency, as well as in the other situations contained in the proposed rule. However, after consideration of the purpose of the rule, the balance between the views of districts and advocates, and problems that the Department has encountered with the existing rule at 3525.2900, subp. 5(C), the Department determined that a more effective and reasonable requirement would be to require a team meeting whenever an emergency occurs two times in 90 days.

The current rule requires the district to convene an IEP team meeting if an emergency intervention is used twice in a month. Minn. R. 3525.2900, subp. 5(C). However, the current rule is not protective of children whose behaviors, over time, result in multiple emergency uses of a regulated intervention, but do not happen to occur in the tight timeframe of twice in one month. A child could have several incidents occurring once per month over a period of several months that result in the need for emergency use of a regulated intervention, but the current rule would not apply to require an IEP team meeting for review of the situation. Conversely, it is also overly proscriptive in response to a child who experiences a single behavioral emergency that is an isolated moment rather than an indication of a behavioral problem that needs to be addressed with an IEP team meeting, an FBA, and possibly a BIP. In both of those cases the current rule does not serve the best interests of the child. Therefore, the Department has changed the timeline to a more reasonable two

emergencies in 90 days before an IEP team meeting is triggered. This slightly longer time frame will better serve all children.

MDLC proposed an addition that would have required districts to report the emergency and use of regulated intervention to the Department. This provision was added to proposed rule 3525.0860, governing regulated interventions, and is discussed in the SONAR of that proposed rule.

Subp. 3. **Notice of peace officer involvement.** If a peace officer restrains or removes a child from a classroom, school building, or school grounds during the school day, the district must notify the child's parent or guardian on the same day the child is restrained or removed or in writing within two school days if district personnel are unable to provide same-day notice.

In earlier drafts of the rules, proposed part 3525.0870 applied Subparts 1 and 2 not only to emergency situations, but also to the involvement of a peace officer. This proposed requirement sparked extended stakeholder group discussions, in which many members of that group believed that schools do not have the same level of control and responsibility over the intervention of a police officer as they do over an emergency situation where a peace officer does not become involved. After consideration about how to address this concern while still ensuring that schools remain in contact with parents, the Department determined to remove references to peace officer involvement from Subparts 1 and 2, and to create a new Subpart 3 that provides direction to schools about notifying parents when a peace officer becomes involved as a result of a child's behavior. The proposed Subpart requires the school to notify parents on the same day that the peace officer restrains or removes the child, or in writing within two days if district personnel are unable to provide same-day notice. Paula Goldberg, Executive Director of PACER Center, suggested that this language be changed to require the school to inform parents on the same day and in writing within 48 hours. The Department considered this change, but does not believe it is necessary to protect a child's or a parent's rights to notification.

Peter Martin, an attorney representing the MSBA, submitted comments stating that this Subpart is unduly burdensome in that it appears to apply both to interventions based on school personnel requests and to unilateral action by law enforcement officials. In response to this concern, the Department added language clarifying that the school must notify parents when a peace officer retrains or removes a child "during the school day." Furthermore, unlike proposed 3525.0855, subp. 1, which imposes a requirement that the district must convene a team meeting when the school calls on law enforcement to intervene with a child twice in 30 days, this notice requirement is simply that – a requirement that districts must notify parents whenever a peace officer removes or restrains a child during the school day. The additional requirements of 3525.0855 do not apply if the district did not request the peace officer's involvement.

3525.1100 STATE AND DISTRICT RESPONSIBILITY FOR TOTAL SPECIAL EDUCATION SYSTEM.

Subpart 1. **State responsibility for all educational programs for ~~pupils~~ children.** The Department of Education is responsible for ensuring that all pertinent requirements in the Code of Federal Regulations, and this part are carried out by the local education agencies. Each special education program within the state, including programs administered by any other public agency is under the general supervision of the persons responsible for special education in the Department of Education.

This shall be done, in part, by reviewing each district's and program's total special education system (TSES) during the monitoring process for compliance. Districts and programs shall also be monitored periodically by the Department of Education for their implementation of the TSES and all requirements in United States Code, title 20, chapter 33, sections 1400 et seq., Code of Federal Regulations, title 34, part 300, Minnesota Statutes, and this part.

Subpart 1 is changed to clarify that the Department will now regularly include in its monitoring responsibilities a review of the local education agency's (LEA) TSES plan. In the past, districts were required to submit their TSES plans to the Department for review and for filing, but that submission requirement has been removed from federal regulation, and is being removed from this rule. *See* 34 C.F.R. § 300.201. However, in order for the Department to meet its obligation to ensure that districts and cooperatives have all of the required policies and procedures in place, the Department's special education monitors now will include a review of the TSES plan in the compliance monitoring process.

Subp. 2. **District responsibility.** A district ~~shall submit to the commissioner the district's~~ prepare and maintain a TSES plan for providing instruction and related services ~~upon request~~ for all ~~pupils~~ children as required by Minnesota Statutes, sections 125A.03 to 125A.24. The plan may be for a single district or for the member districts of a formal special education cooperative. The plan shall be considered as part of the annual school district application for program review, but will not be required to be resubmitted annually. If a cooperative changes administrative organization, it shall ~~submit~~ create a revised plan. ~~The new plan must be submitted before the beginning of the next school year.~~ The plan shall include among its other provisions descriptions of the district's:

Until recently, LEAs were required by federal law to submit to state education agencies their special education policies and procedures. However, in 2006, the federal government removed this requirement from federal regulation. *See* 34 C.F.R. § 300.201. Districts still must have policies and

procedures as directed by federal special education regulations, but they are no longer required to submit them to the Department. Language requiring districts to submit their policies to the Department has been removed from the proposed rule for that reason.

Paula Goldberg, Executive Director of PACER Center, commented that PACER does not support this rule change because it removes the school district obligation to provide modifications of their TSES plans to the Department for approval. Goldberg commented that this "in essence allows school districts to self-monitor except during the MDE monitoring process, that typically occurs on a four-year cycle." The Department disagrees with the concern that districts will be left to self-monitor their TSES plans for significant lengths of time. TSES plans are often reviewed by the Department when complaints are filed. Also, advocates and the general public may request to review the plans at any time. In addition, this proposed rule change is in direct response to a corresponding change in the federal regulations. These changes were made in recognition of the fact that district TSES plans are meant to be living, breathing documents, continually undergoing updates and changes to reflect new research, new knowledge in the field, and new district policies. Given that fact, it simply is not feasible to require every district to submit their plans to the Department, because the districts would either end up sending in multiple updates wasting paper and administrative time, or would stop updating their TSES plans.

However, it is reasonable for districts to be required to prepare and maintain a TSES plan, even though they no longer need to submit it to the Department. Districts still must maintain policies and procedures that are consistent with state policies and procedures established under federal special education laws and regulations. *See* 34 C.F.R. § 300.201. Maintaining the existing TSES system is the least disruptive way to continue to require that districts demonstrate they have these required policies and procedures in place. In addition, districts are required to make available to parents of children with disabilities and to the general public the district's policies and procedures central to their eligibility under federal Part B special education provisions. *See* 34 C.F.R. § 300.212; Therefore, each district must make those policies and procedures available to parents and to the public. A TSES plan is a comprehensive and concise way of making those policies and procedures accessible to all who need or should have access to the district's policies and procedures: Parents and the general public; the Department for compliance monitoring and other purposes; and district staff.

Pursuant to federal regulation, LEAs must maintain policies and procedures that govern the entire range of special education provisions. *See* 34 C.F.R. § 300.201. In order to clarify that districts must maintain all required policies and procedures, including but not limited to those that have been listed here in 3525.1100 for additional emphasis, the language "among its other provisions" was added to the rule.

A. Child study procedures for the identification and evaluation of ~~students~~ children or other persons suspected of having a disability beginning at birth that include a plan for receiving referrals from parents, physicians, private and public programs, and health and human services agencies.

B. Method of providing the special education services for the identified ~~pupils~~ children. The district shall have, as part of the district's TSES plan, a description of the full range of available educational service alternatives. The district's TSES plan shall include:

[For text of subitems (1) and (2), see M.R.]

MDLC submitted comments suggesting that Item B be changed slightly to clarify that the district TSES plan must specify methods for providing services to children beginning at birth, to be consistent with Minnesota's birth mandate. The Department declines to make this change. The Department is not proposing a change to the TSES rule that would alter the state's current birth mandate approach, so this rule will continue to apply just as it always has.

[For text of items C and D, see M.R.]

E. Interagency agreements the district has entered. ~~The commissioner shall approve or implement appropriate procedures for modification of the district plan. The commissioner shall grant the district a reasonable time to make necessary modifications when the commissioner receives a satisfactory corrective action plan that complies with standards for the education of pupils.~~

This provision is out of place; the commissioner's duties related to ensuring that districts carry out all pertinent special education requirements, including the creation and maintenance of the TSES plan, are addressed in Subpart 1. Therefore, the Commissioner's role in the modification process is now addressed in Subpart 1.

F. Policy describing the district's procedures for implementing the use of ~~conditional~~ regulated interventions with ~~pupils~~ children. Policies must be reviewed regularly and shall include, at a minimum, the following components:

The change in this Subpart from the term "conditional interventions" to "regulated interventions" is proposed for consistency in terminology. Proposed rules 3525.0850 through 3525.0870 use the term "regulated intervention" to refer to the use of an aversive or deprivation procedure that is not otherwise prohibited.

(1) ongoing personnel development activities for all staff, contracted personnel, and volunteers who work with ~~pupils~~ children with disabilities that:

[For text of units (a) to (c), see M.R.]

(d) provide an awareness of specific cautions for the use of conditional procedures with specific populations of ~~pupils~~ children or for the use of certain procedures; and

[For text of unit (e), see M.R.]

[For text of subitems (2) and (3), see M.R.]

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

The Department received a comment from Robert Watters, Executive Director of Crisis Prevention Institute, Inc. (CPI), commending the proposed rules because they "show a commitment to the quality of care for students in special education settings in the state of Minnesota." Watters commented that these proposed personnel development rules address many of same training and personnel development activities that CPI recommends for staff working with children with disabilities, and particularly commended the Department's proposed rules for their efforts to reduce the use of regulated interventions by promoting the use of positive approaches and supports, adding that "[t]his will help to ensure that students are taught in the least restrictive environment and not subject to unnecessary regulated interventions."

3525.1310 STATE AID FOR SPECIAL EDUCATION PERSONNEL.

Salaries for essential personnel who are teachers and related services and support services staff members are reimbursable for the following activities:

A. child find and ~~pupil~~ child identification;

[For text of item B, see M.R.]

C. evaluation, progress reporting, and IEP planning for individual ~~pupils~~ children;

D. instruction or related and support services to ~~pupils~~ children who have an IEP;

E. parental involvement and due process;

F. school psychological services and school social worker services provided for ~~pupils~~ children identified as emotional or behavioral disordered according to part 3525.1329 alone or in conjunction with the instructional program outlined in any ~~pupil's~~ child's IEP;

G. other related services provided in conjunction with the instructional program as outlined in a ~~pupil's~~ child's IEP;

[For text of items H to J, see M.R.]

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1325 AUTISM SPECTRUM DISORDERS (ASD).

Subpart 1. **Definition.** "Autism spectrum disorders (ASD)" means a range of pervasive developmental disorders, with onset in childhood, that adversely affect a ~~pupil's~~ child'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. These core features may present themselves in a wide variety of combinations that range from mild to severe, and the number of behavioral indicators present 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.

Subp. 3. **Criteria.** A multidisciplinary team shall determine that ~~pupil~~ child is eligible and in need of special education instruction and related services if the ~~pupil~~ child meets the criteria in items A and 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). The team must document that the ~~pupil~~ child demonstrates patterns of behavior described in at least two of these subitems, one of which must be subitem (1).

The behavioral indicators demonstrated must be atypical for the ~~pupil's~~ child's developmental level. The team shall document behavioral indicators 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.

[For text of subitems (1) to (3), see M.R.]

B. The team shall document and summarize in an evaluation report that ASD adversely affects a ~~pupil's~~ child's performance and that the ~~pupil~~ child is in need of special education instruction and related services. Documentation must include:

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

(2) observations of the ~~pupil~~ child in two different settings, on two different days; and

(3) a summary of the ~~pupil's~~ child's developmental history and behavior patterns.

[For text of subp 4, see M.R.]

Subp. 5. **Implementation.** ~~Pupils~~ Children with various educational profiles and related clinical diagnoses may meet the criteria of ASD under subpart 3. However, a clinical or medical diagnosis is not required for a ~~pupil~~ child to be eligible for special education services, and even with a clinical or medical diagnosis, a ~~pupil~~ child must meet the criteria in subpart 3 to be eligible.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1327 DEAF-BLIND.

Subpart 1. **Definition and criteria.** "Deaf-blind" means medically verified visual loss coupled with medically verified hearing loss that, together, interfere with acquiring information or interacting in the environment. Both conditions need to be present simultaneously, and the ~~pupil~~ child must meet the criteria for both visually impaired and deaf and hard of

hearing to be eligible for special education and services under this category.

Subp. 2. **~~Pupils~~ Children at risk.** ~~Pupils~~ Children at risk of being deaf-blind include ~~pupils~~ children who:

[For text of items A to E, see M.R.]

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1329 EMOTIONAL OR BEHAVIORAL DISORDERS.

[For text of subpart 1, see M.R.]

Subp. 2a. **Criteria.** A ~~pupil~~ child is eligible and in need of special education and related services for an emotional or behavioral disorder when the ~~pupil~~ child meets the criteria in items A to C.

A. A ~~pupil~~ child must demonstrate an established pattern of emotional or behavioral responses that is described in at least one of the following subitems and which represents a significant difference from peers:

[For text of subitems (1) to (3), see M.R.]

B. The ~~pupil's~~ child's pattern of emotional or behavioral responses adversely affects educational performance and results in:

[For text of subitems (1) and (2), see M.R.]

C. The combined results of prior documented interventions and the evaluation data for the ~~pupil~~ child must establish significant impairments in one or more of the following areas: intrapersonal, academic, vocational, or social skills. The data must document that the impairment:

(1) severely interferes with the ~~pupil's~~ child's or other students' educational performance;

[For text of subitems (2) and (3), see M.R.]

Subp. 3. **Evaluation.**

A. The evaluation findings in subpart 2a must be supported by current or existing data from:

[For text of subitems (1) to (4), see M.R.]

(5) interviews with parent, ~~pupil~~ child, and teacher;

[For text of subitems (6) to (8), see M.R.]

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, subitems (2) and (3). The evaluation process must show developmentally significant impairments in self-care, social relations, or social or emotional growth, and must include data from each of the following areas: two or more systematic observations, including one in the home; a case history, including medical, cultural, and developmental information; information on the ~~pupil's~~ child's cognitive ability, social skills, and communication abilities; standardized and informal interviews, including teacher, parent, caregiver, and child care provider; and standardized adaptive behavior scales.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1331 DEAF AND HARD OF HEARING.

[For text of subpart 1, see M.R.]

Subp. 2. **Criteria.** A ~~pupil~~ child who is deaf or hard of hearing is eligible for special education instruction and related services if the ~~pupil~~ child meets one of the criteria in item A and one of the criteria in item B, C, or D.

A. There is audiological documentation provided by a certified audiologist that a ~~pupil~~ child has one of the following:

[For text of subitems (1) to (4), see M.R.]

B. The ~~pupil's~~ child's hearing loss affects educational performance as demonstrated by:

[For text of subitems (1) and (2), see M.R.]

C. The ~~pupil's~~ child's hearing loss affects the use or understanding of spoken ~~English~~ language as documented by one or both of the following:

(1) under the ~~pupil's~~ child's typical classroom condition, the ~~pupil's~~ child's classroom interaction is limited as measured by systematic observation of communication behaviors; or

(2) the ~~pupil~~ child uses American Sign Language or one or more alternative or augmentative systems of communication alone or in combination with oral language as documented by parent or teacher reports and language sampling conducted by a professional with knowledge in the area of communication with persons who are deaf or hard of hearing.

D. The ~~pupil's~~ child's hearing loss affects the adaptive behavior required for age-appropriate social functioning as supported by:

(1) documented systematic observation within the ~~pupil's~~ child's primary learning environments by a licensed professional and the ~~pupil~~ child, when appropriate; and

[For text of subitem (2), see M.R.]

This change is necessary because it is not inclusive of non-English speaking families and reflects the reality that Minnesota's students have differing home primary languages. The change is reasonable because it is inappropriate to define deafness based upon a child's understanding solely of spoken English as opposed to a child's understanding of any spoken language. While it is true that the entirety of the current sentence makes clear that it is the child's "hearing loss" which affects the understanding of spoken English, the new language is inclusive in the same way as the language in Subitem (2) which discusses "American Sign Language or one or more alternative or augmentative systems of communication alone or in combination with oral language…"

3525.1333 DEVELOPMENTAL COGNITIVE DISABILITY.

[For text of subpart 1, see M.R.]

Subp. 2. **Criteria.** The team shall determine that a ~~pupil~~ child is eligible as having a DCD and is in need of special education instruction and related services if the ~~pupil~~ child meets the criteria in items A and B.

A. The ~~pupil~~ child demonstrates below average adaptive behavior in school and home, and, if appropriate, community environments. For the purposes of this item, "below average" means:

[For text of subitem (1), see M.R.]

(2) documentation of needs and the 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:

[For text of units (a) to (f), see M.R.]

(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~~ child self-report.

B. The ~~pupil~~ child demonstrates significantly below average general intellectual functioning 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:

[For text of subitems (1) and (2), see M.R.]

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1335 OTHER HEALTH DISABILITIES.

Subpart 1. **Definition.** "Other health 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 health conditions that adversely affect a ~~pupil's~~ child's educational performance.

Subp. 2. **Criteria.** The team shall determine that a ~~pupil~~ child is eligible and in need of special education instruction and services if the ~~pupil~~ child meets the criteria in items A and B.

[For text of item A, see M.R.]

B. In comparison with peers, the health condition adversely affects the ~~pupil's~~ child's ability to complete educational tasks within routine timelines as documented by three or more of the following:

[For text of subitems (1) to (8), see M.R.]

Subp. 3. **Evaluation.** The health condition results in a pattern of unsatisfactory educational progress as determined by a comprehensive evaluation documenting the required components of subpart 2, items A and B. The eligibility findings must be supported by current or existing data from items A to E:

A. an individually administered, nationally normed standardized evaluation of the ~~pupil's~~ child's academic performance;

B. documented, systematic interviews conducted by a licensed special education teacher with classroom teachers and the ~~pupil's~~ child's parent or guardian;

[For text of item C, see M.R.]

D. a review of the ~~pupil's~~ child's health history, including the verification of a medical diagnosis of a health condition; and

E. records review.

The evaluation findings may include data from: an individually administered, nationally normed test of intellectual ability; an interview with the ~~pupil~~ child; information from the school nurse or other individuals knowledgeable about the health condition of the ~~pupil~~ child; 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.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1337 PHYSICALLY IMPAIRED.

[For text of subpart 1, see M.R.]

Subp. 2. **Criteria.** A ~~pupil~~ child is eligible and in need of special education instruction and services if the ~~pupil~~ child meets the criterion in item A and one of the criteria in item B.

A. There must be documentation of a medically diagnosed physical impairment.

B. The ~~pupil's~~ child's:

[For text of subitems (1) and (2), see M.R.]

(3) physical impairment interferes with educational performance as shown by an achievement deficit of 1.0 standard deviation or more below the mean on an individually administered, nationally normed standardized evaluation of the ~~pupil's~~ child's academic achievement.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1339 SEVERELY MULTIPLY IMPAIRED.

Subpart 1. **Definition.** "Severely multiply impaired" means a ~~pupil~~ child who has severe learning and developmental problems resulting from two or more disability conditions determined by an evaluation as defined by ~~part 3525.2710~~ Code of Federal Regulations, title 34, sections 300.300 to 300.306.

Subp. 2. **Criteria.** The team shall determine that a ~~pupil~~ child is eligible as being severely multiply impaired if the ~~pupil~~ child meets the criteria for two or more of the following disabilities:

[For text of items A to F, see M.R.]

The reference to Minn. R. 3525.2710 is being stricken because the Department is proposing its repeal. The relevant sections of the Code of Federal Regulations are 34 C.F.R. § 300.300 through 300.306 and are cited here in place of Minn. R. 3525.2710.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1341 SPECIFIC LEARNING DISABILITY.

The Department proposes multiple technical edits, changes and additions to Minnesota Rules, part 3525.1341 to align with the federal Individuals with Disabilities Education Improvement Act (IDEA). The amendments and technical changes described below are necessary to ensure that children with a specific learning disability are appropriately evaluated and identified in accordance with IDEA. The proposed rule aligns with the new changes in IDEA requirements for SLD evaluation and identification. The proposed rule will assist the field in the appropriate identification of children suspected of having a specific learning disability, and it will prevent the misidentification of children with low achievement that may be attributed to factors other than those related to a specific learning disability.

The reauthorization of IDEA and the final regulations issued in August 2006 required changes in the state specific learning disability (SLD) criteria in Minnesota Rule 3525.1341 in order to align with the new regulations. Alignment of the federal regulations and Minnesota Rule 3525.1341 is accomplished through the proposed rule.

A Specific Learning Disability Workgroup (workgroup) was convened to make recommendations for the revised criteria. Some members recommended language consistent with federal regulations. Others indicated a preference that federal regulation language be kept out of state rules. Throughout the rule revision process, the Department drafted rules consistent with the IDEA regulations. In keeping with this philosophy, the Department used federal language in this part wherever possible.

The proposed rule provides flexibility in determinations of eligibility for specific learning disability with the severe discrepancy option that currently exists and with a new option which uses data from a child's response to scientific, research-based interventions (SRBI). This flexibility in a specific learning disability determination is necessary given current capacity that exists within the state to develop and implement new SRBI models as well as some inherent limitations in the models available.

There are four Subparts in the revised SLD section of the proposed rules. Subpart 1 contains the definition of the disorder. Subpart 2 contains criteria. Subpart 3 deals with determination and has been reorganized to follow the structure of the federal regulations. Subpart 4 is verification, a new section that combines current rule with the requirements for SRBI process documentation.

Subpart 1. **Definition.** "Specific learning disability" means ~~a condition within the pupil affecting learning, relative to potential and:~~ disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the

imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

The disorder is:

A. manifested by interference with the acquisition, organization, storage, retrieval, manipulation, or expression of information so that the ~~pupil~~ child does not learn at an adequate rate for the child's age or to meet state-approved grade-level standards when provided with the usual developmental opportunities and instruction from a regular school environment; and

~~B. demonstrated by a significant discrepancy between a pupil's general intellectual ability and academic achievement in one or more of the following areas: oral expression, listening comprehension, mathematical calculation or mathematics reasoning, basic reading skills, reading comprehension, and written expression; and~~

~~C.~~ B. demonstrated primarily in academic functioning, but may also affect ~~self-esteem, career development~~ other developmental, functional, and life adjustment ~~skills. A specific learning disability~~ skill areas; and may occur with, but cannot be primarily the result of: visual, hearing, or motor impairment; cognitive impairment; emotional disorders; or environmental, cultural, economic influences, ~~or a history of an inconsistent education program~~ limited English proficiency or a lack of appropriate instruction in reading or math.

The language inserted at Subpart 1 is directly taken from 34 C.F.R. § 300.8(c)(10). Item A is language that is maintained from Minnesota's current SLD rule. Maintaining this language is reasonable because it further explains the meaning of specific learning disability and does not conflict with the federal regulations. The Department proposes to add language from the federal regulations at 34 C.F.R. § 300.309 that serves to further clarify the definition to include the fact that the disorder manifests itself as a failure of a child to learn at an adequate rate for the child's age or to meet state-approved grade-level standards.

The Department proposes to strike Item B because the standard of a severe discrepancy between intellectual ability and achievement must not be required by the SEA to determine SLD according to federal law. *See* 34 C.F.R. § 300.307(a)(1). Severe discrepancy may be considered as an optional component when determining whether a child has a specific learning disability. This option has been moved to the Criteria section of this rule.

The language in Item C has been retained from the current rule but with the addition of new federal requirements for determining SLD found at 34 C.F.R. § 300.309. Federal law states that SLD cannot be the result of limited English proficiency or a lack of appropriate instruction in reading or math. *See* 34 C.F.R. §§ 300.306 and 300.309. There are minor terminology differences between this rule and the federal regulations due to Minnesota's choices in other rules. For example, Minnesota uses the term "developmental cognitive disability" instead of "mental retardation."

The proposed Subpart 2 is reorganized in order to meet all components of the new regulations. There are two options to meet the requirements of the criteria section: A, B, and C or A, B, and D. Option one, Subpart 2, A, B, and C exist in current criteria. The other option is Subpart 2, A, B, and D, the response to SRBI, reflected in the new IDEA regulations.

Subp. 2. **Criteria.** A ~~pupil has a specific learning disability~~ child is eligible and ~~is~~ in need of special education and related services for a specific learning disability when the ~~pupil~~ child meets the criteria in items A, B, and C or in items A, B, and D. Information about each item must be sought from the parent and must be included as part of the evaluation data. The child must receive two interventions prior to evaluation as defined in Minnesota Statutes, section 125A.56. The evaluation data must confirm that the ~~disabling~~ effects of the ~~pupil's~~ child's disability occur in a variety of settings.

The 2004 reauthorization of the Individuals with Disabilities Education Improvement Act (IDEA) requires that states adopt new criteria for determining whether a child has a specific learning disability. *See* 34 C.F.R. § 300.307. The criteria must be consistent with the components for making that determination that are found in IDEA. *See* 34 C.F.R. § 300.309.

As required by 34 C.F.R. § 300.307, the SLD eligibility criteria adopted by the State:

- Must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether the child has a specific learning disability, as defined in 34 C.F.R. § 300.8(C)(10), and
- Must permit the use of a process based on the child's response to SRBI, and
- May permit the use of other alternative research-based procedures.

A significant concern was raised in the stakeholder group about the limited number of scientifically, research-based instruction and intervention models, and that those models primarily cover the content area of reading skills. SRBI is an emerging educational initiative and more models are rapidly being designed. Meanwhile, this concern is addressed by maintaining the current severe discrepancy option.

The overall structure of the proposed rule is designed to provide two options for meeting eligibility. This flexibility is important for a number of reasons:

- Most estimates in the literature estimate that it takes 3-7 years to develop and implement a broad scale system of SRBI (NASDSE, 2006) that is required in order to support Subpart 2 D, the scientific, research-based procedures option.
- For Minnesota local education agencies (LEAs) which implement such systems, there are often content area or grade level limitations to the models that they use.
- There are a number of students for whom the resident LEA has responsibility, but does not control the general curriculum, such as students in a non-public education setting. In such an instance, it may not be possible to implement the evaluation process outlined in Subpart 2, Item D, the scientific, research-based intervention option.

The options in the proposed rule fulfill the requirements of 34 C.F.R. § 300.309(a). Both of the options in the proposed rule address the criteria in Subparts 2 and 3 and provide documentation of student needs as required by 34 C.F.R. § 300.309(a).

A commenter stated that it would be helpful to reference Minnesota Statutes § 125A.56, which defines the requirement of two prereferral interventions prior to evaluation for special education eligibility, in order to make clear that these interventions must still be performed. The Department has added this reference. This statute was revised during the 2007 legislative session and updated to align its language with IDEA and NCLB in terms of scientific, research-based instruction and intervention. In response to the comment, a sentence was added to Subpart 2 to clarify that prereferral interventions apply to both options for eligibility (A, B and C or A, B and D).

A commenter recommended a requirement, prior to a special education evaluation, for the district to inform the parents and to obtain prior written consent related to which eligibility option (A, B and C or A, B, and D) would be used and what the timeline for evaluation would be. The evaluation requirements (including timelines, components of an evaluation, and parent consent) are already covered by existing evaluation laws.

Subpart 2, Item A addresses the first section of the criteria, which is that the child must demonstrate inadequate achievement.

A. The ~~pupil must demonstrate severe underachievement~~ child does not achieve adequately in one or more the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, reading fluency, mathematics calculation, or mathematical problem solving, in response to ~~usual~~ appropriate classroom instruction~~. The performance measures used to verify this finding must be both representative of the pupil's curriculum and useful for developing instructional goals and objectives. The following evaluation procedures are required at a minimum to verify this finding:~~, and either:

(1) ~~evidence of low achievement from, for example, cumulative record reviews, classwork samples, anecdotal teacher records, formal and informal tests, curriculum based evaluation results, and results from instructional support programs such as Chapter 1 and Assurance of Mastery; and~~ the child does not make adequate progress to meet age or state-approved grade-level standards in one or more of the areas listed above when using a process based on the child's response to scientific, research-based intervention; or

(2) ~~at least one team member other than the pupil's regular teacher shall observe the pupil's academic performance in the regular classroom setting. In the case of a child served through an Early Childhood Special Education program or who is out of school, a team member shall observe the child in an environment appropriate for a child of that age~~ the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability.

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

The Department proposes to add federal language from 34 C.F.R. § 300.309(a)(1) to the criteria element formerly known as "severe underachievement." The federal regulations do not require a specific degree of severity for a child's underachievement in order to qualify as SLD, but instead add one of either two qualifiers to narrow the definition. In addition to demonstrating inadequate achievement when provided with appropriate instruction, a child must either make inadequate progress in response to scientific, research-based intervention or exhibit a pattern of strengths and weaknesses in certain areas that the SLD determination group finds relevant.

The language regarding performance measures and evidence of low achievement, stricken at Item A and in Subitem (1), has been moved to a separate paragraph following Subitem (2). While not required by federal law, this language continues to be useful to the field when developing goals and objectives for children.

The observation requirement, stricken at Subitem (2), has been moved to Subpart 3, Item A.

A question was raised in the stakeholder group about the definition of and examples of "targeted support programs in general education" found in the paragraph following Subitem (2). Examples include Title 1 programs or the Assurance of Mastery Program under Minnesota Statutes § 124D.66.

Subpart 2, Item B addresses the second section of the criteria, which is that the child has an information processing condition that is manifested in a variety of settings.

B. ~~The pupil must demonstrate a severe discrepancy between general intellectual ability and achievement in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, mathematical calculation, or mathematical reasoning. The demonstration of a severe discrepancy shall not be based solely on the use of standardized tests. The team shall consider these standardized test results as only one component of the eligibility criteria. The instruments used to assess the pupil's general intellectual ability and achievement must be individually administered and interpreted by an appropriately licensed person using standardized procedures. For initial placement, the severe discrepancy must be equal to or greater than 1.75 standard deviations below the mean of the distribution of difference scores for the general population of individuals at the pupil's chronological age level~~ The child has a disorder in one or more of the basic psychological processes and includes an information processing condition that is manifested in a variety of settings by behaviors such as: inadequate or lack of expected acquisition of information, lack of organizational skills, for example, following written and oral directions; spatial arrangements; correct use of developmental order in relating events; transfer of information onto paper; visual and auditory memory; verbal and nonverbal expression; and motor control for written tasks such as pencil and paper assignments, drawing, and copying.

The language here at Subpart 2, Item B was moved from the current rule Minn. R. 3525.1341, subp. 2, Item C. There is a change to the current rule language with the addition of the introductory phrase, "[t]he child has a disorder in one or more of the basic psychological processes and includes…" The federal definition of SLD states that it is a "disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written…" Minnesota has traditionally used the term "information processing condition" to mean the same thing as the more lengthy federal terminology. To make this connection clear, the Department proposes to add this introductory phrase.

In addition, there are minor language differences between the current rule and the proposed rule that reflect current terminology used in the field.[17]

Subpart 2, Item C addresses the third section of the criteria: severe discrepancy between intellectual ability and achievement.

C. ~~The team must agree that it has sufficient evaluation data that verify the following conclusions:~~

~~(1) The pupil has an information processing condition that is manifested by behaviors such as: inadequate or lack of expected acquisition of information, lack of organizational skills, for example, following written and oral directions; spatial arrangements; correct use of developmental order in relating events; transfer of information onto paper; visual and auditory memory; verbal and nonverbal expression; and motor control for written tasks such as pencil and paper assignments, drawing, and copying;~~

~~(2) the disabling effects of the pupil's information processing condition occur in a variety of settings; and~~

~~(3) the pupil's underachievement is not primarily the result of: visual, hearing, or motor impairment; developmental cognitive disabilities; emotional or behavioral disorders; environmental, cultural, or economic influences; or a history of inconsistent educational programming.~~ The child demonstrates a severe discrepancy between general intellectual ability and achievement in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skills, reading comprehension, reading fluency, mathematics calculation, or mathematical problem solving. The demonstration of a severe discrepancy shall not be based solely on the use of standardized tests. The group shall consider these standardized test results as only one component of the eligibility criteria. The instruments used to assess the child's general intellectual ability and achievement must be

[17] "The Double-Deficit Hypothesis for the Developmental Dyslexias," Wolf and Bowers, 91 Journal of Educational Psychology, 415-438 (1999); "Is Working Memory Still Working?" Baddeley, 56 American Psychologist, 851-864 (2001); "Brain Literacy for Educators and Psychologists," Berninger and Richards, Guilford Press (2002); "Overcoming Dyslexia," S. Shaywitz, Alfred Knopf, N.Y. (2003); "Implementation of IDEA: Integrating Response to Intervention and Cognitive Assessment Methods," Hale, Kaufman, Naglieri, Kavale, Psychology in the Schools vol. 43 (2006); Journal of Learning Disabilities 39(3), 252-269, Swanson, Howard, Saez (2006).

individually administered and interpreted by an appropriately licensed person using standardized procedures. For initial placement, the severe discrepancy must be equal to or greater than 1.75 standard deviations below the mean of the distribution of difference scores for the general population of individuals at the child's chronological age level.

The language here at Subpart 2, Item C was moved from the current rule Minn. R. 3525.1341, subp. 2, Item B. There are minor terminology changes from the old Minnesota SLD rule at part 3525.1341, subp. 2, Item B. To align with federal law, the Department deleted the terms "mathematical calculation" and "mathematical reasoning" and replaced them with terms "mathematics calculation" and "mathematical problem solving." The term "reading fluency" was also added to mirror federal language.

Subpart 2, Item C, Subitem (3), which lists other factors that can influence underachievement, commonly referred to as exclusionary factors, has been moved to a new Subpart 3, Item C, Subitem (2).

Subpart 2, Item D addresses the fourth section of the criteria, regarding scientific, research-based interventions.

D. The child demonstrates an inadequate rate of progress. Rate of progress is measured over time through progress monitoring while using intensive scientific, research-based interventions (SRBI), which may be used prior to a referral, or as part of an evaluation for special education. A minimum of 12 data points are required from a consistent intervention implemented over at least seven school weeks in order to establish the rate of progress. Rate of progress is inadequate when:

(1) rate of improvement is minimal and continued intervention will not likely result in reaching age or state-approved grade-level standards;

(2) progress will likely not be maintained when instructional supports are removed;

(3) the child's level of performance in repeated assessments of achievement falls below the child's age or state-approved grade-level standards; and

(4) the level of achievement must be at or below the fifth percentile on one or more valid and reliable achievement tests using either state or national comparisons. Local comparison data that is valid and reliable may be used in

addition to either state or national data. If local comparison data is used and differs from either state or national data, the group must provide a rationale to explain the difference.

This is a new section of criteria, added to meet the IDEA regulations requirements that the use of a process based on the child's response to SRBI must be permitted. Measurement of the rate of progress implements this requirement. The main issues addressed below which arise from this section are rate of progress, the timeframes for measurement, and the percentage for eligibility cutoff.

There is a developing field of research regarding the use of scientific, research-based instruction and interventions. There is no consensus in the field on specific models, absolute measurement, and who or what determines what is scientific and research-based. The proposed rule in this section reflects a reasonable approach to using SRBI as part of a comprehensive evaluation for special education eligibility.

A concern was raised by a member of the stakeholder group regarding the use of terms "research-based procedures" and "scientific, research-based interventions." These terms are included because they are used by IDEA and NCLB.

A significant challenge in implementing SRBI is the tension between what is enough data to establish a valid response or lack of response to SRBI and at what point is a disability suspected, which would require an evaluation for eligibility determination. These challenges were affirmed by comments from members of the stakeholder group. One concern was whether the use of SRBI could be used to delay a special education evaluation. Another concern was raised about whether a parent could "shortcut" the A, B, and D option by requesting a determination using the A, B and C option. Parents can request a special education evaluation at any time. No parental rights are created or lost by the insertion of this new language.

The child's rate of progress is an important concept in this section. Measuring the rate of progress allows the group to make an inference about the effectiveness of interventions that have been implemented and what is an inadequate response to an intervention, and thus move the child to a more intensive intervention or to a referral for special education evaluation if necessary.

A question was raised by a member of the stakeholder group about the need for information on sequencing of interventions and timelines necessary for districts to implement the combination of Items A, B and D. There is flexibility at the local level for the sequencing of SRBI interventions within the framework of the timelines outlined in the rule.

In this Subpart, the requirement is to establish an inadequate rate of progress. In order to make a decision about the rate of progress, a sufficient amount of data collected over time is required to make the comparison of the child's expected progress to expectations for the grade level. In order to form a sufficient data base, the Department has chosen the requirement of a minimum of 12 data points over at least 7 school weeks using a single intervention. That is, while multiple interventions may be tried, at least one must have been used for at least seven weeks.

The requirement for a minimum of 12 data points over at least 7 weeks comes from a synthesis of numerous articles, presentations and manuals that address measuring response to scientific, research-based interventions (Johnson and Mellard, 2006; McCook, 2006; Batsche, et al, 2005). The numbers do not represent an absolute consensus in the field, as such a consensus does not currently exist. Rather, it represents numbers that are within the current range of practice. These numbers help to establish the minimal amount of data required in order to make judgments about the effectiveness of an intervention and about the rate of progress of an individual child. Setting a consistent standard for the minimal amount of data required to determine rate of progress also helps assure consistency within the state.

There were concerns raised in the stakeholder group that the 7 school week timeline in Subpart 2, Item D does not align with the 30 day timeline for an evaluation, spelled out in Minn. R. 3525.2550. Subpart 2, Item D, explains that the process may begin prior to referral for special education. If an LEA is implementing a system of scientific, research-based instruction and interventions, all students are screened regularly in such a system, typically three times per year. Children who have low performance on a screening measure are provided additional support, such as small group instruction using SRBI. Based on a lack of response to an intervention or to multiple interventions, or if a disability is suspected, a referral is made for a special education evaluation. The research-based procedures as well as the referral for evaluation can be in any of the special education categorical disability areas, and is not limited to specific learning disabilities. Therefore, data may have been gathered before a formal evaluation began that can be used to meet the 7 week requirement.

There was a question raised in the stakeholder group related to whether Subpart 2, Item D implies that referral and evaluation are equivalent processes. The rule does not equate referral and evaluation. The proposed rule in Subpart 2, Item D states that interventions that were started prior to referral for SLD eligibility determination can be continued during the evaluation timeline, as part of the comprehensive evaluation. In addition, the parent and the district may extend the timeline for an initial evaluation upon mutual written agreement. *See* 34 C.F.R. § 300.309.

A concern was raised by a member of the stakeholder group regarding the use of the term "data points" in Subpart 2, Item D. The term "data points" is commonly used in the literature and refers to the measurement of student progress using curriculum-based measures. Each measurement equals a data point that is recorded and is used to analyze student progress. These data are measured according to uniform protocols to determine whether a student is or is not adequately responding to an intervention (Johnson, Mellard, Fuchs and McKnight, 2006).

One commenter felt that in addition to a defined minimum time length for data collection, an outside limit should also be set. That is, a district should not be able to collect data points indefinitely. The standard in the rule applies to the minimum amount of data needed in order to make a reliable judgment about the rate of progress. Given the range of interventions and the number of individual variables that go into determining an appropriate amount of time, it is not reasonable to define a maximum amount of data or time within this rule. Parents have the right to request an evaluation for special education at any time. As required in Subpart 4 below, districts

must explicitly define their timelines. A district's SRBI plan must communicate this information to parents through the TSES.

In general, the literature supports the need for progress to be monitored twice a week for between 6 and 12 weeks (Burns, Deno, and Jimerson, 2007; Christ, 2006; Burns, Appleton, and Stehouwer, 2005). Given the possible range for progress monitoring, a minimal level of at least 12 data points over at least seven weeks was selected for the proposed rule. This minimum standard falls within the range identified in the literature and establishes a consistent threshold for SLD eligibility determination across Minnesota.

Although there was no specific comment by any stakeholders, there may be questions about the use of the 5th percentile in Item D, Subitem (3). It is important to note that the 5th percentile is just one of the components of this section, however this figure is supported by studies.[18] The Minnesota Responsiveness to Intervention (RTI) Task Force reached consensus on an outline for an RTI model that uses the 5th percentile as the level at which interventions may need to be further individualized.[19] The number of children at or below the 5th percentile on one or more valid and reliable tests of achievement may also include a number of children already identified with other disabilities. Also identified may be children who are excluded by the factors in Subpart 4, Item B and therefore are not children with a specific learning disability. In determining the 5th percentile, it is important to use state or national data as a comparison in order to insure consistency in identification from district to district. Additional local data may also be used if the local data are valid and reliable.

One commenter wanted more specificity regarding reaching age or state-approved grade-level standards. State level standards are defined elsewhere in rule and statute and therefore, the Department declines to repeat them here. To do so would unnecessarily lengthen an already lengthy rule.

One commenter noted the importance of using local data if it is valid and reliable. There are two concerns in this area. First, many local districts do not have valid and reliable local norms. Second, there may be large district-to-district differences if local norms are exclusively used. For example, a student in the 5th percentile in one district may be in the 10th percentile in a neighboring district. The Department believes that a rule that utilizes state or national comparison data will be the most consistent and reliable for identifying children with SLD. If there are differences among national, state and local data, and a district wishes to use local data, then the differences need to be explained and justified by the group.

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[18] See, e.g., "Responsiveness-To-Intervention: A Blueprint for Practitioners, Policymakers, and Parents," Fuchs and Fuchs (2001); "Responsiveness to Intervention," Mountain Plains Regional Resource Center (2004); "Recognition and Response: An Early Intervening System for Young Children At-Risk for Learning Disabilities," Coleman, Buysse, and Neitzel (2006); "Response to Intervention: NASDE and CASE White Paper on RTI, " Nat'l Ass'n of State Directors of Special Education, Inc. and Council of Administrators of Special Education (May 2006); "A White Paper on Strategies for Implementing an Effective Response-to-Intervention (RTI) Model," Handrigan (2007); "RTI Goes to Pre-K," FPG Child Development Institute (2007).

[19] http://education.state.mn.us/mdeprod/groups/SpecialEd/documents/Announcement/009253.pdf

A strong recommendation for the future from the workgroup was that there be a specific rule or statute that defines the process used to implement SRBI, such as the problem solving process or the standard protocol process. A problem solving process describes a general process to implement scientific, research-based instruction and interventions (Batsche, et.al, 2005; McCook, 2006). The workgroup gathered information and draft language that may be helpful in further defining this process in the future, but is not included as part of SLD criteria. The problem solving process is neither specific nor limited in application to students suspected as having a specific learning disability, so it would be inappropriate to define the entire problem solving process or other processes as part of the specific learning disabilities criteria. In essence, this would be equivalent to having a process that has implications for all students in education being defined in a rule that defines one category of disability currently impacting approximately 3.5% of the general population in Minnesota.

Subp. 3. **Determination of specific learning disability.** In order to determine that the criteria for eligibility in subpart 2 are met, documentation must include:

A. an observation of the child in the child's learning environment, including the regular classroom setting, that documents the child's academic performance and behavior in the areas of difficulty. For a child of less than school age or out of school, a group member must observe the child in an environment appropriate to the child's age. In determining whether a child has a specific learning disability, the group of qualified professionals, as provided by Code of Federal Regulations, title 34, section 300.308, must:

(1) use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for a special education evaluation; or

(2) conduct an observation of academic performance in the regular classroom after the child has been referred for a special education evaluation and appropriate parental consent has been obtained; and

(3) document the relevant behavior, if any, noted during the observation and the relationship of that behavior to the child's academic functioning;

B. a statement of whether the child has a specific learning disability;

C. the group's basis for making the determination, including that:

(1) the child has a disorder, across multiple settings, that impacts one or more of the basic psychological processes described in subpart 1 documented by information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and

(2) the child's underachievement is not primarily the result of visual, hearing, or motor impairment; developmental cognitive disabilities; emotional or behavioral disorders; environmental, cultural, or economic influences; limited English proficiency; or a lack of appropriate instruction in reading or math, verified by:

(a) data that demonstrate that prior to, or as part of, the referral process, the child was provided appropriate instruction in regular education settings delivered by qualified personnel; and

(b) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of the child's progress during instruction, which was provided to the child's parents;

D. educationally relevant medical findings, if any;

E. whether the child meets the criteria in subpart 2, either items A, B, and C or items A, B, and D; and

F. if the child has participated in a process that assesses the child's response to SRBI, the instructional strategies used and the child-centered data collected, the documentation that the parents were notified about the state's policies regarding the amount and nature of child performance data that would be collected and the general education services that would be provided, strategies for increasing the child's rate of learning, and the parent's right to request a special education evaluation.

This section was reorganized to contain all of the requirements of a determination of specific learning disabilities into a single location in order to make the required components clear to parents and school personnel.

Item A is a federal requirement. *See* 34 CFR § 300.310. Some of the language has been moved from the current rule, Subpart 2, Item A, Subitem (2).

Items B and C are required by federal law. *See* 34 C.F.R. 300.311(a)(1), (2), (6), 300.306(c)(1), and 300.309(b)(1) and (2). The determination that a child has a specific learning disability must be based on information from a variety of sources. These sources include aptitude and achievement tests, parent input, teacher recommendations, and information about the child's physical condition, social or cultural background, and adaptive behavior. In addition, the exclusionary factors, formerly located in Subpart 2, Item C, Subitem (3), have been moved here. Under federal law, exclusionary factors must be verified by the information listed in Item C, under i and ii. Based on comments from MDLC and the Anoka-Hennepin School District that earlier drafts of this rule were inconsistent with federal regulations and confusing, the Department redrafted the rule to include the federal language, which more clearly states the requirements for an SLD determination.

Item D is required by 34 C.F.R. § 300.311(a)(4).

Item E is required by 34 C.F.R. § 300.311(a)(5). To be eligible for special education and services for SLD, a child must meet the state criteria in Subpart 2, Items A, B, and C or Items A, B, and D.

Item F is required by 34 C.F.R. § 300.311(7).

Subp. 4. **Verification.** Each group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the member must submit a separate statement presenting the member's conclusions.

The district's plan for identifying a child with a specific learning disability consistent with this part must be included with its total special education system (TSES) plan. The district must implement its interventions consistent with that plan. The plan should detail the specific SRBI approach, including timelines for progression through the model; any SRBI that is used, by content area; the parent notification and consent policies for participation in SRBI; and a district staff training plan.

The first paragraph of this section is the verification that is specifically required by IDEA for determinations of SLD. 34 CFR 300.311(b) states in its entirety that "[e]ach group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the member must submit a separate statement presenting the member's conclusions."

The second paragraph requires an LEA plan that provides specific details about LEA implementation of a system that utilizes scientific, research-based instruction and intervention. The plan must be part of the LEA's Total Special Education System (TSES). The plan will provide parents, district staff and the Department with the details of the LEA method for implementing a system of scientific, research-based instruction and intervention. This system must be consistent with IDEA requirements.

This second paragraph is in response to concerns that were raised by the workgroup, the stakeholder group, and through public comment. Specifically, commenters believed that this section was needed in order to assure that what was being implemented at a district level is applied consistently throughout the district.

A question was raised by the stakeholder group about where the written plan referred to in Subpart 2, Item D will be stored. In response, new language has been added to clarify that the written plan will be kept on file at the district as part of the TSES. This requirement is consistent with Minnesota Rule 3525.1100 which requires districts to maintain a TSES that explains how the district complies with all the requirements of IDEA.

A question was raised in the stakeholder group related to whether the criteria will increase the number of children eligible for services. As noted in the comment section of the federal regulations, "we do not believe these regulations will result in significant increases in the number of children identified with SLD." 71 FR 46652-46653. Similarly, the Department does not anticipate an increase in the number of children appropriately identified under the proposed rule for SLD eligibility. As a result, the Department believes the criteria itself will not have a statewide fiscal impact. However, because of the added clarity and specificity in the proposed rule, some school districts may expect additional costs related to training requirements for their staff or in the evaluation of students.

3525.1343 SPEECH OR LANGUAGE IMPAIRMENTS.

Subpart 1. **Fluency disorder; definition and criteria.** "Fluency disorder" means the intrusion or repetition of sounds, syllables, and words; prolongations of sounds; avoidance of words; silent blocks; or inappropriate inhalation, exhalation, or phonation patterns. These patterns may also be accompanied by facial and body movements associated with the effort to speak. Fluency patterns that are attributed only to dialectical, cultural, or ethnic differences or to the influence of a foreign language must not be identified as a disorder.

A ~~pupil~~ child has a fluency disorder and is eligible for speech or language special education when:

A. the pattern interferes with communication as determined by an educational speech language pathologist and either another adult or the ~~pupil~~ child; and

B. dysfluent behaviors occur during at least five percent of the words spoken on two or more speech samples.

Subp. 2. **Voice disorder; definition and criteria.** "Voice disorder" means the absence of voice or presence of abnormal quality, pitch, resonance, loudness, or duration. Voice patterns that can be attributed only to dialectical, cultural, or ethnic differences or to the influence of a foreign language must not be identified as a disorder.

A ~~pupil~~ child has a voice disorder and is eligible for speech or language special education when:

A. the pattern interferes with communication as determined by an educational speech language pathologist and either another adult or the ~~pupil~~ child; and

[For text of item B, see M.R.]

Subp. 3. **Articulation disorder; definition and criteria.**

[For text of item A, see M.R.]

B. A ~~pupil~~ child has an articulation disorder and is eligible for speech or language special education when the ~~pupil~~ child meets the criteria in subitem (1) and either subitem (2) or (3):

(1) the pattern interferes with communication as determined by an educational speech language pathologist and either another adult or the ~~pupil~~ child; and

[For text of subitem (2), see M.R.]

(3) a ~~pupil~~ child is nine years of age or older and a sound is consistently in error as documented by two three-minute conversational speech samples.

Subp. 4. **Language disorder; definition and criteria.**

[For text of item A, see M.R.]

B. A ~~pupil~~ child has a language disorder and is eligible for speech or language special education services when:

[For text of subitem (1), see M.R.]

(2) an analysis of a language sample or documented observation of communicative interaction indicates the ~~pupil's~~ child's language behavior falls below or is different from what would be expected given consideration to chronological age, developmental level, or cognitive level; and

(3) the ~~pupil~~ child scores 2.0 standard deviations below the mean on at least two technically adequate, norm-referenced language tests if available; or

[For text of subitem (4), see M.R.]

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1345 BLIND OR VISUALLY IMPAIRED.

Subpart 1. **Definition.** "Blind or visually impaired" means a medically verified visual impairment accompanied by limitations in sight that interfere with acquiring information or interaction with the environment to the extent that special education instruction and related services may be needed.

The Department was directed by the legislature to incorporate references to "blind" and "blindness" into the definition of visually impaired in this rule. 2006 Minn. Law 263, section 22.

Subp. 2. **Criteria.** A ~~pupil~~ child is eligible ~~as having a visual disability~~ and in need of special education and related services for blindness or visual impairment when the ~~pupil~~ child meets one of the criteria in item A and one of the criteria in item B:

A. medical documentation of a diagnosed visual impairment by a licensed eye specialist establishing one or more of the following conditions:

(1) visual acuity of 20/60 or less in the better eye with the best conventional correction;

(a) estimation of acuity is acceptable for difficult-to-test ~~pupils~~ children; and

(b) for ~~pupils~~ children not yet enrolled in kindergarten, measured acuity must be significantly deviant from what is developmentally age-appropriate;

[For text of subitems (2) and (3), see M.R.]

B. functional evaluation of visual abilities conducted by a licensed teacher of the blind or visually impaired that determines that the ~~pupil~~ child:

(1) has limited ability in visually accessing program-appropriate educational media and materials including, for example, textbooks, photocopies, ~~ditto copies, chalkboards~~ black boards, white boards, computers, or environmental signs, without modification;

[For text of subitems (2) to (4), see M.R.]

This change in terminology is necessary to remove the outdated terms "ditto copies" and "chalkboards." The current terminology, based on technology used in today's classrooms, is "black boards" and "white boards."

3525.1348 TRAUMATIC BRAIN INJURY (TBI).

Subpart 1. **Definition.** "Traumatic brain injury" means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that may adversely affect a ~~pupil's~~ child's educational performance and may result in the need for special education and related services. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as: cognition, speech/language, memory, attention, reasoning, abstract thinking, judgment, problem-solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, and information processing. The term does not apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.

Subp. 2. **Criteria.** The team shall determine that a ~~pupil~~ child is eligible and in need of special education and related services if the ~~pupil~~ child meets the criterion in item A and

the criteria in items B and C as documented by the information gathered according to item D:

[For text of items A to D, see M.R.]

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1350 EARLY CHILDHOOD: SPECIAL EDUCATION.

Subpart 1. **Definition.** Early childhood special education must be available to ~~pupils~~ children from birth to seven years of age who have a substantial delay or disorder in development or have an identifiable sensory, physical, mental, or social/emotional condition or impairment known to hinder normal development and need special education.

[For text of subps 2 and 3, see M.R.]

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1352 DEVELOPMENTAL ADAPTED PHYSICAL EDUCATION: SPECIAL EDUCATION.

Subpart 1. **Definition.** "Developmental adapted physical education: special education" means specially designed physical education instruction and services for ~~pupils~~ children with disabilities who have a substantial delay or disorder in physical development. Developmental adapted physical education: special education instruction for ~~pupils~~ children age three through 21 may include development of physical fitness, motor fitness, fundamental motor skills and patterns, skills in aquatics, dance, individual and group games, and sports.

Students with conditions such as obesity, temporary injuries, and short-term or temporary illness or disabilities are termed special needs students. Special needs students are not eligible for developmental adapted physical education: special education. Provisions and modifications for these students must be made within regular physical education.

Subp. 2. **Criteria.** A ~~pupil~~ child is eligible for developmental adapted physical education: special education if

the team determines the ~~pupil~~ child meets the criteria in items A and B.

A. The ~~pupil~~ child has one of the following disabilities in each respective criteria in parts 3525.1325 to 3525.1341, 3525.1345, and 3525.1354: autism spectrum disorders, deaf-blind, emotional or behavioral disorders, deaf or hard of hearing, specific learning disability, developmental cognitive disability, severely multiply impaired, other health disability, physically impaired, visually impaired, traumatic brain injury or part 3525.1350, subpart 3.

B. The ~~pupil~~ child is determined by the team to need specially designed physical education instruction because:

(1) the ~~pupil's~~ child's performance on an appropriately selected, technically adequate, norm-referenced psychomotor or physical fitness instrument is 1.5 standard deviations or more below the mean. The instrument must be individually administered by appropriately licensed teachers; or

(2) the ~~pupil's~~ child's development or achievement and independence in school, home, and community settings is inadequate to allow the ~~pupil~~ child to succeed in the regular physical education program as supported by written documentation from two or more of the following: motor and skill checklists; informal tests; criterion-referenced measures; deficits in achievement related to the defined curriculum; medical history or reports; parent and staff interviews; systematic observations; and social, emotional, and behavioral assessments.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1354 TEAM OVERRIDE ON ELIGIBILITY DECISIONS.

Subpart 1. **Documentation required.** The team may determine that a ~~pupil~~ child is eligible for special instruction and related services because the ~~pupil~~ child has a disability and needs special instruction even though the ~~pupil~~ child does not meet the specific requirement in parts 3525.1325 to 3525.1345 and 3525.2335. The team must include the documentation in the ~~pupil's~~ child's special education record according to items A, B, C, and D.

A. The ~~pupil's~~ child's record must contain documents that explain why the standards and procedures used with the majority of ~~pupils~~ children resulted in invalid findings for this ~~pupil~~ child.

B. The record must indicate what objective data were used to conclude that the ~~pupil~~ child has a disability and is in need of special instruction and related services. These data include, for example, test scores, work products, self-reports, teacher comments, medical data, previous testings, observational data, ecological assessments, and other developmental data.

[For text of items C and D, see M.R.]

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1400 FACILITIES, EQUIPMENT AND MATERIALS.

Classrooms and other facilities in which ~~pupils~~ children receive instruction, related services, and supplementary aids and services shall: be essentially equivalent to the regular education program; provide an atmosphere that is conducive to learning; and meet the ~~pupils'~~ children's special physical, sensory, and emotional needs.

The necessary special equipment and instructional materials shall be supplied to provide instruction, related services, and supplementary aids and services.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.1550 CONTRACTED SERVICES.

[For text of subpart 1, see M.R.]

Subp. 2. **Community-based services.** A school district may provide direct or indirect special education services by district special education staff to a ~~pupil~~ child attending a community-based program. A school district may contract for special education services with a community-based program if the program meets Department of Education rules.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.2325 EDUCATION PROGRAMS FOR K-12 ~~PUPILS~~ CHILDREN WITH DISABILITIES AND REGULAR STUDENTS PLACED ~~IN CENTERS~~ OUTSIDE THE NORMAL SCHOOL SITE FOR CARE AND TREATMENT.

The Department is revising this rule, commonly known as the care and treatment rule, to bring it into alignment with recent changes to the care and treatment statute, Minn. Stat. § 125A.515, and to improve the clarity of the rule. The Department was directed by legislation to make changes to the rule that will conform it to the statute. 2006 Minn. Laws 163, § 16. The Department agrees with the Minnesota Legislature that the rule needs to be changed because there has been confusion in the field about when this rule applies. The confusion was whether the rule conflicts with Minn. Stat. § 125A.515 because the statute also governs education services for certain children and students in care and treatment. Section 125A.515 was changed in the 2006 legislative session in order to alleviate this confusion, and this proposed rule change will further facilitate clarity and ensure that all children in care and treatment receive education services. Section 125A.515 extends protections and services only to children in licensed residential facilities, but care and treatment is a much broader category than that. This rule governs provision of education services for children placed in care and treatment in all cases.

Subpart 1. **When education is required.** ~~The district in which a facility is located must provide regular education, special education, or both, to a pupil or regular education student in kindergarten through grade 12 placed in a facility, or in the student's home for care and treatment~~ All children with disabilities and regular education students in kindergarten through grade 12 who are placed for care and treatment in the student's home or in any facility, center, or program must receive regular education, special education, or both.

The current language in Subpart 1 addresses two subjects: (1) responsibility for services and (2) who must receive those services. The Department proposes to strike from Subpart 1 the language that assigns district responsibility for the education services provided to children placed for care and treatment. A new Subpart 1a is proposed, which outlines the statutes that govern responsibility for services. As discussed in greater detail in the SONAR discussion of Subpart 1a, responsibility for services is fully addressed in Minnesota Statutes, so the existing rule language was at best duplicative, and in many situations in direct conflict with statutory provisions.

Removing any reference to responsibility for services from Subpart 1 will provide structural clarity and consistency to the rule. Subpart 1 substantively addresses the subject of when education is required, by outlining when children and students must be provided with education services, and what care and treatment situations are implicated. District responsibility for ensuring provision of the required education services is an important, but separate, issue and is addressed in Subpart 1a. This arrangement also is more consistent with the structure of § 125A.515, which addresses required

education services and responsibility for providing those education services in two distinct subdivisions.

The existing language that describes who must receive education services will remain in Subpart 1. It has been redrafted slightly in order to emphasize that all children and students in kindergarten through grade 12 who are placed in any setting for care and treatment must receive education services pursuant to this rule.

When these proposed rules were presented to the Department's informal stakeholder group, a commenter asked about the requirement that the rule applies only to children and students in kindergarten through grade 12. The commenter wondered about education services for younger children and students placed for care and treatment. The Department also received comments from MDLC, PACER Center, and the Autism Society of Minnesota suggesting that the rule language should apply to all children, and that the phrase "in kindergarten through grade 12" should be removed. These rules do not propose to change the scope of education services available to children and students placed in care and treatment. The proposed rule language currently encompasses all children with disabilities as well as students – those who receive regular education services but not special education services – in kindergarten through grade 12. Based on that language, any child or student who is entitled to education services under federal laws and Minnesota statutes and rules will receive education services under this rule. Therefore, the Department does not believe it is necessary to alter the rule to change its scope.

A. Education services must be provided to a ~~pupil~~ child with a disability or regular education student ~~who is:~~ whenever the child or student is either prevented from attending or predicted to be absent from the normal school site for 15 or more intermittent or consecutive school days according to the placing authority, such as a medical doctor, psychologist, psychiatrist, judge, or a court-appointed authority.

~~A. prevented from attending the pupil's or student's normal school site for 15 consecutive school days; or~~

~~B. predicted to be absent from the normal school site for 15 consecutive school days according to the placing authority, such as a medical doctor, psychologist, psychiatrist, judge, or other court-appointed authority; or~~

~~C. health-impaired and in need of special education and predicted by the team to be absent from the normal school site for 15 intermittent school days.~~

The proposed language consolidates into a single group the three categories of children and students who are addressed separately in the current rule: those prevented from attending school; those

predicted to be absent from school; and health-impaired students in need of special education and predicted to be absent from school. Under the proposed language, all children and students who meet the now uniformly applied requirements of Subpart 1, Item A must receive education services.

The Department decided to consolidate the three categories of children and students into a single group for two reasons. First, the proposed rule language conforms with new statutory language in § 125A.515. Section 125A.515 provides that all children who are predicted to be absent for 15 intermittent school days are entitled to regular and special education services:

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

Minn. Stat. § 125A.515, subd. 10; 2006 Minn. Laws 163, sec. 16.

By contrast, the current rule only requires education services for a child who is predicted to be absent for 15 intermittent days when that child is health-impaired and in need of special education. Other children who are unable to attend school or who are predicted to be absent must be absent or predicted to be absent for 15 consecutive days before they receive education services under the current rule. This is in violation of the new statutory language, which allows all children and students who are absent or predicted to be absent from school for 15 intermittent days to receive services. Therefore, the proposed rule language parallels the statutory language, requiring education services for all children and students who are absent or predicted to be absent for 15 consecutive or intermittent days to receive education services.

Furthermore, it is important to remove the provision about health-impaired children from the rule because it is confusing. It is unclear whether the term means that only a child who meets the other health disability criteria contained in Minn. R. 3525.1335 can receive education services if predicted to be absent for 15 intermittent days, or whether the term means that if the reason for absence is health-related, then education services must be provided when the child or student is predicted to be absent for 15 intermittent days.

Second, the consolidated rule more clearly applies the requirement that a child or student is placed for care and treatment only if placed by a placing authority, such as a medical doctor, psychologist, psychiatrist, judge, or other court-appointed authority. In the current rule, this requirement is only included in one of the three eligible categories, but it is intended to apply to all children and students placed for care and treatment. The proposed rule will result in reduced confusion and greater clarity about the scope of this requirement. And, by clearly applying this standard to all children and students, the proposed rule is more consistent and fair. For those reasons, the proposed change is necessary and reasonable.

Finally, the Department proposes to add the phrase "or more" to the provision that a child or student must receive education services when he or she is absent from school for "15 or more intermittent or consecutive school days." This proposed addition does not change the application of the rule, but only makes it more clear that a child or student must be absent for at least 15 days, but can also be absent for more than 15 days.

~~A pupil or regular education student shall begin receiving instruction as soon as practicable under treatment conditions.~~

This stricken language conflicts with provisions on the same subject that are contained in more specific parts of the rule. In order to reduce confusion and eliminate the conflicts, this language has been stricken. The concerns addressed by these provisions are addressed below, in Subparts 2 and 3. Furthermore, "as soon as practicable" is not only in conflict with more specific rule provisions, it also is vague, which makes it hard to apply and difficult for facilities and districts to follow. The question of who determines "as soon as practicable" is an open one, allowing facilities and districts to make a variety of choices about when it is practicable to begin providing instruction.

~~Special education services must be provided as required by a pupil's IEP, and to the extent that treatment considerations allow the pupil to participate. Number of school days for determining due process procedures shall begin upon enrollment in an education program. Placement for care and treatment does not of itself require special education placement.~~

This language also conflicts with provisions on the same subject that are contained in more specific parts of the rule. In order to reduce confusion and eliminate the conflict, this language has been stricken. The concerns addressed by these provisions are addressed below in Subparts 2 and 3.

Furthermore, "to the extent that treatment considerations allow" is not only in conflict with more specific provisions, it is also vague, which makes it challenging to apply and difficult for facilities and districts to follow. The question of who determines whether "treatment considerations allow" is also an open one, allowing facilities and districts to make a variety of choices about when it is practicable to begin providing instruction.

Finally, due process procedures are addressed elsewhere in Minnesota Rules, Chapter 3525, and placement for care and treatment does not suspend those due process rights. Therefore, it is unnecessary and confusing to include this language here.

~~D. For those education programs run by the Department of Corrections, the district shall be the Department of Corrections for the purpose of this part. The district is responsible for ensuring that a cooperative agreement is reached with the care and treatment center facility which addresses all the requirements of Department of Human Services Rules, parts 9545.0900 to 9545.1090 and 9545.1400 to 9545.1480 which pertain~~

~~to the provision of education services for students placed in centers for care and treatment. Provision of special education services requires implementation of all due process safeguards defined in state and federal law. Some procedures are modified to assure the pupil's access to education.~~

These various provisions must be removed from the rule because they are in conflict with other statutes and rules, increasing the risk of confusion. First, education programs run by the Department of Corrections are now governed in the first instance, if not exclusively, by Minn. Stat. § 125A.515. Therefore, this rule does not need to assign district responsibility for those programs, and leaving this provision here would only cause confusion and uncertainty. Second, DHS rules referenced here have been repealed, and so reference to them in this rule should be removed. Placement for care and treatment does not suspend due process rights, and due process procedures are addressed elsewhere in Minnesota Rules, Chapter 3525. Therefore, it is unnecessary and confusing to include this language here.

B. For purposes of this part, ~~pupils~~ children with disabilities and regular education students are considered to be placed for care and treatment when they are placed by a placing authority other than the district in one of the following ~~facilities by someone other than the district are considered to be placed for care and treatment~~:

[For text of subitems (1) to (3), see M.R.]

(4) hospitals;

(5) day treatment centers;

(6) correctional facilities;

(7) residential treatment centers; ~~and~~

(8) mental health programs; or

(9) any other placement for medical care, treatment, or rehabilitation.

The intent of the legislation, as stated in Minn. Stat. § 125.515, subd. 10, is that all children placed for care and treatment receive education services under that statute, this rule, or both. In order to ensure that this requirement is clear, the rule describes the types of care and treatment situations that exist and are covered by the rule.

During the rulemaking process, the Department considered a variety of approaches to drafting this section of the rule in order to best ensure that any child or student legitimately placed for care and

treatment in any setting will receive education services pursuant to this rule. Among the approaches considered:

1. The Department contemplated including the phrase "such as but not limited to" at the beginning of the list, but this approach was too imprecise and indefinite.

2. The Department considered removing the list and instead defining "care and treatment placement," but this proved to be complicated, and the Department felt it would add to, rather than reduce, confusion and uncertainty about what is considered a care and treatment placement.

3. The Department tried cutting back this list to remove those facilities that are covered in the first instance by Minn. Stat. § 125A.515, but the Department does not believe it is effective to include an incomplete list of care and treatment facilities in the rule, even though some of those facilities are also – and even primarily – covered by the statute. Rather, the Department believes that the list should be as accurate and complete as possible to ensure that all children and students placed for care and treatment are covered by the rule, even if they are also covered by the statute. A more complete list also provides better guidance to districts and facilities about the types of facilities that are considered care and treatment placements for purposes of this rule.

4. The Department considered expanding the list, to include care and treatment facilities or placements that are not covered by the list in the current rule. From a policy perspective, the Department wants to ensure that all children who should be receiving education services in school, but cannot because they have been placed for care and treatment, receive the education services to which they are entitled. As the care and treatment community continues to evolve in response to new needs, and changing theories and practices, the Department needed a way to capture in rule all legitimate care and treatment placement options that exist in 2007 and that will arise in the years to come. Pursuant to this approach, a preliminary rule draft that was presented to the stakeholder group and to SEAP included the list above, along with some proposed additions to the numbered list of placement options. However, after receiving stakeholder group and SEAP input, the Department decided to remove those additions to the list, because of concerns that they increased confusion rather than decreasing it.

5. Instead of these various approaches, the Department proposes to leave the existing list of care and treatment facilities intact with one critical addition: "(9) any other placement for medical care, treatment, or rehabilitation." The Department believes that this additional language is the best way to ensure that all children placed for care and treatment, even if it the placement is in a facility not specifically enumerated in (1) to (8), receive the education services to which they are entitled. This 'catch-all' category of care and treatment placement was phrased so that it captures any other placement, but is limited to placements that are reasonably related to care and treatment purposes, including treatment and rehabilitation offered in various settings for physical, mental, and behavioral conditions.

This proposed language was presented to the stakeholder group and to SEAP, and both groups supported the addition to the rule. The proposed language has the benefit of leaving intact the existing list of care and treatment placements that are covered by the rule, which encompasses the

vast majority of placement options which are typically utilized, while still providing room for those rare care and treatment placements that may exist but are not specifically enumerated, or that may come into use at a future date, due to changes and advancements in the various care and treatment fields. It also acknowledges that the terms used in this rule or by districts and providers may be common language terms rather than official statutory terms for various care and treatment options. Subpart 1(B)(9) is intended to ensure that children and students placed in care and treatment options that are not specifically identified in the list receive education services.

Subp. 1a. **Responsibility for provision of education services.** Responsibility for provision of education services for children with disabilities placed for care and treatment is as provided by Minnesota Statutes, section 125A.15 or section 125A.515. For regular education students in kindergarten through grade 12 placed for care and treatment, Minnesota Statutes, section 125A.51 or section 125A.515 govern the responsibility for provision of education services.

This is a new proposed Subpart, designated specifically to address the subject of responsibility for provision of education services. The current rule includes responsibility for services in Subpart 1, and the reasons that the Department proposes to move this subject matter to a new Subpart are addressed in the SONAR discussing Subpart 1.

In addition to moving the subject matter of responsibility for service to an independent Subpart, the Department proposes to change the existing rule language that assigns responsibility for responsibility for service. Rule 3525.2325 currently provides that "[t]he district in which a facility is located must provide regular education, special education, or both, to a pupil or regular education student in kindergarten through grade 12 placed in a facility, or in the student's home for care and treatment." However, three different statutory provisions also govern responsibility for provision of services when a child or student is placed for care and treatment. The three statutes, Minn. Stat. §§ 125A.15, 125A.51, and 125A.515, combine to cover all possible care and treatment situations. When a child is placed for care and treatment in a day program located in another district, the district of residence is responsible for providing an appropriate educational program. Minn. Stat. § 125A.15(b). When a child is placed in a residential program located in another district, the nonresident district in which the child is placed for care and treatment is responsible for providing an appropriate educational program, and must bill the district of residence for the actual cost of providing the program. Minn. Stat. § 125A.15(c) and Minn. Stat. § 125A.515, subd. 3(a).

When a student is placed for care and treatment in a day program located in another district, the district of residence is responsible for providing instruction. Minn. Stat. § 125A.51(d). When a student is placed for care and treatment in a residential program located in another district, the district in which the facility is located must provide instruction for the student, and bill the resident district for the actual cost of providing instruction. Minn. Stat. § 125A.51(e) and Minn. Stat. § 125A.515, subd. 3(a). Finally, when students are remanded to the Commissioner of Corrections, and when education programs are operated by the Department of Corrections, the Department of Corrections is the providing district. Minn. Stat. § 125A.515, subd. 3(b).

Because those three statutes fully address the responsibility for provision of services in various care and treatment situations, the Department believes that to include language in the rule addressing this subject would cause confusion and lead to unnecessary conflict over or misapplication of the provisions related to responsibility for services. Instead, the Department proposes rule language that directs districts and facilities to the statutes which govern responsibility for services. By including this language in the rule, districts and facilities will be able to reference the appropriate statutory requirements for a given care and treatment situation, and appropriately assign responsibility for services. The Department believes this provision is important, even though it only serves to direct districts and facilities to the statutes, because responsibility for services is addressed in so many different statutes. Proposed Subpart 1A pulls all of those various statutory references together into one accessible resource. For those reasons, this proposed rule language is both necessary and reasonable.

Subp. 2. **Education programs for students and ~~pupils~~ children with disabilities and regular education students placed in short-term programs for care and treatment.** A placement for care and treatment is a short-term placement if the anticipated duration of the placement is less than 31 school days. The school district must begin to provide instruction without delay to the ~~pupil~~ child with a disability or regular education student ~~immediately~~ after the ~~pupil~~ child or student ~~is enrolled in the education~~ enters the facility or program, unless medical or other treatment considerations, as determined by the medical or treatment provider, do not allow for the prompt delivery of education services, in which case education services should begin as soon as possible. If the student is enrolled in the educational program without an educational record or IEP, the district's procedures must include immediate phone contact with the home school to see if the regular education student has been identified as disabled.

The existing rule language that requires education services to be provided after enrollment in the education program is too vague. A strict interpretation of the phrase "enrolled in the education program," could result in a delay enrolling the child in an education program. That possibility of delay could defeat the rule's purpose: To ensure that children placed for care and treatment receive education services promptly and without delay following placement in care and treatment. It also contravenes Minnesota's policy of providing quality education services to all Minnesota children and students.

The proposed language requires the provision of education services without delay after entry into the care and treatment program in most cases, but it allows some flexibility and recognizes that some children who enter care and treatment may be unable to participate in instruction because of the nature of their unique care and treatment situations. In those cases, the provision of education services can be delayed until the child is able to participate. That decision must be made by the

medical or treatment provider, such as a physician, who is the individual most informed about whether the care and treatment being offered to the child precludes the ability to participate in education services.

This proposed language was shared with the stakeholder group, with SEAP, and with the public via the Department's website. It did not draw any comments.

A. If a ~~regular education student~~ child with a disability has been identified as disabled and has a current IEP:

Initial due process procedures for previously identified ~~pupils~~ children placed for care and treatment in a short-term facility may be accomplished by telephone; however, the required written documentation, including notices, consent forms, and IEP~~'~~s, must follow immediately. If the ~~pupil~~ child has a current IEP in the home school, the home school must give the providing agency an oral review of the IEP goals and objectives and services provided. The providing agency must contact the parents and together an agreement must be reached about continuing or modifying special education services in accordance with the current IEP goals and objectives. If agreement is not reached over the phone, the providing district shall hold a team meeting as soon as possible. At least the following people shall receive written notice to attend: the person or agency placing the ~~pupil~~ child, the resident district, the appropriate teachers and related services staff from the providing district, the parents, and, when appropriate, the ~~pupil~~ child. This meeting may be held in conjunction with a meeting called by a placing agency. A copy of the documentation, including the modified IEP, must be provided to the parents with a copy of their rights, including a response form.

A child with a disability is the appropriate term to describe someone who is both identified as disabled and has a current IEP; regular education students do not have current IEPs. Therefore, the existing rule uses incorrect terminology and must be changed.

B. If a regular education student has not been identified as disabled or if the providing district cannot determine if a student has been identified as disabled:

(1) Regular education instruction must begin ~~immediately~~ without delay upon ~~enrollment in the education~~ entry into the care and treatment facility or program, unless medical or other treatment considerations, as determined by the medical or treatment provider, do not allow for the prompt delivery of

education services, in which case education services should begin as soon as possible.

[For text of subitem (2), see M.R.]

As discussed above, the phrase "enrollment in the education program" is too vague, in that it does not specify that students must receive education services immediately upon entry into the care and treatment program. The language has been revised to provide a clear timeframe in which education services must begin. Education must begin promptly and without delay, although the rule includes an exception to allow for the fact that the nature of some students' care and treatment programs will prevent them from participating in education services. In those cases, education must begin as soon as possible at the direction of the medical or treatment provider, who must determine whether participation in education services is feasible given the student's care and treatment protocol.

(3) Based on the documented results of the screening, a decision must be made about the need for prereferral interventions or an appropriate special education evaluation according to ~~parts~~ part 3525.2550 and ~~3525.2710~~ Code of Federal Regulations, title 34, sections 300.300 to 300.306. It is not required that an appropriate evaluation be started unless it appears that it can be completed.

(4) During the student's placement, regular education instruction must be provided.

A special education evaluation is clearly defined by federal law. Including internal references to rules is unnecessary and can lead to confusion when the citations need to be updated.

Subp. 3. **Education programs for ~~pupils~~ children with disabilities and regular education students placed in long-term programs for care and treatment.** A placement made for care and treatment is long term if it is anticipated to extend beyond 30 school days. The ~~pupil~~ child with a disability or regular education student must receive educational services ~~immediately upon enrollment in the education~~ without delay after the child or student enters the facility or program, unless medical or other treatment considerations, as determined by the medical or treatment provider, do not allow for the prompt delivery of education services, in which case education services should begin as soon as possible:

As discussed in the SONAR for Subpart 2, the phrase "enrollment in the education program" is too vague, so the language has been revised to provide a clear timeframe in which education services must begin. Education must begin promptly and without delay, although the rule includes an

exception to allow for the fact that the nature of some students' care and treatment programs will prevent them from participating in education services.

A. If the ~~student~~ child with a disability has been identified as disabled and has a current IEP.

A child with a disability is the appropriate term to describe someone who is both identified as disabled and has a current IEP; students, a term which in this part refers to regular education students, do not have current IEPs. Therefore, the existing rule uses incorrect terminology and must be changed.

If the education staff of the providing district decides that the ~~pupil's~~ current IEP of the child with a disability can be implemented while the ~~pupil~~ child is placed for care and treatment, the education staff must contact the parents to secure an agreement to continue to provide special education services according to the IEP. If the parents do not agree with the providing district's proposal, the district shall hold a team meeting as soon as possible.

If the education staff needs additional evaluation information or the ~~pupil's~~ child's current IEP cannot be fully implemented while the ~~pupil~~ child is placed for care and treatment, the education staff must:

[For text of subitem (1), see M.R.]

(2) call a team meeting to revise the current IEP or develop an interim IEP while the ~~pupil~~ child with a disability is undergoing additional evaluation to determine an appropriate program.

B. If the student has not been identified as disabled or if the providing district cannot determine if the student has been identified as disabled, the student entering a residential facility for a long-term placement must be screened to determine if there is a need for an appropriate educational evaluation. An evaluation must begin with a review of screening and other information such as the parent or student interview, available educational and social history, and the purpose of the treatment placement. The evaluation must be conducted according to ~~parts~~ part 3525.2550 and ~~3525.2710~~ Code of Federal Regulations, title 34, sections 300.300 to 300.306.

If the student meets entrance criteria for special education, an IEP must be developed. Special education services must be provided by appropriately licensed staff in accordance with the IEP. If the student was not evaluated or was evaluated and does not meet entrance criteria for special education, regular education services must be provided in accordance with the student's education plan.

The reference to Minn. R. 3525.2710 is being stricken because the Department proposes to repeal those sections of 3525.2710 that duplicate federal law. Because both state and federal law cover this topic, it is more accurate to reference "state and federal law" in this part.

Subp. 4. **When a student or ~~pupil~~ child with a disability leaves the facility.** If a student or ~~pupil~~ child with a disability has received an evaluation or special education services for 15 or more school days, the providing district must prepare an exit report summarizing the regular education or special education evaluation or service information and must send the report to the home school, the receiving facility, the parent, and any appropriate social service agency. For a ~~pupil~~ child with a disability, this report must include a summary of current levels of performance, progress, and any modifications made in the ~~pupil's~~ child's IEP or services. Record transfers between anyone other than educational agencies and the parent require prior approval of the parents in accordance with data privacy laws.

Subp. 5. **Minimum service required.** The team must predict how long the ~~pupil~~ child with a disability or regular education student must be placed for care and treatment. If the prediction is for a restricted period of more than 170 school days or its equivalent, exclusive of summer school, the district shall make available:

A. the instruction necessary for the student or ~~pupil~~ child with a disability to make progress in the appropriate grade level for the successful completion of the courses, programs, or classes the student or ~~pupil~~ child would have been enrolled in if the student or ~~pupil~~ child were not placed for care and treatment;

B. preferably a normal school day in accordance with the ~~pupil's~~ IEP of the child with a disability, as defined in part 3525.2810, subpart 1, item A, and Code of Federal Regulations, title 34, section 300.320;

C. an average of at least two hours a day of one-to-one instruction; or

D. a minimum of individualized instruction for one-half of the normal school day if it is justified in the ~~pupil's~~ IEP of the child with a disability or student's education plan that none of these options are appropriate. If the predicted restricted period is fewer than 171 school days, exclusive of summer school, the district shall make available at a minimum either small group instruction for one-half of the normal school day or at least an average of one hour a day of one-to-one instruction.

Provision of special educational services for ~~pupils~~ children with disabilities outside of the providing school district's regular calendar is optional unless the ~~pupil~~ child has an extended year IEP.

The reference to Minn. R. 3525.2810, Subpart 1, Item A is supplemented by a citation to the Code of Federal Regulations because the Department proposes to repeal the sections of Minn. R. 3525.2810 that duplicate federal law. Therefore, the relevant section of the Code of Federal Regulations is cited in addition to the reference to the rule.

Subp. 6. **Placement, services, and due process requirements for ~~pupils~~ children with disabilities.**

A. The IEP developed by the team must include the provisions of parts 3525.2900, and 3525.2810 and Code of Federal Regulations, title 34, sections 300.320, 300.321 and 300.324, the location of the special education services, the projected duration of the special education services, and provisions for coordinating the care and treatment and the special education services.

B. The nature of and the restrictiveness of some long-term facilities require the ~~pupils~~ children with disabilities to remain on site. When a ~~pupil's~~ child's treatment and educational needs allow, integration shall be provided in a regular educational setting. The determination of the amount and site of integrated services must be a joint decision between parents, the treatment and education staff, and when possible final educational placement decisions must be made by the IEP team of the providing educational agency. If the IEP team concludes a ~~pupil~~ child with a disability can benefit from

an average of more than three hours of educational services, it must, in conjunction with care and treatment center staff, consider the feasibility and appropriateness of an education placement at a regular school site.

C. If a ~~pupil~~ child with a disability is placed in a residential facility outside the resident district, the providing district must provide appropriate special education services. The placement of the ~~pupil~~ child with a disability in a residential center for care and treatment outside the resident district is not an initial placement in the receiving district. The providing district shall make every effort to implement the resident district's IEP, making the modifications necessary due to the restrictive care and treatment setting and based on agreements reached with the parent. The providing district shall comply with the due process procedures of parts 3525.2550 to 3525.4770. Districts shall develop alternative procedures for implementing the legal requirements for observing the student in a regular classroom and document previous interventions that have been tried before the student placed for care and treatment is identified as having a specific learning disability or an emotional or behavioral disorder. These alternative procedures must be included in the district's entrance criteria. The district and facility shall cooperatively develop procedures to be used in emergency situations that comply with the Pupil Fair Dismissal Act according to Minnesota Statutes, sections 121A.40 to 121A.56, and the district's discipline policy.

The reference to Minn. R. 3525.2810 is supplemented with a citation to the Code of Federal Regulations because the Department proposes to repeal parts of Minn. R. 3525.2810 that duplicate federal law. The relevant sections of the Code of Federal Regulations are cited in addition to the reference to the rule.

Subp. 7. **~~Student's and pupil's and regular education student's~~ Placement of students and children with a disability and regular education students; aid for special education.** Special education services provided to ~~pupils~~ children with disabilities and regular education students who have been placed for care and treatment are reimbursable in accordance with ~~parts 3525.0800 and 3525.1310~~ Minnesota Statutes, section 125A.515.

~~A. When regular education and special education services are provided, only the special education portion shall be reimbursed with special education aid.~~

~~B. The special education services provided to pupils in accordance with an IEP are reimbursable.~~

~~C. The indirect or consultative services provided in conjunction with regular education prereferral interventions and evaluation provided to regular education students suspected of being disabled and who have demonstrated learning or emotional or behavioral problems in a screening are reimbursable.~~

~~D. Regular education, including screening, provided to students, pupils, and regular education students are not reimbursable with special education categorical aids.~~

The Department proposes to strike the bulk of this Subpart because it duplicates state statute and is confusing. The information in Items A and B is spelled out in more detail in Minnesota Statutes. *See, e.g.,* Minn. Stat. §§ 123A.488, 125A.11, 125A.15 and 125A.51. Item C is substantially similar to Minn. Stat. § 125A.515, subd. 9 (b). Item D is a verbatim restatement of Minn. Stat. § 125A.515, subd. 9(c). Furthermore, these fiscal rules are applied generally to regular and special education students; they are not in any way specific to care and treatment settings. Including reimbursement language in the care and treatment rule only serves to make a complicated rule unnecessarily more complicated and confusing.

~~3525.2435~~ EFFORT TO LOCATE PARENT.

REPEALER. Minnesota Rules, part 3525.2435, are repealed.

It is necessary to repeal this part and move the language to the surrogate parent rule because this part was orphaned when parts 3525.2410, 3525.2415, and 3525.2430 were repealed. *See* 19 SR 2432. Such a move is reasonable because the requirement makes logical sense when paired with the surrogate parent provisions in part 3525.2440.

3525.2335 EARLY CHILDHOOD PROGRAM SERVICES, ALTERNATIVES, AND SETTINGS.

Subp. 2. **Program services, alternatives, and settings.** Appropriate program alternatives to meet the special education needs, goals, and objectives of a ~~pupil~~ child must be determined on an individual basis. Choice of specific program alternatives must be based on the ~~pupil's~~ child's current levels of performance, ~~pupil~~ child special education needs, goals, and objectives, and must be written in the IEP. Program alternatives are comprised of the type of services provided, the setting in which services occur, and the amount of time and frequency in which special education services occur. A ~~pupil~~

child may receive special education services in more than one alternative based on the IEP or IFSP.

A. There are two types of special education services: direct and indirect.

B. There are three types of settings: home, district early childhood special education (ECSE) classroom, and community-based programs.

(1) Home includes the home of the ~~pupil~~ child and parent or relative, or a licensed family child care setting in which the ~~pupil~~ child is placed by the parent.

[For text of subitem (2), see M.R.]

(3) Community-based programs include licensed public or private nonsectarian child care programs other than a family child care setting, licensed public or private nonsectarian early education programs, community cultural centers, Head Start programs, and hospitals. A school district must provide direct or indirect special education services by district special education staff to a ~~pupil~~ child attending a community-based program.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.2340 CASE LOADS.

Subp. 4. **Case loads for school-age educational service alternatives.**

A. The maximum number of school-age ~~pupils~~ children that may be assigned to a teacher:

(1) for ~~pupils~~ children who receive direct special instruction from a teacher 50 percent or more of the instructional day, but less than a full school day:

(a) deaf-blind, autism spectrum disorders, developmental cognitive disability: severe-profound range, or severely multiply impaired, three ~~pupils~~ children;

(b) deaf-blind, autism spectrum disorders, developmental cognitive disability: severe-profound range, or severely multiply impaired with one program support assistant, six ~~pupils~~ children;

(c) developmental cognitive disability: mild-moderate range or specific learning disabled, 12 ~~pupils~~ children;

(d) developmental cognitive disability: mild-moderate range or specific learning disabled with one program support assistant, 15 ~~pupils~~ children;

(e) all other disabilities with one program support assistant, ten ~~pupils~~ children; and

(f) all other disabilities with two program support assistants, 12 ~~pupils~~ children; and

(2) for ~~pupils~~ children who receive direct special education for a full day:

(a) deaf-blind, autism spectrum disorders, developmental cognitive disability: severe-profound range, or severely multiply impaired with one program support assistant, four ~~pupils~~ children;

(b) deaf-blind, autism spectrum disorders, developmental cognitive disability: severe-profound range, or severely multiply impaired with two program support assistants, six ~~pupils~~ children; and

(c) all other disabilities with one program support assistant, eight ~~pupils~~ children.

B. For ~~pupils~~ children who receive direct special education less than 50 percent of the instructional day, caseloads are to be determined by the local district's policy based on the amount of time and services required by ~~pupils'~~ children's IEP plans.

Subp. 5. **Case loads for early childhood program alternatives.** A teacher's case load must be adjusted downward based on ~~pupils'~~ children's severity of disability or delay, travel time necessary to serve ~~pupils~~ children in more than one program alternative, and if the ~~pupils~~ children on the teacher's

case loads are receiving services in more than one program alternative or the ~~pupils~~ children are involved with other agencies. The maximum number of ~~pupils~~ children that can be assigned to a teacher in any early childhood program alternative is:

A. birth through two years: 12 ~~pupils~~ children per teacher;

B. three through six years: 16 ~~pupils~~ children per teacher; and

C. birth through six years: 14 ~~pupils~~ children per teacher.

District early childhood special education (ECSE) classes must have at least one paraprofessional employed while ~~pupils~~ children are in attendance. The maximum number of ~~pupils~~ children in an ECSE classroom at any one time with a teacher and a program support assistant is eight. The maximum number of ~~pupils~~ children in an ECSE classroom at any one time with an early childhood team is 16.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.2350 MULTIDISABILITY TEAM TEACHING MODELS.

Subpart 1. **Team staff.** A district may assign more than one teacher licensed in different areas or one or more teachers and related services staff as a team to provide instruction and related services to ~~pupils~~ children in a school-age educational service alternative.

Subp. 2. **License requirement.** There must be a teacher on the team who is licensed in the disability area of each ~~pupil~~ child served by the team.

Subp. 3. **Team member responsibility.** The team member licensed in a ~~pupil's~~ child's disability shall be responsible for conducting the ~~pupil's~~ child's evaluation and participating at team meetings when an IEP is developed, reviewed, or revised. Consultation and indirect services as defined in part 3525.0210 must be provided to the general or special education teacher providing instruction if not licensed in the disability. The frequency and amount of time for specific consultation and indirect services shall be determined by the IEP team.

Subp. 4. **Implementation.** ~~Pupils~~ Children may receive instruction and related services from any or all of the team members with appropriate skills. The special education provided by each team member shall be included in the IEP.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.2440 SURROGATE PARENT APPOINTMENT.

The district shall appoint ~~the~~ a surrogate parent when:

A. the parent, guardian, or conservator is unknown or unavailable;

B. the ~~pupil~~ child is a ward of the commissioner of human services; ~~or~~

C. the child is an unaccompanied homeless youth as defined by United States Code, title 42, chapter 119, subchapter VI, part B, section 11434a; or

D. the parent requests in writing the appointment of a surrogate parent. The request may be revoked in writing at any time.

Reasonable efforts shall be made to locate the parent. These may be made through documented phone calls, letters, certified letters with return receipts, and visits to the parent's last known address.

The district shall make reasonable efforts to ensure the appointment of a surrogate parent not more than 30 days after determining that a child needs a surrogate parent.

This part is necessary to comply with state and federal law. State and federal law require the school district to appoint a surrogate parent for an eligible child. Minn. Stat. § 125A.42 and 34 C.F.R. § 300.519. It is reasonable to amend this part to include the safeguards for homeless children with disabilities and a reasonable efforts requirement as provided by 34 C.F.R. § 300.519.

3525.2445 CONSULTATION WITH COUNTY SOCIAL SERVICES.

The district shall consult the county social services office before appointing the surrogate parent when a ~~pupil~~ child is the ward of the commissioner of human services.

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.2450 REMOVAL OF SURROGATE PARENT.

A surrogate parent may be removed by majority vote of the school board. The surrogate parent must be notified of the time and place of the meeting at which a vote is to be taken and of the reasons for the proposed removal. The surrogate parent shall be given the opportunity to be heard. Removal may be for any of the following reasons:

[For text of item A, see M.R.]

B. conflict of interest as referenced in Code of Federal Regulations, title 34, section ~~300.515(c)(2)~~ 300.519(d)(ii);

C. actions that threaten the well-being of the assigned ~~pupil~~ child;

D. failure to appear to represent the ~~pupil~~ child; or

E. the ~~pupil~~ child no longer needs special education and related services.

This change is necessary because the citation to the Code of Federal Regulations has changed. It is reasonable to provide correct citations to federal law.

3525.2455 SURROGATE PARENT KNOWLEDGE AND SKILLS.

The district shall ~~either make the information and training available to the surrogate parent or appoint~~ ensure that a person selected as a surrogate parent ~~who has all of the following~~:

A. is not an employee of the department, the district itself, or any other agency that is involved in the education or care of the child;

B. has no personal or professional interest that conflicts with the interests of the child;

C. has knowledge and skills that ensure adequate representation of the child, or such information and training shall be made available by the district, including:

~~A.~~ (1) a knowledge of state and federal requirements;

~~B.~~ (2) a knowledge of district structure and procedures;

~~C.~~ (3) an understanding of the nature of the ~~pupil's~~ child's disability and needs; and

~~D.~~ (4) an ability to effectively advocate for an appropriate educational program for the ~~pupil~~ child.

A person otherwise qualified to be a surrogate parent is not an employee of an agency solely because the agency pays the person to serve as a surrogate parent.

In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, street outreach programs, and other programs for homeless youth may be appointed as temporary surrogate parents until a surrogate can be appointed who meets the requirements of item A.

This change is necessary because federal law requires that a surrogate parent not be an employee of the Department or the district, nor of any other agency involved in the education or care of the child. 34 C.F.R. § 300.519(d)(2). A more detailed definition of "employee" for purposes of this part is also provided by federal law, which clarifies that just because a person is paid by an agency to serve as a surrogate parent that does not create an employer/employee relationship that would disqualify the person to serve as a surrogate parent.

In the case of an unaccompanied homeless youth, appointing a temporary surrogate parent who is an employee of an emergency shelter, transitional shelter, independent living program, or street outreach program is permissible. § 300.519(f). This is a reasonable change because it mirrors the federal requirements for surrogate parents and provides parameters for appointing surrogate parents for homeless children with disabilities.

3525.2550 ~~CONDUCT BEFORE~~ EVALUATION REPORT AND TIMELINE.

[For text of subp 2, see M.R.]

Subp. 3. **Evaluation report.** An evaluation report must be completed and delivered to the child's parents within the

specified evaluation timeline in subpart 2. At a minimum, the evaluation report must include:

A. a summary of all evaluation results;

B. documentation of whether the child has a particular category of disability or, in the case of a reevaluation, whether the child continues to have such a disability;

C. the child's present levels of performance and educational needs that derive from the disability;

D. whether the child needs special education and related services or, in the case of a reevaluation, whether the child continues to need special education and related services; and

E. whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the child's IEP and to participate, as appropriate, in the general curriculum.

The change here is structural, not substantive. The language in Subpart 3 is taken directly from the repealed part 3525.2710, Subpart 6. It is not the Department's intention to remove any protections for children that are currently in place, therefore this part of 3525.2710 that provides more detail than the federal law is being preserved here. It is logical to put all of the provisions regarding evaluations that differ from the federal requirements in one place.

3525.2710 EVALUATIONS AND REEVALUATIONS.

REPEALER. Minnesota Rules, part 3525.2710, are repealed.

The Department proposes to repeal Minn. R. 3525.2710, Evaluations and reevaluations, because the rule is parallel to, but not exactly the same as the requirements of federal law. In looking at both Minnesota Rules and the Code of Federal Regulations, federal law is the more authoritative source. Most of the requirements for evaluations and reevaluations are covered in the Code of Federal Regulations. *See* 34 C.F.R. §§ 300.300(a), 300.301(a), 300.303, 300.304, 300.305, and 300.306.

As pointed out by some members of the stakeholder group, when the federal regulations already set a standard, the Minnesota Rules should not duplicate the same standard barring circumstances that require a different approach. They also pointed out that if the Rules duplicate federal regulations or standards found in Minnesota Statutes, the requirements should be restated verbatim. This was not the case with Minn. R. 3525.2710, therefore the Department proposes the repeal of sections that duplicate federal requirements.

Subpart 4, Item F, regarding conducting an FBA before a conditional procedure is used, is fully addressed by the new behavioral intervention rules at parts 3525.0850 through 3525.0870.

Paula Goldberg of the PACER Center commented that Minn. R. 3525.2710 is fundamental to the education of children with disabilities and opposed the repeal of this rule. Mary Powell of the Autism Society of Minnesota also opposed the repeal of this part. Dan Stewart of MDLC, a member of the stakeholder group, commented that Subpart 6, Evaluation report, is not included in either federal law or state statute. The Subpart provides different due process and content requirements. Therefore, as the Department does not intend to remove any protections for children with disabilities that currently exist in the Minnesota Rules, the section has been moved to Minn. R. 3525.2550, into a new Subpart 3.

3525.2720 CRITERIA UPON REEVALUATION.

Upon reevaluation, a child who continues to have a disability as provided by Code of Federal Regulations, title 34, section 300.8, and continues to demonstrate a need for special education and related services is eligible for special education and related services.

This proposed rule is necessary because there is a current controversy throughout the state as to what criteria must be used to determine eligibility for special education and related services when reevaluating a child. This controversy has led to the unequal application of the law and to some litigation. Leaving the standard ambiguous is likely to lead to more litigation and a lack of uniformity in access to special education. Federal law states that upon reevaluation, the IEP team must determine "whether the child continues to have such a disability… as defined in § 300.8," but does not mandate that children have to meet initial state criteria every time they are reevaluated. *See* 34 C.F.R. § 300.305. Indeed, if a child has been receiving special education and related services, it is likely that the child may not be at the starting place of the 13 initial disability criteria, yet still be in need of special education services. The Department's longstanding position has been that if a child who is receiving special education services continues to have a disability and demonstrates a continuing need for such services upon reevaluation, that child continues to qualify for special education services.

Peter Martin, a member of the stakeholder group, commented on a previous draft of this rule, stating that the proposed rule "essentially provides that a student can remain eligible for special education simply by demonstrating the continuing 'need' for specialized instruction without also establishing that the student meets the applicable disability criteria." To address Martin's concerns, the Department revised the proposed rule to add a reference to the federal definitions of disabilities to the current draft that makes it clear that both need and a disability are required.

Federal law states that during a review of existing evaluation data, the IEP team must determine "whether the child is a child with a disability, as defined in § 300.8, and the educational needs of the child; or [i]n the case of a reevaluation of a child, whether the child continues to have such a

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

The proposed rule was redrafted to mirror the federal law. The new rule encompasses both prongs of the two part federal criteria for eligibility under IDEA, which also addresses Martin's concern that "it must be shown that the student (1) meets the criteria for a disability as described in the IDEA and (2) has demonstrated a need for special education and services."

3525.2810 DEVELOPMENT OF INDIVIDUALIZED EDUCATION PROGRAM PLAN.

Subpart 1. **~~Definitions~~ Definition.** ~~As used in parts 3525.0210 to 3525.4770, the terms defined in this part have the meanings given them.~~

~~A.~~ "Individualized education program" or "IEP" means a written statement for each ~~pupil~~ child that is developed, reviewed, and revised in a meeting in accordance with ~~this part~~ Code of Federal regulations title 34, section 300.320 and that includes:

~~(1) a statement of the pupil's present levels of educational performance, including how the pupil's disability affects the pupil's involvement and progress in the general curriculum, or for preschool pupils, as appropriate, how the disability affects the pupil's participation in appropriate activities;~~

~~(2)~~ A. a statement of measurable annual goals, including benchmarks or short-term objectives, related to meeting the ~~pupil's~~ child's needs that result from the ~~pupil's~~ child's disability to enable the ~~pupil~~ child to be involved in and progress in the general curriculum, and meeting each of the ~~pupil's~~ child's other educational needs that result from the ~~pupil's~~ child's disability;

~~(3) a statement of the special education and related services and supplementary aids and services to be provided to the pupil, or on behalf of the pupil, and a statement of the program modifications or supports for school personnel that will be provided for the pupil to advance~~

~~appropriately toward attaining the annual goals, to be involved and progress in the general curriculum in accordance with subitem (1) and to participate in extracurricular and other nonacademic activities, and to be educated and participate with other pupils and students in the activities described in this paragraph;~~

~~(4) an explanation of the extent, if any, to which the pupil will not participate with students in the regular class and in the activities described in subitem (3);~~

~~(5) a statement of any individual modifications in the administration of state or districtwide assessments of student achievement that are needed in order for the pupil to participate in such assessment. If the IEP team determines that the pupil will not participate in a particular state or districtwide assessment of student achievement or part of such an assessment, a statement of why that assessment is not appropriate for the pupil; and how the pupil will be assessed;~~

~~(6) the projected date for the beginning of the services and modifications described in subitem (3), and the anticipated frequency, location, and duration of those services and modifications;~~

~~(7)~~ B. beginning at age 14, and updated annually, a statement of the transition service needs of the ~~pupil~~ child in accordance with part 3525.2900, subpart 4;

~~(8) when a pupil reaches the age of 18, unless a guardian or conservator has been appointed for the pupil by a court of competent jurisdiction, the following shall occur and be documented in the pupil's IEP:~~

~~(a) the district shall provide any notice required under this chapter to the pupil and the pupil's parents; and~~

~~(b) all other rights accorded to the parents under this chapter and Part B of IDEA 1997, Code of Federal Regulations, title 34, chapter 300, transfer to the pupil, even if the pupil is incarcerated in an adult or juvenile state or local correctional institution.~~

~~Beginning at least one year before the pupil reaches the age of 18, the pupil and the pupil's parents must be informed of~~

~~those rights under this chapter that will transfer to the pupil at age 18;~~

~~(9)~~ C. a statement of how the ~~pupil's~~ child's progress toward the annual goals described in ~~subitem (2)~~ item A will be measured, how the ~~pupil's~~ child's parents will be regularly informed by such means as periodic report cards, at least as often as parents are informed of their nondisabled student's progress, of the ~~pupil's~~ child's progress toward the annual goals described in ~~subitem (2)~~ item A, and the extent to which that progress is sufficient to enable the ~~pupil~~ child to achieve the goals by the end of the year; and

~~(10)~~ D. a statement of the ~~pupil's~~ child's need for and the specific responsibilities of a paraprofessional~~; and~~

~~(11) any documentation required in part 3525.2900, subpart 5~~.

~~B. "Individualized education program team" or "IEP team" means a group of individuals that must include:~~

~~(1) the parents of the pupil;~~

~~(2) at least one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment;~~

~~(3) at least one special education teacher or, where appropriate, at least one special education provider of the pupil;~~

~~(4) an administrative designee, as defined in part 3525.0210, subpart 2, who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of pupils with disabilities, is knowledgeable about the general curriculum, and is knowledgeable about the availability of resources of the district;~~

~~(5) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in subitems (2) to (6);~~

~~(6) at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the pupil, according to Code of Federal~~

~~Regulations, title 34, section 300.344(c), including related services personnel, as appropriate; and~~

~~(7) whenever appropriate, the pupil.~~

Subp. 2. **Development of IEP.**

~~A. In developing each pupil's IEP, the IEP team shall consider the strengths of the pupil and the concerns of the parents for enhancing the education of the pupil, the results of the initial evaluation or most recent evaluation of the pupil, and, as appropriate, the results of the pupil's performance on any general state or districtwide assessment program.~~

~~B. The IEP team shall:~~

~~(1) in the case of a pupil whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions and supports to address that behavior;~~

~~(2) in the case of a pupil with limited English proficiency, consider the language needs of the pupil as such needs relate to the pupil's IEP;~~

~~(3) in the case of a pupil who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP team determines, after an evaluation of the pupil's reading and writing skills, needs, and appropriate reading and writing media, including an evaluation of the pupil's future needs for instruction in Braille or the use of Braille, that instruction in Braille or the use of Braille is not appropriate for the pupil;~~

~~(4) consider the communication needs of the pupil, and in the case of a pupil who is deaf or hard of hearing, consider the pupil's language and communication needs, opportunities for direct communications with peers and professional personnel in the pupil's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the pupil's language and communication mode; and~~

~~(5) consider whether the pupil requires assistive technology devices and services.~~

~~C.~~ If, in considering the special factors described in ~~items A and B~~ Code of Federal Regulations, title 34, section 300.324(a), the IEP team determines the ~~pupil~~ child needs a particular device or service, including an intervention, accommodation, or other program modification, in order for the ~~pupil~~ child to receive FAPE, the IEP team must include a statement to that effect in the ~~pupil's~~ child's IEP.

~~D. The regular education teacher of the pupil, as a member of the IEP team, shall, to the extent appropriate, participate in the development of the IEP of the pupil, including the determination of appropriate positive behavioral interventions and strategies and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with subpart 1, item A, subitem (3).~~

The stricken language in part 3525.2810 above is duplicative of federal regulations and the Department proposes its repeal. 34 C.F.R. § 300.324 is reproduced in Subparts 1 and 2 almost verbatim. Subpart 1, Item A is renumbered as Subpart 1 with its own Items A to D.

Subpart 1, Item A, Subitem (2) is renumbered as Subpart 1, Item A. This requirement is not duplicated in federal law and state statute requires only that the IEP team determine appropriate goals and objectives based on a child's needs. *See* Minn. Stat. § 125A.08(a)(1). The statute does not, however, explicitly state that these goals and objectives must be included in the child's IEP. "Measurable annual goals, including benchmarks or short-term objectives" that must be included in a written IEP provides more specificity about how goals and objectives are to be developed and used, which is instructive to the field. The Department proposes to retain this provision.

Subpart 1, Item A, Subitem (7) is renumbered as Subpart 1, Item B. This provision is not duplicated in federal law and state statute requires transition planning to begin in 9th grade or by age 14. *See* Minn. Stat. § 125A.08(a)(1). This is permissible under federal law, because federal law requires that transition planning begin no later than when the child turns 16. *See* 34 C.F.R. § 300.320(b).

Subpart 1, Item A, Subitem (9) is renumbered as Subpart 1, Item C. This section describes the timing and content of the progress report more thoroughly than federal law or state statute and provides clear direction that is helpful to service providers.

Subpart 1, Item A, Subitem (10) is renumbered as Subpart 1, Item D. Minnesota statutes lists the skills, training, and supervision requirements for paraprofessionals who work with children with disabilities, but does not require a statement of the paraprofessional's specific responsibilities in the child's IEP. *See* Minn. Stat. § 125A.08(b). There are several places in the federal regulations that seem to contemplate a child's need for and use of a paraprofessional, but the regulations do not make this as clear as Minnesota Rules do, nor do the regulations spell out the specific responsibilities

of a paraprofessional. *See* 34 C.F.R. § 300.34(a) and 300.320(a)(4). This requirement differs from the federal law, but clarifies an existing provision in Minnesota law and reduces conflict by ensuring that parents are informed about the specific duties of the paraprofessional.

Subpart 2 is stricken in its entirety but for Item C, which is renumbered solely as Subpart 2. This section retains the requirement that special factors are considered in development of the IEP and that a statement regarding the particular device, service, intervention, accommodation, or other program modification that a child needs to receive FAPE is included in the child's IEP.

ARC, the Disability Law Center, the Autism Society and PACER all commented that their preference would be to retain both 3525.2710 and 3525.2810 in their entirety. In the alternative, the Department proposes keep the parts of the rule that are not duplicated in federal law or spelled out explicitly by state statute. The current draft of the proposed rules retains existing rights for children while at the same time addresses concerns from the school districts that language duplicative of federal law, whether or not it is verbatim, creates two standards which can lead to confusion and increased litigation.

Subpart 3. [See repealer.]

Subpart 4. [See repealer.]

Subpart 5. [See repealer.]

REPEALER. Minnesota Rules, part 3525.2810, subparts 3 to 5, are repealed.

The Department proposes to repeal portions of Minn. R. 3525.2810, Development of individualized education program, because the rule parallels federal law, but is not a verbatim restatement of the federal regulations. Dual standards are confusing and can lead to multiple interpretations of the law. A consensus of the stakeholder group felt strongly that when Minnesota Rules duplicated federal law, those rules should be repealed.

3525.2900 TRANSITION ~~AND BEHAVIORAL INTERVENTION~~ PLANNING.

Subp. 4. **Transition planning.** By grade nine or age 14, whichever comes first, the IEP plan shall address the ~~pupil's~~ child's needs for transition from secondary services to postsecondary education and training, employment, and ~~community~~ where appropriate, independent living skills.

A. For each ~~pupil~~ child, the district shall conduct an evaluation of secondary transition needs and plan appropriate services to meet the ~~pupil's~~ child's transition needs. The areas of evaluation and planning must be relevant to the ~~pupil's~~ child's needs and may include work, recreation and leisure, home

living, community participation, and postsecondary training and learning opportunities. To appropriately evaluate and plan for a ~~pupil's~~ child's secondary transition, additional IEP team members may be necessary and may include vocational education staff members and other community agency representatives as appropriate. The district must invite the child to attend any transition planning meeting, or if the child does not attend, the district must take steps to ensure that the child's preferences and interests are considered.

B. Secondary transition evaluation results must be documented as part of an evaluation report. Current and secondary transition needs, goals, and instructional and related services to meet the ~~pupil's~~ child's secondary transition needs must be considered by the team with annual needs, goals, objectives, and services documented on the ~~pupil's~~ child's IEP.

C. Beginning not later than one year before the child reaches the age of majority, the IEP must include a statement that the child has been informed that the parents' rights will transfer to the child on reaching the age of majority.

This update is necessary to comply with current federal law. Federal law requires transition assessments and planning to be related to training, education, employment, and where appropriate, independent living skills. *See* 34 C.F.R. § 300.320(b)(1).

Federal law requires that transition planning begin no later than in the IEP that is developed and will be in place when the child turns 16, or younger if determined to be appropriate by the IEP team. *See* 34 C.F.R. § 300.320(b). Section 300.321(b) requires the invitation of the child to IEP meetings if the purpose of the meeting is transition planning and postsecondary goals. Minnesota state law requires transition planning to begin in 9th grade or by age 14. *See* Minn. Stat. § 125A.08(a)(1). This is permissible under federal law, because federal law requires that transition planning begin no later than when the child turns 16.

34 C.F.R. § 300.320(c) requires the IEP to include a statement that the child has been given notice of the child's rights under IDEA that will transfer to the child upon reaching the age of majority.

Subpart 5. [See repealer.]

REPEALER. Minnesota Rules, part 3525.2900, subpart 5, are repealed.

The Department proposes to repeal the rules regarding regulated interventions in part 3525.2900, Subpart 5, and replace them with more clear and updated rules in parts 3525.0850 through 3525.0870. By moving the purpose, definitions and other matters pertaining to positive behavioral

interventions and supports and other strategies to a new section of the Rules, the Department is consolidating and clarifying provisions related to BIPs as mandated by Minn. Stat. § 121A.67, subd. 1(5). The need for and reasonableness of each definition will be addressed in turn.

3525.3010 EDUCATIONAL PLACEMENT.

Subpart 1. **Continuum of alternative placements.** Each district must ensure that its TSES includes a continuum of alternative placements ~~is available~~ to meet the needs of ~~pupils for special education and related services~~ children. The continuum must:

[For text of items A and B, see M.R.]

This provision remains consistent with state and federal law. *See* 34 C.F.R. § 300.115. It is not clear that a district must have its continuum of placements listed in its total special education system policy (TSES) as is required by Minn. R. 3525.1100. It is necessary to modify the provision to make it clear that the continuum of placements must be listed in a district's TSES.

Subp. 2. **General least restrictive environment requirements.** Each district must ensure that ~~pupils~~ children are placed in the least restrictive environment according to part 3525.0400 and Code of Federal Regulations, title 34, ~~section~~ sections 300.114 to 300.552.

This provision remains consistent with state and federal law. It is necessary to update the federal citation. It is reasonable to have correct citations to federal law.

Subp. 3. **Nonacademic settings.** In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Code of Federal Regulations, title 34, section ~~300.306~~ 300.117, each district must ensure that each ~~pupil~~ child participates with nondisabled ~~students~~ children in those services and activities to the maximum extent appropriate to the needs of that ~~pupil~~ child.

This provision remains consistent with state and federal law. It is necessary to update the federal citation. It is reasonable to have correct citations to federal law.

Subp. 4. **Educational placement.** Each district shall ensure that the parents of each ~~pupil~~ child are members of any group that makes decisions on the educational placement of the ~~pupil~~ child and that placement determinations are documented in the IEP.

This provision remains consistent with state and federal law. The additional language provides clarity for parents, teachers, and school administrators regarding documentation of a child's educational determination and any related changes. *See* 34 C.F.R. § 300.324(a)(6).

3525.3100 FOLLOW-UP REVIEW REQUIREMENTS.

~~Pupils~~ A child who ~~are~~ is discontinued from all special education services may be reinstated within 12 months. If data on the ~~pupil's~~ child's present levels of performance are available and an evaluation had been conducted within three years pursuant to ~~part 3525.2710~~ Code of Federal Regulations, title 34, sections 300.300 to 300.306, the district is not required to document two prereferral interventions or conduct a new evaluation.

This rule concerns the eligibility of children for special education and related services. Minn. Stat. § 125A.07 states: "The commissioner must adopt rules to determine eligibility for special education services." This rule aids in ensuring children receive special education services when necessary, after exiting from such services.

The reference to Minn. R. 3525.2710 is being stricken because the Department is proposing to repeal sections that are duplicative of federal law. The relevant sections of the Code of Federal Regulations are 34 C.F.R. § 300.300 through 300.306 and are cited here in place of Minn. R. 3525.2710.

3525.3600 PRIOR WRITTEN NOTICE.

When a district proposes or refuses to initiate or change the identification, evaluation, or educational placement of a ~~pupil~~ child, or the provision of FAPE to the ~~pupil~~ child, the district must serve prior written notice on the parent. The district must serve the notice on the parent within a reasonable time, and in no case less than 14 calendar days before the proposed effective date of change or evaluation. If the notice only includes a refusal of a request, it must be served on the parent within 14 calendar days of the date the request was made.

The notice must meet the requirements of Minnesota Statutes, section 125A.091, subdivisions 3 and 4. The notice must also:

A. inform the parents that the school district will not proceed with the initial placement and provision of services ~~as defined in part 3525.0210~~ without prior written consent of the ~~pupil's~~ child's parents;

[For text of item B, see M.R.]

C. inform the parents that if they refuse to provide prior written consent for initial evaluation or initial placement or object in writing to any proposal, or if the district refuses to initiate or change the identification, evaluation, or educational placement or the provision of a free appropriate public education to the ~~pupil~~ child, the parent may request a conciliation conference.

The district must provide the parents with a copy of the proposed individual educational program plan as described in part 3525.2810, subpart 1, item A, and Code of Federal Regulations, title 34, section 300.320, whenever the district proposes to initiate or change the content of the IEP.

It is necessary to maintain this rule because it remains consistent with both the state statute, Minn. Stat. § 125A.091, subd. 3 and 4, and the federal law, 34 C.F.R. § 300.503, and provides clarity for parents regarding the written notice requirement regarding identification, evaluation, or placement changes of students.

The definition of initial placement has been stricken from Minn. R. 3525.0210, subp. 26. It was inaccurate and not a useful definition of a complex term. Therefore, the reference to the definition in this rule has been stricken also.

The reference to Minn. R. 3525.2810 is supplemented here by an additional citation to the Code of Federal Regulations because the Department is proposing the repeal of parts of Minn. R. 3525.2810 where they duplicate federal law. The relevant section of the Code of Federal Regulations is cited in addition to the reference to the rule.

3525.3700 CONCILIATION CONFERENCE.

Subpart 1. **~~When a~~ Conciliation conference ~~must be offered~~.** "Conciliation conference" means a meeting held for the purpose of resolving a dispute between the parents and district over identification, evaluation, educational placement, manifestation determination, interim alternative educational placement, or the provision of a free appropriate public education (FAPE) to a child with a disability. A conciliation conference must have in attendance, at a minimum, a parent and a district staff person with authority to resolve the dispute. Parents must have an opportunity to meet with appropriate district staff in at least one conciliation conference if the parents object to any proposal or refusal of which the parents

are notified under Minnesota Statutes, section 125A.091, subdivision 2. If the parent refuses efforts by the district to conciliate the dispute with the district, the district is deemed to have satisfied its requirement to offer a conciliation conference.

[For text of subps 1a and 3, see M.R.]

Because this definition of conciliation conference, formerly Minn. R. 3525.0210, subp. 8, has operational requirements embedded in it, it is reasonable to merge it into the operational rule. The conciliation conference is required by Minn. Stat. §§ 125A.09 and 125A.25.

3525.3900 INITIATING A DUE PROCESS HEARING.

Subpart 1. **Request to be filed with department.** A parent or a district is entitled to an impartial due process hearing conducted by the state when a dispute arises over the identification, evaluation, educational placement, manifestation determination, interim alternative educational placement, or the provision of a free appropriate public education to a child with a disability. A request for a due process hearing must be in writing and filed with the department and a copy sent to the other party. The due process hearing request must allege a violation that occurred not more than two years before the date the parent or district knew or should have known about the action that provides the basis for the due process hearing complaint, unless the district specifically misrepresented that it had resolved the alleged violation or if the district withheld information required to be given to the parent. A school district administrator receiving a request for a due process hearing must immediately file the request with the department and in no case more than two business days following receipt of the request. If the request for a due process hearing is filed directly with the department, the department must notify the district of the request immediately and in no case more than two business days following receipt of the request. The department must not deny a request for hearing if it is incomplete. When a district is notified of a due process hearing request it must serve notice on the parent, within two business days, which includes the federally required procedural safeguards notice and the ~~information~~ notice required ~~under subpart 3, item J~~ upon hearing request, if it has not already done so as part of the pending dispute.

These insertions incorporate language about the federal time limit on due process hearing requests and the exceptions to bring the rules into compliance with 34 C.F.R. § 300.507 (a)(2) and 34 C.F.R.

§ 300.511(f). This additional language makes the federal requirement clear, keeps hearing requests relevant to recent educational issues and prevents resources from being expended on outdated requests. The rest of the current rule should be maintained as it provides guidance and clarification regarding requests for hearings.

The Department also proposes to amend the rule to mirror the federal requirement under 34 C.F.R. § 300.508(a)(2) that the party filing the request send the request to the Department.

The addition of "notice required upon hearing request" reflects the Department's intent to clarify the distinction between the federally required procedural safeguards notice and the "basic procedures and safeguards notice" which is detailed in Subpart 4, below. The two terms are currently similar and invite confusion.

Subp. 2. **Parent request for hearing.** A parent request for hearing must include:

A. a statement indicating the parents request a hearing;

B. the name and address of the child involved; in the case of a homeless child, the available contact information for the child and the name and address of the school the child is attending;

C. the name, address, and telephone number, if available, of the parent;

D. the name and address of the school the child is attending at the time of the request;

E. the name or number of the school district of the parent's residence;

F. a description of the nature of the problem about the provision of special education services to the ~~student~~ child, including facts relating to the problem; and

G. a proposed resolution of the problem to the extent known and available to the parents at the time of the request.

In addition to the state requirements listed above, federal law adds the requirements of the child's name and address; the name of the school the child attends; and contact information for homeless children. 34 C.F.R. § 300.508 requires a due process complaint to include any available contact information and the school attended for a child who is homeless. Although federal law states that a complaint will not be sufficient if these six Items are not included in a due process complaint, under

state law, sufficiency of due process complaint is irrelevant. Minn. Stat. § 125A.091, subd. 14 states that the commissioner must not deny a request for hearing because the request is incomplete.

Subp. 3. [See repealer.]

REPEALER. Minnesota Rules, part 3525.3900, subpart 3, are repealed.

Because the basic requirements for a due process hearing request are identical for parents and districts, the Department proposes to repeal this Subpart as redundant and insert the additional requirements for district requests for hearing into Subpart 4, below.

Subp. 4. ~~**Requirements of basic procedures and safeguards**~~ **District request for hearing and notice required upon hearing request**. ~~The statement of the basic procedures and safeguards in subpart 3, item J,~~ A district must serve written notice of hearing on the parents and file it with the department in order to initiate a hearing. In addition to the requirements in subpart 2, a district request for hearing must include a copy of the prior written notice, the federally required procedural safeguards notice, and the notice required upon hearing request which must include:

This Subpart has been renamed because it now incorporates the requirements for the district request for hearing that were previously located in Subpart 3. There was some confusion between the federal procedural safeguards notice, required by 34 C.F.R. § 300.504, and Minnesota's basic procedures and safeguards notice. The Department proposes to rename the basic procedures and safeguards notice to "Notice required upon hearing request." Language inserted here makes it clear that these are two different required notices.

[For text of items A and B, see M.R.]

C. a statement that the parent will receive notice of the time, date, and place of the evidentiary hearing from the hearing officer at least ten calendar days in advance of the evidentiary hearing. This statement must also state that~~, with the exception of an expedited hearing,~~ the evidentiary hearing must be held ~~within 30 calendar days from the date the hearing request was filed with the department,~~ at a location within the district responsible for ensuring a free appropriate public education is provided to the ~~student~~ child;

This language is being stricken because federal law requires a 30-day resolution period which changes the timeline for due process hearing decisions. *See* 34 C.F.R. § 300.510(c). It would not be possible to hold the hearing within 30 days given federal requirements for a 30-day resolution period prior to the hearing.

[For text of items D to F, see M.R.]

G. a statement that, with the exception of an expedited hearing for which a decision must be rendered within ten days, 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 date the hearing request was filed with the department~~ following the expiration of the 30-day resolution period or following the date of mutual written waiver by both parties to the resolution meeting and that the proposed action or refusal will be upheld only upon showing by the school district by a preponderance of the evidence;

Language inserted at Item G reflects the federal requirement for a 30 day resolution period which changes the timeline for due process hearing decisions. *See* 34 C.F.R. § 300.510(c).

H. a statement that the parent or district may appeal a decision of the hearing officer to the Minnesota Court of Appeals within 60 calendar days of receipt of the decision or to the United States District Court for the District of Minnesota within 90 calendar days;

This addition is necessary to amend the rule to conform with federal law, which provides for 90 calendar days to appeal a hearing decision to federal district court. *See* 34 C.F.R. §300.516(b). The added language provides clear guidelines for both parents and districts about the time in which to appeal a decision and that the timelines for the Minnesota Court of Appeals and federal district court are different.

I. a statement that unless the district and parents agree otherwise, the ~~pupil~~ child shall not be denied initial admission to school and the ~~pupil's~~ child's education program shall not be changed;

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

J. ~~a statement that the parents have the burden of proving, by a preponderance of the evidence, that services for which the parents are paying or have paid, and for which the parents are seeking public funds, are appropriate for the pupil child. This statement must also indicate that in order for parents to prevail, the hearing officer must have found that the district has failed to provide a free appropriate public education in the least restrictive environment;~~

The language in Item J is stricken here because it is redundant of Item F.

~~K.~~ a statement that the parents may choose to have the ~~pupil~~ child, who is the subject of the hearing, present and that they may open the evidentiary hearing to the public;

~~L.~~ K. a statement that the department will provide the parents with a written verbatim record of the hearing, at no cost, as well as the findings of fact and decision;

~~M.~~ L. a statement that parents prevailing at a hearing may be entitled to reasonable attorney fees at the discretion of the court; and

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

~~N.~~ M. a statement that the hearing officer ~~may apply a statute of limitations that may limit the complaints that will be heard~~ must not consider violations that occurred more than two years before the date the parent or district knew or should have known about the alleged violation unless the district specifically misrepresented that it had resolved the alleged violation or withheld required information from the parent.

The language in Item M (formerly N) is inserted to reflect the federal requirement that a hearing officer must not consider violations that occurred prior to two years of the date that the parent or the district should have known about the violations, unless the district made a specific misrepresentation that it had resolved the problem or withheld information it was required to provide to the parent. *See* 34 C.F.R. § 300.511(e) and (f).

[For text of subp 5, see M.R.]

3525.4010 HEARING OFFICERS.

Subpart 1. **Criteria for selection.** An individual must meet, at a minimum, the following criteria to be placed on the department's list of hearing officers. The individual must:

A. have at least five years of experience practicing law and hold a current license to practice law in the state of Minnesota; ~~and~~

B. have ~~litigation experience and an understanding of administrative law~~ knowledge of and ability to understand the

provisions of the relevant state and federal law, and legal interpretations of the relevant law by federal and state courts; and

C. have the knowledge and ability to conduct hearings and render written decisions in accordance with appropriate, standard legal practice; but

D. must not be an employee of the department or the district that is involved in the education or care of the child, nor have a personal or professional interest that conflicts with that individual's objectivity in the hearing.

The current rule does not encompass all the requirements for hearing officers under federal law. *See* 34 C.F.R. § 300.511(c). Federal law prescribes minimum qualifications for hearing officers, which include having the knowledge and ability to understand the relevant law, conduct hearings, and render written decisions in accordance with standard legal practice. The rules have reasonably required hearing officers to hold a current Minnesota law license and have at least five years of experience practicing law. Minnesota state law governing hearing officers primarily addresses impartiality. *See* Minn. Stat. § 125A.091, subd. 13. Item D addresses both federal and state requirements for impartial hearing officers. The new language ensures that appropriately trained, knowledgeable, and impartial individuals are appointed as hearing officers for due process hearings.

[For text of subp 2, see M.R.]

Subp. 3. **Evaluation.** The department will collect and maintain data on the hearing system which must include, at a minimum: the number of hearing requests, the method of resolving hearings, and participant evaluation of the process and outcome and any data the federal special education agency, OSEP, requires that the department report in its annual performance report.

The inserted language in this Subpart ensures that the data required by OSEP for Minnesota's APR is collected. The remainder of this part should be maintained as it ensures the Department collects data on the hearing process in order to report and make informed decisions about its procedures.

3525.4110 PREHEARING CONFERENCE.

[For text of subpart 1, see M.R.]

Subp. 2. **Purpose.** The hearing officer has the following duties at a prehearing conference:

A. The hearing officer must establish the management, control, and location of the hearing to ensure its fair,

efficient, and effective disposition including, but not limited to:

(1) informing the parties of their rights should the dispute proceed;

(2) ensuring parents have been provided access to or copies of all education records and ensuring all required notices, information on the ~~pupil's~~ child's educational progress, and any information requested by the hearing officer has been shared between the parties with copies provided to the hearing officer;

[For text of subitems (3) to (5), see M.R.]

[For text of item B, see M.R.]

C. The hearing officer must set a scheduling order for the hearing and for any additional prehearing activities including requests for extensions to the 45-day timeline in which to dispose of the matter. The 45-day timeline for the due process hearing starts the day after one of the following events:

(1) both parties agree in writing to waive the resolution meeting;

(2) after either mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or

(3) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later the parent or the district withdraws from the mediation process.

A hearing officer may ~~only~~ grant an extension for a period of up to 30 calendar days if the requesting party shows good cause on the record. Extensions may last longer than 30 calendar days if both parties agree and the hearing officer approves. All written orders granting or denying motions must be filed with the department. All orders granting or denying motions to extend the 45-day timeline must be in writing. The hearing officer may require an independent education evaluation be conducted at district expense.

This language is inserted because federal law requires that the 45 day timeline for a hearing decision begin after the 30 day resolution period. *See* 34 C.F.R. § 300.515(a). Minnesota law requires a hearing officer to issue a decision within 45 calendar days after receipt of the hearing request. *See* Minn. Stat. § 125A.091, subd. 20. Because federal law now requires a resolution period of 30 days before the 45-day timeline for a hearing decision, this change is proposed to accommodate the new federal requirement.

[For text of item D, see M.R.]

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

[For text of subps 3 and 4, see M.R.]

This language is inserted to align the rules with current federal law. Federal law allows a due process hearing to proceed after a resolution period of 30 days after receipt of the request for hearing if the district has not resolved a due process complaint to the parent's satisfaction. *See* 34 C.F.R. § 300.510(b)(5).

3525.4420 DECISIONS OF HEARING OFFICER.

Subpart 1. **Basis of decision.** A hearing officer's determination of whether a child received FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that the child did not receive FAPE only if the procedural inadequacies:

A. impeded the child's rights to FAPE;

B. significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of FAPE to the parent's child; or

C. caused a deprivation of educational benefit to the child.

Subp. 2. **Form of decision.** The hearing officer must issue a written decision or order after the hearing and serve the decision or order on all parties. This order must include

information detailing the right to appeal the decision and the time in which to do so. The hearing officer must maintain the hearing record until the date of the final decision or order and send it to the department within one week of the issuance of the final decision or order. The record must include all pleadings, motions and orders; evidence offered or considered; offers of proof, objections, and rulings thereon; the hearing officer's final decision or order; all memoranda or data submitted by any party in connection with the case; and the transcripts of all proceedings. The hearing officer's decision is final on the date the decision is issued.

A decision must:

A. be in writing;

B. state the controlling and material facts to which the law is applied;

C. state the conclusions of law applied to the facts; and

D. be based on local standards, state statute, the rules of the department, and federal law. A summary disposition based upon stipulation, settlement, or withdrawal of a hearing request need not contain extensive findings or conclusions. An order, to be treated as a consent decree approved by the hearing officer, must expressly state it is a consent order.

Federal law requires that a hearing officer's decision of whether a child received FAPE be based on substantive grounds. If a procedural violation is alleged, federal law makes it clear that such a violation only deprives a child of FAPE in the three circumstances indicated in Subpart 1. *See* 34 C.F.R. § 300.513(a). The inserted language will help ensure that a consistent standard is applied to decisions regarding FAPE and provide guidance to hearing officers.

This part was broken into two Subparts and headings were added for ease of reference and to clarify the rule.

3525.4700 ENFORCEMENT AND APPEALS.

If the district fails to implement the hearing officer's decision, the parent has the right to bring the failure to the attention of the department through the special education complaint process. The department must monitor final orders and ensure they are enforced. In accordance with Minnesota Statutes, section 127A.42, the commissioner may impose sanctions

necessary to correct any failure. Once the hearing officer has issued a final decision, the hearing officer lacks authority to amend the decision except for clerical or mathematical errors. The parent or district may seek review of the hearing officer's decision in the Minnesota Court of Appeals within 60 calendar days or in the federal District Court~~, consistent with federal law. A party must appeal to the Minnesota Court of Appeals~~ within ~~60~~ 90 calendar days of ~~receiving the hearing officer's~~ the decision.

This insertion reflects the federal timeline which expressly provides for a 90 day appeal period to federal court. *See* 34 C.F.R. § 300.516. There was some discussion during a stakeholder meeting that having two timelines for appeal would be confusing for districts and for parents. However, specifying what the timelines actually are, as opposed to the stricken language, which merely states "consistent with federal law," clarifies the timelines and provides guidance for parents and districts.

3525.4750 EXPEDITED HEARINGS, WHO MAY REQUEST.

Subpart 1. **Parent request for a hearing.** A parent of a ~~pupil~~ child with a disability may request an expedited due process hearing if the ~~pupil's~~ child's parent disagrees:

A. with the determination that the ~~pupil's~~ child's behavior subject to disciplinary action was not a manifestation of the ~~pupil's~~ child's disability;

B. with any decision regarding a change of the ~~pupil's~~ child's placement to an interim alternative educational setting for a weapon, controlled substance, or drug violation; or

C. with any decision regarding a change of the ~~pupil's~~ child's placement under Code of Federal Regulations, title 34, sections 300.520 to 300.528, that is based upon a district contention that the move is for disciplinary or safety reasons.

Subp. 2. **Local education agency request for a hearing.** The local education agency may request an expedited hearing if school personnel maintain that the current placement of the ~~pupil~~ child is substantially likely to result in injury to the ~~pupil~~ child or to others.

[For text of subp 3, see M.R.]

The term "child" or a similar term is substituted for "pupil" or "student" or similar terms wherever they appear in Minnesota Rules, Chapter 3525.

3525.4770 EXPEDITED HEARINGS, TIMELINES.

Subpart 1. **When parents request hearing.** When requesting an expedited hearing the parents shall provide the district and department with~~:~~ the information required by part 3525.3900, subpart 2. In addition, the parents should describe

~~A. a statement indicating the parents request an expedited hearing;~~

~~B. the name and address of the child involved;~~

~~C. the name, address, and telephone number, if available, of the parent;~~

~~D. the name of the school the child is attending at the time of the request;~~

~~E. the name or number of the school district of the parent's residence;~~

~~F. a description of~~ the nature of the problem ~~of the child~~ relating to the manifestation determination, interim placement, or proposed interim placement, including facts relating to the problem~~; and~~.

~~G. a proposed resolution of the problem to the extent known and available to the parents at the time.~~

~~The parent's right to an expedited hearing must not be denied or delayed for failure to provide the notice required here.~~

~~Immediately upon the district's receipt of the request for an expedited hearing or upon the initiation of an expedited hearing, the district shall serve the parents with a written notice of rights and procedures relative to the hearing, including the availability of free or low-cost legal services.~~

This language was stricken to streamline the rules and eliminate requirements that are not mandated by state or federal law. The only differences between regular due process hearings and expedited due process hearings are the timeline and the subject matter of the dispute. The other procedural

requirements are the same. Referring parents back to part 3525.3900 for the elements required in a due process complaint ensures that the rules are consistent and makes the rules more cohesive. As these requirements are already stated in part 3525.3900, it would be redundant to repeat them here.

Subp. 2. **When district requests hearing.** When the district requests an expedited hearing it shall provide the parents and department with a written notice ~~of~~ containing:

[For text of item A, see M.R.]

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. the information required by part 3525.3900, subpart 4.

Districts are required to follow the same procedures as parents when requesting an expedited due process hearing, in addition to providing prior written notice, federal procedural safeguards notice, and the notice required upon hearing request. The insertions make clear both to districts and parents what the district's responsibilities are.

[For text of subps 3 to 6 see M.R.]

Subp. 8. **Decision.** A written decision for an expedited hearing shall be rendered by the hearing officer in ten calendar days from the date the hearing was requested. An extension of up to five calendar 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~~ sections 300.514 and 300.518. All regulations in this chapter apply to expedited due process hearings to the extent not modified by this part.

Minnesota's timeline for expedited hearings is shorter than federal law requires. Minn. Stat. § 125A.091, subd. 19 requires a hearing officer to hold an expedited hearing and issue a decision within 10 calendar days of the expedited hearing request. The hearing officer may extend the timeline up to 5 additional calendar days. Federal law permits states to establish different procedural rules for expedited due process hearings. 34 C.F.R. § 300.532(c)(4).

CONCLUSION

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

October 12, 2007 Chas Anderson, Deputy Commissioner

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