

September 17, 2018

VIA EMAIL ONLY

Alex Liuzzi
Executive Director
Minnesota Professional Educator Licensing
and Standards Board
1500 W Hwy 36
Roseville, MN 55113
alex.liuzzi@state.mn.us

Re: *In the Matter of the Proposed Rules of the Professional Educator Licensing and Standards Board Governing the Issuance, Renewal, and Validity of Teaching Licenses*
OAH 82-9021-35209; Revisor R-04534

Dear Mr. Liuzzi:

Enclosed and served upon you please find the **CHIEF ADMINISTRATIVE LAW JUDGE'S ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.16, SUBD. 2 AND MINN. R. 1400.2240, SUBP. 4** in the above-entitled matter.

If you have any questions regarding this matter, please contact Denise Collins at (651) 361-7875 or denise.collins@state.mn.us.

Sincerely,

s/Lisa Armstrong

LISA ARMSTRONG
Legal Assistant

Enclosure

cc: Office of the Governor
Office of the Revisor of Statutes
Legislative Coordinating Commission
Representative Tim O'Driscoll
Senator Mary Kiffmeyer

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW SECTION
PO BOX 64620
600 NORTH ROBERT STREET
ST. PAUL, MINNESOTA 55164

CERTIFICATE OF SERVICE

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| In the Matter of the Proposed Rules of the Professional Educator Licensing and Standards Board Governing the Issuance, Renewal, and Validity of Teach | OAH Docket No. 82-9021-35209 R-04534 |
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Kendra Schmit certifies that on September 17, 2018, she served a true and correct copy of the attached **CHIEF ADMINISTRATIVE LAW JUDGE’S ORDER ON REVIEW OF RULES UNDER MINN. STAT. § 14.16, SUBD. 2 AND MINN. R. 1400.2240, SUBP. 4**; by courier service, by placing it in the United States mail with postage prepaid, or by electronic mail, as indicated below, addressed to the following individuals:

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|---|---|
| <p><u>VIA EMAIL ONLY</u> Alex Liuzzi Executive Director Minnesota Professional Educator Licensing and Standards Board 1500 W Hwy 36 Roseville, MN 55113 alex.liuzzi@state.mn.us</p> | <p>Katie Carlucci Office of Governor Mark Dayton kate.carlucci@state.mn.us</p> |
| <p>Legislative Coordinating Commission lcc@lcc.leg.mn</p> | <p>Paul Marinac Office of the Revisor of Statutes paul.marinac@revisor.mn.gov</p> |
| <p>Representative Tim O’Driscoll Chair Committee on Government Operations and Elections Policy 559 State Office Building 100 Rev. Dr. Martin Luther King Jr. Blvd. St. Paul, MN 55155</p> | <p>Senator Mary Kiffmeyer Chair State Government Finance and Policy and Elections Committee 95 University Avenue W Minnesota Senate Bldg Room 3103 St. Paul, MN 55155</p> |

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Professional Educator Licensing and Standards Board Governing the Issuance, Renewal, and Validity of Teaching Licenses

**CHIEF ADMINISTRATIVE LAW JUDGE'S
ORDER ON REVIEW OF RULES UNDER
MINN. STAT. § 14.16, SUBDS. 1, 2 AND
MINN. R. 1400.2240, SUBPS. 4, 5**

This matter came on for review by the Chief Administrative Law Judge pursuant to Minn. Stat. § 14.16, subds. 1 and 2 (2018), and Minn. R. 1400.2240, subps. 4 and 5 (2017).

The Minnesota Professional Educator Licensing and Standards Board (Board) proposes to adopt the above-entitled rules pursuant to Minn. Stat. § 14.16 (2018). The proposed rules came on for a public hearing on June 8, 2018.

Administrative Law Judge Barbara Case disapproved portions of the rules in a Report dated August 6, 2018. The Chief Administrative Law Judge concurred with the determinations of the Administrative Law Judge by Order dated August 14, 2018.

On August 31, 2018, the Board requested that the Chief Administrative Law Judge review and approve modifications to the proposed rules pursuant to Minn. R. 1400.2240, subp. 5. The newly submitted rules include term definitions, deadline clarifications and corrections of minor typographical errors. On September 7, 2018, the Board submitted another new version of its proposed rules containing additional proposed modifications, this time in a format approved by the Office of the Revisor. The record closed on September 7, 2018 with this submission.

For reasons explained in the attached memorandum, the Chief Judge finds that the following rules continue to have defects:

- Rule 8710.0310, item K: Professional License from another State
- Rule 8710.0311, subps. 2(B)(2)(c), 4(B)(3), 5(B)(3) and 6(B)(3): Acceptable Applicants

The Chief Judge finds that the other defects previously identified in the Administrative Law Judge's Report have been corrected. In addition, the Chief Judge finds that the Board's proposed modifications do not render the final proposed rules substantially different from those noticed in the *State Register* on February 26, 2018, and proposed at the public hearing.

Based upon a review of the modifications made by the Board as presented in its August 31 and September 7, 2018 submissions and the rulemaking record as a whole, the Chief Administrative Law Judge issues the following:

ORDER

1. Proposed rule 8710.0310, item K, "Professional license from another state" is **DISAPPROVED**.

2. Proposed rule 8710.0311, subps. 2(B)(2)(c), 4(B)(3), 5(B)(3) and 6(B)(3) ("Acceptable Applicant") is **DISAPPROVED**.

3. The remaining proposed rules as modified and approved by the Office of the Revisor on September 7, 2018 are approved as to legality.

4. If the Board elects not to correct the defects associated with the proposed rules, the Board must submit the rule to the Legislative Coordinating Commission and the House of Representatives and Senate policy committees with primary jurisdiction over state governmental operations, for review under Minn. Stat. § 14.15, subd. 4 (2018).

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

Dated: September 17, 2018



TAMMY L. PUST
Chief Administrative Law Judge

MEMORANDUM

The 2017 Legislature created the Board as part of a complete overhaul of the state's teacher licensure system.¹ In legislation, it created a four-tier licensing structure and set forth the requirements for licensure in each tier.² It also directed the Board to adopt rules to implement the statutory changes.³

The Administrative Law Judge's Report, and the Report of the Chief Administrative Law Judge, initially found many of the Board's proposed rules to be legally defective for identified reasons.⁴ As noted in this Order, the Board has adequately corrected all but two of the earlier-identified deficiencies. The two remaining defects relate to the Board's (1) definition of the term "professional license from another state" in proposed rule 8710.0310, item K; and (2) continued reliance on unfettered discretion to determine who is an "acceptable applicant" in proposed rule 8710.0311, subs. 2(B)(2)(c), 4(B)(3), 5(B)(3) and 6(B)(3).

I. Professional License From Another State

Minn. Stat. § 122.183 defines five distinct pathways through which an applicant can qualify for a Tier 3 teaching license in Minnesota.

A candidate for a Tier 3 license must meet the coursework requirement by demonstrating one of the following:

- (1) completion of a Minnesota-approved teacher preparation program;
- (2) completion of a state-approved teacher preparation program that includes field-specific student teaching equivalent to field-specific student teaching in Minnesota-approved teacher preparation programs. The field-specific student teaching requirement does not apply to a candidate that has two years of teaching experience;

¹ 2017 Minn. Laws 1st Spec. Sess. 5, art. 3, 12.

² See Minn. Stat. §§ 122A.18, .181, .182, .183, .184 (2018).

³ 2017 Minn. Laws 1st Spec. Sess. 5, art. 12, sec. 11.

⁴ The Report identified the following deficiencies in the proposed rules: (a) Rule 8710.0310 (Definitions): Subpart 1G. "Good cause;" Subpart 1J. "Professional license from another state;" (b) Rule 8710.0311 (Tier 1 License): Subparts 2B, 4B, 5B, 6B ("acceptable" applicants); Subparts 2C(1), 4D(2), 5C(1), 6D(1) (mentorship program); Subpart 6C(2) (good cause); Subparts 2D, 4E, 5D, 6C, 6E (emergency placements); Subpart 6 (additional renewals); (c) Rule 8710.0312 (Tier 2 License): (1) Subpart 6B (good cause); (d) Rule 8710.0314 (Tier 4 License): (1) Subpart 2B(1) (conventional, nonconventional, or alternative teacher preparation program); (e) Rule 8710.0320 (Out-of-Field Permission): Subpart 2A ("acceptable" applicants); Subpart 2C (emergency placements); Subpart 4C ("acceptable" applicants); Subpart 5 (additional renewals); (f) Rule 8710.6000 (Speech-Language Pathologist): (1) Subpart 1b (waiver for Tier 2 License); (g) Rule 8710.6200 (School Psychologist): (1) Subpart 1c (Tier 2 license duration); (h) Rule 8710.6400 (School Counselor): Subpart 1bC(3) (day-to-day supervision); Subpart 1cB (renewal).

- (3) submission of a content-specific licensure portfolio;
- (4) a **professional teaching license from another state**, evidence that the candidate's license is in good standing, and two years of teaching experience; or
- (5) three years of teaching experience under a Tier 2 license and evidence of summative teacher evaluations that did not result in placing or otherwise keeping the teacher on an improvement process pursuant to section 122A.40, subdivision 8, or section 122A.41, subdivision 5.⁵

The term “professional teaching license from another state” is specifically relevant to the fourth pathway identified above.

In its initial rule submission, the Board proposed to define “professional licensure from another state” to mean a teaching license from another state that allows the individual to be a teacher of record based on completion of a state-approved conventional, nonconventional, or alternative teacher preparation program from another state or licensure via an aligned portfolio process in another state. The Board took the position that it needed to differentiate between a “professional” teaching license and “any” teaching license granted by another state “for parity and to prevent individuals from obtaining a license without training in another state in order to convert the license to a full Minnesota license without meeting other requirements.”⁶ In essence, the Board asserted that this differentiation was necessary to ensure that a licensee from another state is not granted a Minnesota Tier 3 license if the out-of-state license aligns to the qualifications of only a Minnesota Tier 1 or Tier 2 license.⁷

The Administrative Law Judge initially found the Board’s proposed definition of “professional license from another state” defective on two separate grounds. First, it requires all out-of-state applicants to complete a teacher preparation program, which is in conflict with the enabling statute’s allowing applicants in good standing with a “professional license from another state” and two years of teaching experience to become teachers in Minnesota without the qualification that they must have taken a teacher preparation program.⁸ Second, the definition relied on undefined and ambiguous terms (“conventional,” “nonconventional,” and “alternative”) and so was found to be unconstitutionally vague.⁹

To correct those defects, the Board now proposes a new definition of “professional license from another state” The Board seeks to address the identified conflict with the enabling statute by “ensur[ing] that pathways to a professional license

⁵ Emphasis added.

⁶ Ex. 3 at 15 (SONAR, April, 2018).

⁷ Rule by rule analysis (Analysis from A. Liuzzi, June 20, 2018).

⁸ See Minn. Stat § 183, subd. 2(4).

⁹ See Minn. R. 1400.2110, E (2017).

are not limited to teacher preparation or a portfolio process while also ensuring that license types that are deemed not professional are clearly identified.”¹⁰

As now proposed, and including the deletion of the Board’s previously proposed definition, the rule states as follows:

J. K. "Professional license from another state" means a teaching license from a state other than Minnesota that allows the individual to be a teacher of record ~~based on completion of a state-approved conventional, nonconventional, or alternative teacher preparation program from another state or licensure via a portfolio process in another state aligned to part 8710.0330 and Minnesota Statutes, section 122A.18, subdivision 10.~~ A professional license from another state does not include:

- (1) a license issued requiring only passage of teacher licensure exams;
- (2) a license issued requiring only experience in a classroom;
- (3) a license issued on an emergency basis;
- (4) a substitute teaching license;
- (5) a license that does not require a successfully completed field experience in the scope and content of the license; or
- (6) a nonpublic school license.

The Board’s newly proposed definition seeks to define “professional license” by reference to what it is not, but never affirmatively states what a professional license is. While that structure is not per se impermissible, the Board is required to provide a clear explanation of what issues its proposed definition is meant to address in order to ensure that licensure applicants are provided fair notice of what is, and what is not, allowed to support an application under this pathway to Tier 3 licensure.¹¹

The statute permits applicants for Tier 3 licensure to meet the “coursework” element of licensure with only three criteria: (1) a professional teaching license from another state; (2) evidence that the candidate’s license is in good standing; and (3) two years of teaching experience.¹² The Board’s proposed definition of “professional teaching license from another state” impermissibly adds criteria to the coursework requirements of the statute. For example, the proposed rule revision states that a teaching license from another state does not include “a license requiring only

¹⁰ Analysis of proposed rule changes (A. Liuzzi, August 31, 2018).

¹¹ *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).

¹² Minn. Stat. § 122A.183, subd. 2(4).

experience in the classroom” or “a license requiring only passage of teacher licensing exams.”¹³ These definitions are open-ended and thus impermissibly vague regarding what criteria, in addition to experience in the classroom or passage of a licensure exam, are sufficient to support a Tier 3 licensure application. The additional unknown criteria amounts to something more than a professional teaching license in good standing and two years of experience.

These new requirements are also confusing because the Board’s already-approved rules for issuing a Tier 3 license based upon an out-of-state license require “passing scores on board-approved pedagogy and content examinations aligned to the licensure area sought” and two years of teaching experience.¹⁴ These rule provisions appear to address the Board’s concerns about individuals receiving a Tier 3 license having only passed a test or having only taught. The new proposed rule defining “professional license from another state” continues to exceed the Board’s discretion beyond what is allowed by the enabling statute¹⁵ because the proposed rule adds additional criteria to that set forth in the statute. In addition, because the exact requirements are not defined, the proposed rule remains unconstitutionally vague.¹⁶

The Board may correct this defect by substituting its proposed definition with the following language:

“Professional license from another state” means “a professional teaching license issued by the responsible state agency of another state and required by the law of that state for an individual to teach in a public school, but does not include an emergency, temporary or substitute teaching license.”

II. Acceptable Applicants

The statute allows a district to hire a teacher on a Tier 1 license if the district is unable to hire “an acceptable teacher with a Tier, 2, 3, or 4 license.”¹⁷ The legislation does not define the term “acceptable” nor delineate whether a district or the Board has the ultimate authority to determine whether any specific teacher is or is not “acceptable.”

In its initial proposed rule, the Board identified three specific circumstances in which a school district may hire a Tier 1 teacher. The proposed rule allowed a district to do so if: (1) no Tier 2, 3, or 4 licensed individuals applied for the position; (2) no Tier 2, 3, or 4 individuals accepted the position; or (3) all Tier 2, 3, or 4 individuals had a record of disciplinary action with the Board.¹⁸ In addition, the original proposed rule granted to the Board “the sole discretion” to approve or deny other justifications provided by districts in support of their hiring Tier 1 teachers.

¹³ *Id.*

¹⁴ Proposed Rule 8710.0313, subp. 2(B).

¹⁵ See Minn. R. 1400.2100, subp. D (2017).

¹⁶ See Minn. R. 1400.2100, subp. E (2017).

¹⁷ Minn. Stat. § 122A.181, subd. 1(3)(ii).

¹⁸ Proposed Minn. R. 8710.0311.

The Administrative Law Judge found that the Board has the authority to define the word “acceptable” for the purpose of determining whether a district is unable to hire “an acceptable teacher with a Tier, 2, 3, or 4 license.”¹⁹ However, the Administrative Law Judge determined that the Board’s proposed case-by-case review “creates a standard that is subject to the whim and caprice of the Board” and was therefore defective.²⁰ The Report explained that the Board could remedy the defect by, among other options, considering what objective facts might make a higher-tiered candidate unacceptable and describe those facts with specificity.²¹

In its resubmission, the Board developed and proposed a list of criteria that more specifically describe an unacceptable applicant. A district must provide justification to the Board if the district cannot meet the criteria. However, the Board continues to maintain its broad discretion to further deny a district’s license application if the district fails to provide adequate justification. The proposed language states:

- B. The hiring district must show one of the following:
- (1) no individual who holds a Tier 2, 3, or 4 licensed individuals license for the assignment applied for the position;
 - (2) no individual who holds a Tier 2, 3, or 4 licensed applicants license for the assignment accepted the position; or
 - (3) ~~all Tier 2, 3, or 4 licensed applicants had a record of disciplinary action with the board.~~ for each Tier 2, 3, or 4 licensed applicant that may have accepted the position, one of the following:
 - (a) the applicant is not fluent in the language required for the position;
 - (b) the applicant was unwilling to abide by or unable to apply the pedagogical model of the district or school;
 - (c) the applicant had disciplinary action with the board or final disciplinary action in a district;
 - (d) the applicant was unwilling to abide by culturally responsive teaching principles; or
 - (e) the applicant had references that indicated an unwillingness or ineligibility to rehire the applicant, including in the applying district.

¹⁹ Minn. Stat. § 122A.181, subd. 1(3)(ii).

²⁰ Report of the Administrative Law Judge at ¶ 190, 191 (Aug. 6, 2018).

²¹ *Id.* at ¶ 191.

If the hiring district cannot meet the requirements of items A and B, the district must provide justification to be reviewed by the board for approval or denial. The justification must include why no Tier 2, 3, or 4 licensed applicant was acceptable for the position. Failure by a district to provide justification constitutes grounds for the board to deny a request for a Tier 1 renewal, at the sole discretion of the board.

The proposed language continues to be unconstitutionally vague because the Board has reserved for itself the right to determine whether a district has shown a Tier 2, 3 or 4 applicant to be unacceptable without identifying the criteria it will apply in making its determination.

The Board may correct the defect by changing the language wherever it appears to:

B. The hiring district must show one of the following:

- (1) no individual who holds a Tier 2, 3, or 4 licensed individuals license for the assignment applied for the position;
- (2) no individual who holds a Tier 2, 3, or 4 licensed applicants license for the assignment accepted the position; or
- (3) all Tier 2, 3, or 4 licensed applicants had a record of disciplinary action with the board. for each Tier 2, 3, or 4 licensed applicant that may have accepted the position, the district documents in its request that the applicant was unacceptable because, for example:
 - (a) the applicant is not fluent in the language required for the position;
 - (b) the applicant was unwilling to abide by or unable to apply the pedagogical model of the district or school;
 - (c) the applicant had disciplinary action with the board or final disciplinary action in a district;
 - (d) the applicant was unwilling to abide by culturally responsive teaching principles; or
 - (e) the applicant had references that indicated an unwillingness or ineligibility to rehire the applicant, including in the applying district.

~~If the hiring district cannot meet the requirements of items A and B, the district must provide justification to be reviewed by the board for approval or denial. The justification must include why no Tier 2, 3, or 4 licensed~~

~~applicant was acceptable for the position. Failure by a district to provide justification constitutes grounds for the board to deny a request for a Tier 1 renewal, at the sole discretion of the board.~~

T. L. P.