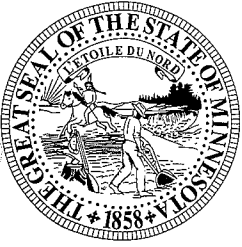


1-9-2006



Minnesota Board of Barber and Cosmetologist Examiners

January 6, 2006

Legislative Reference Library
645 State Office Bldg
St. Paul, MN 55155

RE: In The Matter of the Proposed Rules of
the Board of Barber and Cosmetologist
Examiners Relating to Hairbraiding

Dear Librarian:

The Board of Barber and Cosmetologist Examiners
intends to adopt rules relating to hairbraiding.
We plan to publish a Dual Notice in the
January 17, 2006 State Register.

The Board has prepared a Statement of Need and
Reasonableness. As required by Minnesota Statutes
sections 14.131 and 14.23, the Board is sending
the Library a copy of the Statement of Need and
Reasonableness at the time we are mailing our
Notice of Intent to Adopt Rules.

If you have any questions, please contact me at
651-201-2744.

Yours very truly,

A handwritten signature in cursive script that reads "Maureen Tibbetts".

Maureen Tibbetts
Executive Secretary

Enclosures: Notice of Intent To Adopt Rules
Statement of Need and Reasonableness
Proposed Rules

2829 University Ave SE, Suite 710, Minneapolis MN 55414
(651) 201-2742 FAX (612) 617-2601 www.bceboard.state.mn.us

MN Relay Service for Hearing or Speech Impaired: 1-800-627-3529
AN AFFIRMATIVE ACTION / EQUAL OPPORTUNITY EMPLOYER

Minnesota Board of Barber and Cosmetologist Examiners

DUAL NOTICE: Notice of Intent to Adopt Rules Without a Public Hearing Unless 25 or More Persons Request a Hearing, And Notice of Hearing If 25 or More Requests For Hearing Are Received

Proposed Amendment to Rules Governing Barbering and Cosmetology and Cosmetology Schools, *Minnesota Rules*, parts 2100.0100, 2105.0010, 2110.0010, 2110.0100, 2110.0500, and 2110.0680.

Introduction. The Board of Barber and Cosmetologist Examiners intends to adopt rules without a public hearing following the procedures set forth in the rules of the Office of Administrative Hearings, *Minnesota Rules*, parts 1400.2300 to 1400.2310, and the Administrative Procedure Act, *Minnesota Statutes*, sections 14.22 to 14.28. If, however, 25 or more persons submit a written request for a hearing on the rules by 4:30 p.m. on February 16, 2006, a public hearing will be held in Conference Room A, Fourth Floor, 2829 University Ave. S.E., Minneapolis, Minnesota 55415, starting at 9:00 a.m. on Tuesday, February 28, 2006 and continuing on Wednesday, March 1, 2006, if a second hearing day is necessary. To find out whether the rules will be adopted without a hearing or if the hearing will be held, you should contact the agency contact person after February 16, 2006 and before February 28, 2006.

Agency Contact Person. Comments or questions on the rules and written requests for a public hearing on the rules must be submitted to the agency contact person. The agency contact person is: Maureen Tibbetts at the Board of Barber and Cosmetologist Examiners, 2829 University Ave. S.E., Suite 710, Minneapolis, MN 55414, phone (651) 201-2744, FAX, (612) 617-2601. TTY users may call the Board of Barber and Cosmetologist Examiners at 1-800-627-3529.

Subject of Rules and Statutory Authority. The proposed rule amendments would: (1) modify the definitions of barbering and cosmetology to exclude hair braiding, hair braiding services, and hair braiders, as defined in the proposed rule amendments; (2) preempt ordinances by local units of government that prohibit hair braiding, hair braiding services, or hair braiders, as defined in the proposed rule amendments, or regulate any matter relating to licensing, testing, or training of hair braiding, hair braiding services, or hair braiders; and (3) modify the educational requirements for cosmetology students to allow for a maximum of one percent of the total curriculum time in cosmetology schools to be dedicated to the teaching of unregulated services, as defined in the proposed rule amendments. The statutory authority to adopt the rules is *Minnesota Statutes*, section 154.22(f), 154.24, and 155A.05. A copy of the proposed rules is published in the *State Register* and attached to this notice as mailed. A free copy of the rules is available upon request from the agency contact person listed above.

Comments. You have until 4:30 p.m. on Thursday, February 16, 2006, to submit written comment in support of or in opposition to the proposed rules or any part or subpart of the rules. Your comment must be in writing and received by the agency contact person by the due date. Comment is encouraged. Your comments should identify the portion of the proposed rules

addressed, the reason for the comment, and any change proposed. You are encouraged to propose any change desired. Any comments that you would like to make on the legality of the proposed rules must also be made during this comment period.

Request for a Hearing. In addition to submitting comments, you may also request that a hearing be held on the rules. Your request for a public hearing must be in writing and must be received by the agency contact person by 4:30 p.m. on Thursday, February 16, 2006. Your written request for a public hearing must include your name and address. You must identify the portion of the proposed rules to which you object or state that you oppose the entire set of rules. Any request that does not comply with these requirements is not valid and cannot be counted by the agency when determining whether a public hearing must be held. You are also encouraged to state the reason for the request and any changes you want made to the proposed rules.

Withdrawal of Requests. If 25 or more persons submit a valid written request for a hearing, a public hearing will be held unless a sufficient number withdraw their requests in writing. If enough requests for hearing are withdrawn to reduce the number below 25, the agency must give written notice of this to all persons who requested a hearing, explain the actions the agency took to effect the withdrawal, and ask for written comments on this action. If a public hearing is required, the agency will follow the procedures in *Minnesota Statutes*, sections 14.131 to 14.20.

Alternative Format/Accommodation. Upon request, this Notice can be made available in an alternative format, such as large print, Braille, or cassette tape. To make such a request or if you need an accommodation to make this hearing accessible, please contact the agency contact person at the address or telephone number listed above.

Modifications. The proposed rules may be modified, either as a result of public comment or as a result of the rule hearing process. Modifications must be supported by data and views submitted to the agency or presented at the hearing and the adopted rules may not be substantially different than these proposed rules, unless the procedure under *Minnesota Rules*, part 1400.2110, has been followed. If the proposed rules affect you in any way, you are encouraged to participate in the rulemaking process.

Cancellation of Hearing. The hearing scheduled for February 28, 2006 and March 1, 2006, will be canceled if the agency does not receive requests from 25 or more persons that a hearing be held on the rules. If you requested a public hearing, the agency will notify you before the scheduled hearing whether or not the hearing will be held. You may also call the agency contact person at (651) 201-2744 after February 16, 2006 to find out whether the hearing will be held.

Notice of Hearing. If 25 or more persons submit valid written requests for a public hearing on the rules, a hearing will be held following the procedures in *Minnesota Statutes*, sections 14.131 to 14.20. The hearing will be held on the date and at the time and place listed above. The hearing will continue until all interested persons have been heard. Administrative Law Judge Beverly Jones Heydinger is assigned to conduct the hearing. Judge Heydinger can be

reached at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota 55401-2138, telephone (612) 341-7606, and FAX 612-349-2665.

Hearing Procedure. If a hearing is held, you and all interested or affected persons, including representatives of associations or other interested groups, will have an opportunity to participate. You may present your views either orally at the hearing or in writing at any time before the close of the hearing record. All evidence presented should relate to the proposed rules. You may also submit written material to the Administrative Law Judge to be recorded in the hearing record for five working days after the public hearing ends. This five-day comment period may be extended for a longer period not to exceed 20 calendar days if ordered by the Administrative Law Judge at the hearing. Following the comment period, there is a five-working-day rebuttal period during which the agency and any interested person may respond in writing to any new information submitted. No additional evidence may be submitted during the five-day rebuttal period. All comments and responses submitted to the Administrative Law Judge must be received at the Office of Administrative Hearings no later than 4:30 p.m. on the due date. All comments or responses received will be available for review at the Office of Administrative Hearings. This rule hearing procedure is governed by *Minnesota Rules*, parts 1400.2000 to 1400.2240, and *Minnesota Statutes*, sections 14.131 to 14.20. Questions about procedure may be directed to the Administrative Law Judge.

The agency requests that any person submitting written views or data to the Administrative Law Judge prior to the hearing or during the comment or rebuttal period also submit a copy of the written views or data to the agency contact person at the address stated above.

Statement of Need and Reasonableness. A statement of need and reasonableness is now available from the agency contact person. This statement contains a summary of the justification for the proposed rules, including a description of who will be affected by the proposed rules and an estimate of the probable cost of the proposed rules. The statement may also be reviewed and copies obtained at the cost of reproduction from the agency.

Lobbyist Registration. *Minnesota Statutes*, chapter 10A, requires each lobbyist to register with the State Campaign Finance and Public Disclosure Board. Questions regarding this requirement may be directed to the Campaign Finance and Public Disclosure Board at: Suite 190, Centennial Building, 658 Cedar Street, St. Paul, Minnesota 55155, telephone 651-296-5148 or 1-800-657-3889.

Adoption Procedure if No Hearing. If no hearing is required, the agency may adopt the rules after the end of the comment period. The rules and supporting documents will then be submitted to the Office of Administrative Hearings for review for legality. You may ask to be notified of the date the rules are submitted to the office. If you want to be so notified, or want to receive a copy of the adopted rules, or want to register with the agency to receive notice of future rule proceedings, submit your request to the agency contact person listed above.

Adoption Procedure After a Hearing. If a hearing is held, after the close of the hearing record, the Administrative Law Judge will issue a report on the proposed rules. You may ask to

be notified of the date when the Administrative Law Judge's report will become available, and can make this request at the hearing or in writing to the Administrative Law Judge. You may also ask to be notified of the date on which the agency adopts the rules and the rules are filed with the Secretary of State, and can make this request at the hearing or in writing to the agency contact person stated above.

Order. I order that the rulemaking hearing be held at the date, time, and location listed

above

12/20/05
Date

Susan Schaefer
Printed Name: Susan Schaefer
Title: Chairman of the Board

Minnesota Board of Barber and Cosmetologist Examiners

STATEMENT OF NEED AND REASONABLENESS

Proposed Amendment to Rules Governing Barbering and Cosmetology and Cosmetology Schools, Minnesota Rules, parts 2100.0100, 2105.0010 (formerly 2642.0010), 2110.0010 (formerly 2644.0010), 2110.0100 (formerly 2644.0100), 2110.0500 (formerly 2644.0500), and 2110.0680 (formerly 2644.0680).

INTRODUCTION

The Board of Barber and Cosmetologist Examiners ("Board") was created by the Minnesota legislature in 2004, supplemented by further legislation in 2005. The jurisdiction of the Board of Barber and Cosmetologist Examiners combines the authority and functions of the former Board of Barber Examiners, which licensed and regulated the practice of barbers, barber shops, and barber schools, and the authority and functions formerly exercised by the Minnesota Commissioner of Commerce, who administered and enforced the laws regulating cosmetologists, cosmetology salons, and cosmetology schools.

The Board is responsible for administration, licensing, enforcement, regulation, and adoption of rules under Minnesota Statutes chapter 154 (barbers, barber shops, barber schools) and Minnesota Statutes chapter 155A (cosmetologists, salons, and cosmetology schools). Board membership terms, compensation of members, removal of members, the filling of membership vacancies, and fiscal year and reporting requirements for the board are as provided in Minnesota Statutes sections 214.07 to 214.09. Operation of the board staff, administrative services and office space, the review and processing of complaints, the setting of board fees, and other aspects of board operations are governed by Minnesota Statutes chapter 214. Board staff serves both professions.

The proposed rule amendments govern the definitions of barbering and cosmetology and the cosmetology educational curriculum. The proposed rule amendments would: (1) modify the definitions of barbering and cosmetology to exclude hair braiding, hair braiding services, and hair braiders, as defined in the proposed rule amendments; (2) preempt ordinances by local units of government that prohibit hair braiding, hair braiding services, or hair braiders, as defined in the proposed rule amendments, or regulate any matter relating to licensing, testing, or training of hair braiding, hair braiding services, or hair braiders; and (3) modify the educational requirements for cosmetology students to allow for a maximum of one percent of the total curriculum time in cosmetology schools to be dedicated to the teaching of unregulated services, as defined in the proposed rule amendments. The Board published a Request for Comments in the State Register on Monday, October 31, 2005 (30 SR 449).

The Board of Barber and Cosmetologist Examiners is specifically required by a June 10, 2005 Hennepin County District Court order to initiate this rulemaking to adopt the first two categories of proposed rule amendments discussed above, which relate to the exemption of hair braiding, hair braiding services, and hair braiders from the definitions of barbering and cosmetology and from licensing and regulation by the Board, and the preemption of any ordinances of local units of government that prohibit hair braiding, hair braiding services, and hair braiders, or regulate any matter relating to licensing, testing or training of hair braiding, hair

braiding services, or hair braiders. See Stipulated Findings of Fact and Conclusions of Law and Agreed Order in *Anderson et al. v. Minnesota Board of Barber and Cosmetologist Examiners et al.*, Court File No. 05-5467, Hennepin County District Court, June 10, 2005 (Honorable Isabel Gomez) ("Court Order"). The definitions of "hair braiding," "hair braiding services," "hair braiders," and "simple braiding devices" and the content of the first and second parts of the proposed rule amendments are mandated by the Court Order. The Court Order requires the Board to work in good faith towards adoption of the rule amendments by April 20, 2006. Further discussion of the legal background and necessity for adoption of the proposed rules appears in the section below entitled "Need and Reasonableness."

Until the Court Order, the statutes and rules concerning "cosmetology" and "licensed services" were interpreted by the Commissioner of Commerce (who formerly administered and enforced the cosmetology laws, as discussed above) to include hair braiding, hair braiding services, and hair braiders. The curriculum offered by Minnesota cosmetology schools often included some instruction in hair braiding skills. Since the Commissioner interpreted hair braiding as falling within the definition of "cosmetology" until the Court Order, the Commissioner counted instruction in hair braiding taught in cosmetology schools towards fulfillment of some of the required types and hours of instruction for a cosmetology student.

Adoption of the first two categories of rule amendments would shift hair braiding from a "licensed service" to an "unregulated service," as hair braiding would no longer fall within the definition of "cosmetology" in the Board's statutes and rules. The cosmetology schools and cosmetology association have expressed to the Board a desire to continue instruction in hair braiding that would provide some measure of academic credit for students. The third category of proposed rule amendments responds to that need by modifying the educational curriculum for cosmetology students to allow for a maximum of one percent of the total curriculum time to be dedicated to the teaching of unregulated services. This category of proposed rule amendments, therefore, also relates to the requirements of the Court Order.

The rule definition of "unregulated services" currently lists other skills exempt from regulation by the Board, including ear piercing, body wrapping, permanent depilation, tattooing, artificial tanning of the skin, personal services incidental to performance in theatrical or musical productions or media appearances, personal services incident to mortuary practice, and massage services. The Board believes it is reasonable to treat all types of unregulated services similarly and allow for the proposed small amount of instructional credit to apply to the teaching of any type of unregulated service as defined in the proposed amendments to the Board rules.

ALTERNATIVE FORMAT

Upon request, this Statement of Need and Reasonableness can be made available in an alternative format, such as large print, Braille, or cassette tape. To make a request, contact Maureen Tibbetts at the Board of Barber and Cosmetologist Examiners, 2829 University Ave. S.E., Suite 710, Minneapolis, MN 55414, telephone: (651) 201-2744; fax: (612) 617-2601. TTY users may call the Board of Barber and Cosmetologist Examiners at 1-800-627-3529.

STATUTORY AUTHORITY

The Board of Barber and Cosmetologist Examiners' statutory authority to adopt the rule amendments is set forth in Minnesota Statutes, sections 154.22(f) (renumbered as section 154.001) (2005 Laws, ch. 27, §9); 154.24; and 155A.05 (2005), which provide, in pertinent part:

154.22(f) The barber members of the board shall separately oversee administration, enforcement, and regulation of, and adoption of rules under, sections 154.01 to 154.26. The cosmetologist members of the board shall separately oversee administration, enforcement, and regulation of, and adoption of rules under, sections 155A.01 to 155A.16. Staff hired by the board, including inspectors, shall serve both professions.

154.24 Rules.

The Board of Barber and Cosmetologist Examiners shall have authority to make reasonable rules for the administration of the provisions of sections 154.01 to 154.26 and prescribe sanitary requirements for barber shops and barber schools, subject to the approval of the state commissioner of health. Any member of the board, or its agents or assistants, shall have authority to enter upon and to inspect any barber shop or barber school at any time during business hours. A copy of the rules adopted by the board shall be furnished by it to the owner or manager of each barber shop or barber school and such copy shall be posted in a conspicuous place in such barber shop or barber school.

155A.05 Rules.

The Board may develop and adopt rules according to chapter 14 that the Board considers necessary to carry out sections 155A.01 to 155A.16.

This rulemaking is an amendment of rules and so Minnesota Statutes, section 14.125, does not apply. Even if section 14.125 did apply, the Board has initiated this rulemaking prior to January 1, 2006; thus, it is within 18 months of the effective dates of both the 2004 and 2005 legislation that transferred the authority to adopt rules on cosmetology and barbering to the Board.

Under these statutes, the Board of Barber and Cosmetologist Examiners has the necessary statutory authority to adopt the proposed rule amendments.

NEED AND REASONABLENESS

The proposed amendments to the Board's rules are both needed and reasonable based on the June 10, 2005 Court Order, which requires the Board to work in good faith to adopt these rule amendments and the agreed upon contents of the rules by April 20, 2006. The Court Order also enjoins the Board from enforcing the barber and cosmetology laws against hair braiders and hair braiding establishments. The need and reasonableness of these rule amendments are also based upon the reasoning in a 1999 California federal court decision which held that enforcement of California cosmetology licensing and training requirements against hair braiders violated their

substantive due process and equal protection rights. *Cornwell v. Hamilton*, 80 F.Supp. 2d 1101 (S.D. Cal. 1999). The court in *Cornwell* ruled that California cosmetology licensing and training requirements were not rationally related to the achievement of any legitimate state objectives. Minnesota cosmetology statutes and rules are similar, in many respects, to the California laws that were struck down as unconstitutional when applied to hair braiders. The proposed rule amendments would address and remedy this constitutional defect in the Minnesota laws, which led to the Court Order.

The Court Order also mandates that the Board interpret its rules as exempting hair braiding, hair braiders, and hair braiding establishments from regulation by the Board and preempting any similar local licensing and training requirements for hair braiders. There is no indication that the result in the *Cornwell* case would have been any different if local governments had enforced the same types of licensing and training requirements for hair braiders as the state of California. In the present context, preemption is supported by the legislature giving the Board authority to license and regulate cosmetologists and barbers and to interpret and implement the laws related to those professions by means of administrative rules (including what practices fall within the definitions of "barbering" and "cosmetology"). When the Board exercises its authority to adopt the proposed rule amendments, as required by the Court Order, the adoption of those amendments would preempt the field and not allow for any local licensing or training requirements for hair braiders or hair braiding establishments that are similar to the former Board requirements. The Board's intent regarding preemptive effect of the proposed rule amendments is, however, not meant to extend to local ordinances that only regulate health and safety and do not impose licensing or training requirements on hair braiders or hair braiding establishments.

Finally, the Board also believes that it is reasonable to modify its rules to allow for a small amount of credit for hair braiding instruction as part of the cosmetology curriculum, and the Board wishes to treat other "unregulated services," as defined by Board rules, in a similar manner. Therefore, the Board is proposing in the rule amendments that a very small portion of the cosmetology student instructional time, up to a maximum of one percent of the total curriculum time, may include the teaching of "unregulated services." This amendment would allow the cosmetology schools to continue teaching some types of "unregulated services," and would continue past practice for those schools in teaching hair braiding skills. Similarly, the rule amendments would allow cosmetology students, who may wish to learn how to perform some types of "unregulated services," to receive a reasonable amount of curriculum credit for those instructional hours.

REGULATORY ANALYSIS

Minnesota Statutes, section 14.131, sets out seven factors for a regulatory analysis that must be included in the SONAR. Paragraphs (1) through (7) below quote these factors and then give the Board'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 Board anticipates that the following classes of persons would likely be affected by the proposed rule amendments: hair braiders, hair braiding establishments, cosmetology students, cosmetology schools, cosmetologists, and local units of government. All the classes of persons would benefit from the proposed rules.

First, hair braiders would benefit because they no longer would be required to complete the extensive cosmetology educational curriculum so that they could become licensed as cosmetologists. The cosmetology curriculum contains a large part of instruction that has little, if any, relation to hair braiding. *See Cornwell v. Hamilton, supra*. Exemption of hair braiders would relieve them of the cost and time of completing the cosmetology licensing requirements, which would likely have the effect of removing regulatory barriers to entry into the hair braiding profession.

Second, hair braiding establishments would benefit because they would no longer have to be licensed as cosmetology salons and they would no longer have to be managed by a licensed cosmetologist. Removal of these requirements would likely increase employment opportunities for hair braiders and reduce costs of doing business for hair braiding establishments.

Third, cosmetology schools and students would benefit as the proposed rule amendments would comply with the Court Order, but continue to provide a reasonable amount of credit for instruction in "unregulated services" as part of the cosmetology curriculum. Therefore, the schools could continue providing instruction in skills that students want to learn, and students could continue receiving some credit for that instruction towards their licensure requirements.

Fourth, the Board and the barbering and cosmetology professions would benefit because the rule amendments would modify the Minnesota laws to remove the constitutional issues created by application of the barber and cosmetology laws to hair braiders and hair braiding establishments. The Board does not anticipate any negative impact on currently licensed barbers and cosmetologists, nor on their business establishments. The proposed rule amendments do not change the services that licensed barbers or cosmetologists may perform for the public or increase their costs of doing business. They do not prohibit licensed barbers or cosmetologists from offering to perform hair braiding services to the public as part of their businesses. The proposed rule amendments also fairly treat hair braiding and other types of unregulated services that may be offered by licensed establishments in a similar manner.

Finally, although local units of government would technically be affected because the proposed rule amendments would preempt them from imposing the same types of licensing and training requirements on hair braiders or hair braiding establishments that the Board will be eliminating, the Board anticipates that there will be no economic cost to local units of government because the proposed rules do not create any new regulatory requirements or enforcement obligations for local governments.

(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 only costs to the Board for the implementation of the proposed rule amendments are its legal and publication expenses related to this rulemaking proceeding. Because the Board is enjoined by the Court Order from enforcing the barber and cosmetology laws against hair braiders and hair braiding establishments and the proposed rule amendments will exempt hair

braiders and hair braiding establishments from the Board's regulatory jurisdiction, the Board will incur no enforcement or administrative expenses related to hair braiding once this rulemaking proceeding is concluded.

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

The Board did not consider whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule amendments. The Board does not anticipate that there will be any resulting costs for the affected classes of persons listed in subpart (1) above. Under the terms of the Court Order, the Board must initiate these rulemaking proceedings to adopt the proposed rule amendments. It is possible that the legislature could enact laws in the 2006 session that would have the same effect as the proposed rule amendments. However, the Board is under a legal obligation to timely comply with the Court Order and does not believe that it is in a position to wait to see what the legislature might do. The Board has not drafted any bills that would achieve the purpose of the proposed rule amendments.

(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 Board did not seriously consider any alternative methods for achieving the purpose of the proposed rule amendments, as the Court Order requires the Board to initiate and work in good faith toward adoption of these rule amendments. The Court Order does not allow the Board to consider alternative methods for achieving these goals.

(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 Board did not compute the probable costs of complying with the proposed rule amendments because, as discussed in subpart (1) above, the Board does not anticipate that any of the affected classes of persons will incur any costs as a consequence of the adoption of the proposed rule amendments.

(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

If the proposed rule amendments are not adopted, the lion's share of the probable costs or consequences will fall upon the Board, as the plaintiffs in *Anderson et al v. Board of Barber and Cosmetologists et al.* litigation will likely ask the court to lift the stay on those proceedings and ask for sanctions to be imposed on the Board for noncompliance with the Court Order. The plaintiffs would probably also seek to recover their costs and attorney fees. The Board would have to incur additional legal expenses to defend against the reinstatement of this court case and the Board would argue that it acted in good faith to get the rule amendments adopted.

If the proposed rule amendments were not adopted, the Court Order still would have the effect of enjoining the Board from enforcing the barber and cosmetology laws against hair

braiders and hair braiding establishments. However, hair braiders and hair braiding establishments would not have achieved "codification" of the principles of the *Cornwell* decision as part of the ongoing regulatory policy of the State of Minnesota. See Minnesota Statutes section 214.001 (2004).

If the proposed rule amendments were not adopted, particularly the third category relating to modifying the rules on qualifying types of instruction, cosmetology students would no longer be able to get credit towards required hours of instruction for hair braiding instruction because the current Board rules only allow credit for instruction in "licensed services," and the Court Order would have the effect of making hair braiding an "unregulated service." Cosmetology schools may decide not to offer any instruction in "unregulated services" as students would not get credit for those hours.

(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

The Board is not aware of any existing federal regulations applicable to the barbering and cosmetology professions, so that the Board could not compare any differences between the proposed rule amendments and any federal regulations.

PERFORMANCE-BASED RULES

The Board recognizes that the State regulatory policy set forth in Minnesota Statutes, section 14.002 reflects a concern that State regulatory rules and programs not become "overly prescriptive and inflexible" with the effect of increasing costs to the State, local governments and the regulated community and decreasing the effectiveness of State regulation. The Board shares these concerns. The proposed rule amendments will remove hair braiders and hair braiding establishments from the Board's regulatory jurisdiction, as required by the Court Order and constitutional law principles reflected in the *Cornwell v. Hamilton* decision, discussed above. Therefore, the proposed rule amendments will actually increase the effectiveness of State regulation by eliminating a questionable area of State regulation and enhancing the employment and business opportunities for hair braiders and hair braiding establishments. In addition, the proposed rule amendments will not create any additional costs for State or local governments, except for the Board's legal and publication expenses incurred for the rulemaking proceeding.

Indeed, if the Board did not follow the mandate of the Court Order and initiate this rulemaking proceeding, the State would have exposure to incur substantially larger costs. If the Board did not comply with the Court Order, the plaintiffs in the *Anderson et al. v. Board of Barber and Cosmetologist Examiners et al.* litigation would likely ask the district court to lift the stay on those proceedings, ask the court to impose sanctions against the Board for noncompliance, and seek recovery of plaintiffs' damages, costs, and attorney fees, which could be substantial. The Board believes that by initiating this rulemaking proceeding, the Board is fulfilling not only its strict legal obligation but is increasing the effectiveness of State regulation by modifying or eliminating Board rules when there are substantial legal issues as to their constitutionality.

ADDITIONAL NOTICE

The Board's Additional Notice Plan was reviewed by the Office of Administrative Hearings and approved in a December 16, 2005 letter by Administrative Law Judge Beverly Jones Heydinger.

The Board's Additional Notice Plan includes mailing a copy of the Dual Notice and the proposed rule amendments to: 1) all persons who are on the Board's current mailing list to receive advance notice of all Board meetings; 2) the barbering and cosmetology trade associations in Minnesota; 3) all the licensed cosmetology schools in Minnesota; 4) the attorneys representing the plaintiffs in the *Anderson et al. v. Minnesota Board of Barber and Cosmetologist Examiners et al* case; and 5) the Minnesota Commissioner of Commerce, who was also a defendant in the *Anderson et al. v. Minnesota Board of Barber and Cosmetologist Examiners et al.* case. The Board also will send a press release concerning the Notice of Intent to Adopt to the Minneapolis Star Tribune and the St. Paul Pioneer Press, which will state that a complete copy of the Notice of Intent to Adopt and the proposed rule amendments may be obtained from the Board's office or viewed in the *State Register*. In addition, the Board will post a copy of the Dual Notice on its website.

Our Notice Plan also includes giving notice required by statute. The Board of Barber and Cosmetologist Examiners does not have any current notice of rulemaking list, however. The last time that the Board of Barber Examiners was involved in a rulemaking proceeding, several years ago, the vast majority of mailings on its notice of rulemaking list were returned as undeliverable because the Board of Barber Examiners was not notified of changes in address of persons on the list. The Board of Barber and Cosmetologist Examiners contacted the Minnesota Department of Commerce, which formerly licensed and regulated cosmetologists, salons, and cosmetology schools, and the Board learned that the Commerce Department did not maintain a list of persons who wished to be notified regarding cosmetology rulemaking. We will also give notice to the Legislature per Minnesota Statutes, section 14.116.

CONSULT WITH FINANCE ON LOCAL GOVERNMENT IMPACT

As required by Minnesota Statutes, section 14.131, the Board has consulted with the Commissioner of Finance. We did this by sending to 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 Board publishing the Notice of Intent to Adopt. We sent the copies on November 17, 2005. The documents included: the Governor's Office Proposed Rule and SONAR Form; almost final draft rules; and almost final SONAR. The Department of Finance sent a letter dated November 22, 2005 with its comments.

The Board does not believe that the proposed rule amendments will have any fiscal impact on local governments. The proposed rule amendments will not require local governments to take any actions or incur any expenses. The proposed rule amendments are intended to preempt local units of government from prohibiting hair braiding or hair braiding establishments or imposing licensing or training requirements on hair braiders or hair braiding establishments.

COST OF COMPLYING FOR SMALL BUSINESS OR CITY

Agency Determination of Cost

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

The Board has made this determination based on the probable costs of complying with the proposed rule, as described in the Regulatory Analysis section of this SONAR on pages 4 to 7. As noted in the Board's Regulatory Analysis, the Board does not believe that any of the affected classes of persons will incur any costs as a result of adoption of the proposed rule amendments. Hair braiders and hair braiding establishments would be relieved of the costs of State cosmetology training and licensing. Cosmetology schools would continue their current practice of providing some instruction in unregulated services. Barber and cosmetology practitioners would not be required to make any changes in their business practices as a result of the proposed rule amendments. The proposed rule amendments would preempt local units of government from imposing licensing or training requirements on hair braiders and hair braiding establishments. Therefore, the Board does not anticipate that local units of government would incur any costs as a result of these rule amendments.

LIST OF WITNESSES

If the proposed rule amendments go to a public hearing, the Board anticipates that its Executive Secretary, Chair, and one or more Board members may testify in support of the need for and reasonableness of the rules. The Board does not anticipate asking any non-agency witnesses to testify. If the proposed rule amendments go to a public hearing, interested non-agency persons may wish to testify.

RULE-BY-RULE ANALYSIS

Part 2100.0100 Definitions: As required by the Court Order, the amendments to this rule modify the definition of "barbering" to ensure that it is construed to not prohibit or regulate hair braiding, hair braiding services, and hair braiders, as defined in subparts 4 to 6, and preempt ordinances by local units of government that prohibit hair braiding, hair braiding services, or hair braiders, as defined in subparts 4 to 6, or regulate any matter relating to licensing, testing, or training of hair braiding, hair braiding services, or hair braiders. The rule amendments also add new definitions of "hair braiding," "hair braiding services," "hair braider," and "simple braiding devices" which are also required by the Court Order.

Part 2105.0010 Definitions: As required by the Court Order, the amendments to this rule add new definitions of "hair braiding," "hair braiding services," "hair braider," and "simple braiding devices" to the chapter of rules applicable to individual cosmetologists and cosmetology salons. The amendments also modify the definition of "licensed services" in the cosmetology rules to ensure that the statutory term "cosmetology" is construed to not prohibit or regulate hair braiding, hair braiding services, and hair braiders, as defined in subparts 10a to 10c. The rule amendments also modify the definition of "unregulated service" to include hair braiding, hair

braiding services, and hair braiders, as defined in subparts 10a to 10c, exempt from regulation by the Board as “unregulated services.” The amendments also preempt ordinances by local units of government that prohibit hair braiding, hair braiding services, or hair braiders, as defined in subparts 10a to 10c, or regulate any matter relating to licensing, testing, or training of hair braiding, hair braiding services, or hair braiders, which is also required by the Court Order.

Part 2110.0010 Definitions: As required by the Court Order, the amendments to this rule add new definitions of “hair braiding,” “hair braiding services,” “hair braider,” and “simple braiding devices.” The amendments also modify the definitions of “licensed services” and “unregulated service” in the same manner, and for the same reasons, as the amendments to part 2105.0010, but these amendments apply to cosmetology schools rather than individual cosmetologists or salons.

Part 2110.0100, subp.2 Disclosure of Courses: This provision is not required by the express provisions of the Court Order. However, as noted in the Need and Reasonableness section above, if the Board only adopts the rule changes expressly required by the Court Order and does not modify its cosmetology curriculum rules, no credit towards the educational requirements for cosmetology licensure could be granted for instruction in hair braiding. Currently, the Board rules do not count instructional time in unregulated services toward education requirements for licensure. This amendment responds to a need asserted by the cosmetology association and cosmetology schools to continue to offer hair braiding instruction in the schools and continue to allow some measure of academic credit toward licensure requirements for such instruction. The Board wishes to treat all unregulated services in a similar manner, so the rule amendment is drafted to include instruction in all types of unregulated services, not just hair braiding, in the one percent category.

Part 2110.0500 Curriculum Approval and Content: This rule is being amended to specifically authorize cosmetology schools to dedicate no more than one percent of the total curriculum time to the teaching of unregulated services. This amendment works in conjunction with the amendments also being proposed to Part 2110.0100, subp.2 and 2110.0680. This amendment is not required by the express provisions of the Court Order.

Part 2110.0680 Certification of Student Hours: This rule amendment modifies the previous language in subpart E which only allowed student credit for hours of instruction in licensed services. In conjunction with the amendments also being proposed to Part 2110.0100, subp.2 and 2110.0500, this amendment cross-references the other two modified rules to authorize students to receive credit for no more than one percent of their total instructional time and clinical experience in learning unregulated services. This amendment is not required by the express provisions of the Court Order.

LIST OF EXHIBITS

In support of the need for and reasonableness of the proposed rules, the Board anticipates that it will enter the following exhibits into the hearing record:

- The request for comments published in the State Register.
- The proposed rule amendments, including the Revisor’s approval.

- The statement of need and reasonableness.
- A copy of the transmittal letter or a certificate showing that the Board sent a copy of the statement of need and reasonableness to the Legislative Reference Library.
- The dual notice as mailed and as published in the State Register.
- The certificate of mailing the dual notice and certificate of accuracy of the mailing list.
- A certificate of additional notice or a copy of the transmittal letter.
- Any written comments on the proposed rule received by the Board during the comment period.
- Copies of the transmittal letters sending a copy of the dual notice and statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rule amendments.
- A copy of the Stipulated Findings of Fact, Conclusions of Law and Agreed Order in *Anderson et al. v. Board of Barber and Cosmetologist Examiners et al.*, Court File No. 05-5467, Hennepin County District Court, June 10, 2005 (Honorable Isabel Gomez).
- A copy of *Cornwell v. Hamilton*, 80 F.Supp. 2d 1101 (S.D. Cal. 1999).

CONCLUSION

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

Dated: 12/20, 2005.

Susan Schaefer

Printed Name: Susan Schaefer

Title: Chairman of the Board

1 Board of Barber and Cosmetologist Examiners
2 Proposed Permanent Rules Governing Hair Braiding

3 2100.0100 DEFINITIONS.

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

5 Subp. 1a. **Barbering.** The practice of barbering as defined
6 in Minnesota Statutes, section 154.02, means the services
7 described in that section when performed on a living person and
8 includes those services when performed in conjunction with the
9 selling of hair pieces, wigs, or an artificial hair
10 application. The definition of "barbering" in Minnesota
11 Statutes, section 154.02, must be construed to not prohibit or
12 regulate hair braiding, hair braiding services, and hair
13 braiders, as defined in subparts 4 to 6. Ordinances by local
14 units of government that prohibit hair braiding, hair braiding
15 services, or hair braiders, as defined in subparts 4 to 6, or
16 regulate any matter relating to licensing, testing, or training
17 of hair braiding, hair braiding services, or hair braiders are
18 preempted by this part.

19 [For text of subps 2 and 3, see M.R.]

20 Subp. 4. Hair braiding. "Hair braiding" means a natural
21 form of hair manipulation that results in tension on hair
22 strands by beading, braiding, cornrowing, extending, lacing,
23 locking, sewing, twisting, weaving, or wrapping human hair,
24 natural fibers, synthetic fibers, and/or hair extensions into a
25 variety of shapes, patterns, and textures (predominantly by hand
26 and/or by simple braiding devices), and maintenance thereof.
27 Hair braiding includes what is commonly known as "African-style

1 hair braiding" or "natural hair care" but is not limited to any
2 particular cultural, ethnic, racial, or religious forms of hair
3 styles. Hair braiding includes the making of customized wigs
4 from natural hair, natural fibers, synthetic fibers, and/or hair
5 extensions. Hair braiding includes the use of topical agents
6 such as conditioners, gels, moisturizers, oils, pomades, and
7 shampoos. Hair braiding does not involve the use of penetrating
8 chemical hair treatments, chemical hair coloring agents,
9 chemical hair straightening agents, chemical hair joining
10 agents, permanent wave styles, or chemical hair bleaching agents
11 applied to growing human hair.

12 Subp. 5. Hair braiding services. "Hair braiding services"
13 means offering to perform or performing hair braiding, as
14 defined in part 2105.0010, subpart 10a, as a service to members
15 of the public for a fee or other consideration.

16 Subp. 6. Hair braider. "Hair braider" means a person who
17 offers to perform or performs hair braiding or hair braiding
18 services as defined in part 2105.0010, subparts 10a to 10c.

19 Subp. 7. Simple braiding devices. "Simple braiding
20 devices" include clips, combs, curlers, curling irons, hairpins,
21 rollers, scissors, needles, and thread.

22 2105.0010 DEFINITIONS.

23 [For text of subps 1 to 10, see M.R.]

24 Subp. 10a. Hair braiding. "Hair braiding" means a natural
25 form of hair manipulation that results in tension on hair
26 strands by beading, braiding, cornrowing, extending, lacing,
27 locking, sewing, twisting, weaving, or wrapping human hair,

1 natural fibers, synthetic fibers, and/or hair extensions into a
2 variety of shapes, patterns, and textures (predominantly by hand
3 and/or by simple braiding devices), and maintenance thereof.
4 Hair braiding includes what is commonly known as "African-style
5 hair braiding" or "natural hair care" but is not limited to any
6 particular cultural, ethnic, racial, or religious forms of hair
7 styles. Hair braiding includes the making of customized wigs
8 from natural hair, natural fibers, synthetic fibers, and/or hair
9 extensions. Hair braiding includes the use of topical agents
10 such as conditioners, gels, moisturizers, oils, pomades, and
11 shampoos. Hair braiding does not involve the use of penetrating
12 chemical hair treatments, chemical hair coloring agents,
13 chemical hair straightening agents, chemical hair joining
14 agents, permanent wave styles, or chemical hair bleaching agents
15 applied to growing human hair.

16 Subp. 10b. Hair braiding services. "Hair braiding
17 services" means offering to perform or performing hair braiding,
18 as defined in subpart 10a, as a service to members of the public
19 for a fee or other consideration.

20 Subp. 10c. Hair braider. "Hair braider" means a person
21 who offers to perform or performs hair braiding or hair braiding
22 services as defined in subparts 10a and 10b.

23 Subp. 11. Licensed services. "Licensed services" means
24 those services defined as the practice of cosmetology under
25 Minnesota Statutes, section 155A.03, subdivision 2 and includes
26 the fitting of wigs and hair pieces on the head and the dressing
27 of wigs and hair pieces while on the head. The definition of

1 "cosmetology" in Minnesota Statutes, section 155A.03,
2 subdivision 2, must be construed to not prohibit or regulate
3 hair braiding, hair braiding services, and hair braiders, as
4 defined in subparts 10a to 10c.

5 Subp. 11a. Simple braiding devices. "Simple braiding
6 devices" include clips, combs, curlers, curling irons, hairpins,
7 rollers, scissors, needles, and thread.

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

9 Subp. 13. Unregulated service. "Unregulated service"
10 means those services not defined as the practice of cosmetology
11 under Minnesota Statutes, section 155A.03, subdivision 2, and
12 which are exempt from regulation by the board, and includes ear
13 piercing, body wrapping, permanent depilitation, tattooing,
14 artificial tanning of the skin; personal services incidental to
15 performance in theatrical or musical productions or media
16 appearances; any personal services performed incidental to
17 mortuary practice; and massage services; and hair braiding, hair
18 braiding services, and hair braiders, as defined in subparts 10a
19 to 10c. Ordinances by local units of government that prohibit
20 hair braiding, hair braiding services, or hair braiders, as
21 defined in subparts 10a to 10c, or regulate any matter relating
22 to licensing, testing, or training of hair braiding, hair
23 braiding services, or hair braiders are preempted by this part.

24 2110.0010 DEFINITIONS.

25 [For text of subps 1 to 17, see M.R.]

26 Subp. 17a. Hair braiding. "Hair braiding" means a natural
27 form of hair manipulation that results in tension on hair

1 strands by beading, braiding, cornrowing, extending, lacing,
2 locking, sewing, twisting, weaving, or wrapping human hair,
3 natural fibers, synthetic fibers, and/or hair extensions into a
4 variety of shapes, patterns, and textures (predominantly by hand
5 and/or by simple braiding devices), and maintenance thereof.
6 Hair braiding includes what is commonly known as "African-style
7 hair braiding" or "natural hair care" but is not limited to any
8 particular cultural, ethnic, racial, or religious forms of hair
9 styles. Hair braiding includes the making of customized wigs
10 from natural hair, natural fibers, synthetic fibers, and/or hair
11 extensions. Hair braiding includes the use of topical agents
12 such as conditioners, gels, moisturizers, oils, pomades, and
13 shampoos. Hair braiding does not involve the use of penetrating
14 chemical hair treatments, chemical hair coloring agents,
15 chemical hair straightening agents, chemical hair joining
16 agents, permanent wave styles, or chemical hair bleaching agents
17 applied to growing human hair.

18 Subp. 17b. Hair braiding services. "Hair braiding
19 services" means offering to perform or performing hair braiding,
20 as defined in subpart 17a, as a service to members of the public
21 for a fee or other consideration.

22 Subp. 17c. Hair braider. "Hair braider" means a person
23 who offers to perform or performs hair braiding or hair braiding
24 services as defined in subparts 17a and 17b.

25 Subp. 18. Licensed services. "Licensed services" means
26 those services defined as the practice of cosmetology under
27 Minnesota Statutes, section 155A.03, subdivision 2 and includes

1 the fitting of wigs and hair pieces on the head and the dressing
2 of wigs and hair pieces while on the head. The definition of
3 "cosmetology" in Minnesota Statutes, section 155A.03,
4 subdivision 2, must be construed to not prohibit or regulate
5 hair braiding, hair braiding services, and hair braiders, as
6 defined in subparts 17a to 17c.

7 Subp. 18a. Simple braiding devices. "Simple braiding
8 devices" include clips, combs, curlers, curling irons, hairpins,
9 rollers, scissors, needles, and thread.

10 [For text of subp 19, see M.R.]

11 Subp. 20. Unregulated service. "Unregulated service"
12 means those services not defined as the practice of cosmetology
13 under Minnesota Statutes, section 155A.03, subdivision 2, and
14 which are exempt from regulation by the board, and includes ear
15 piercing, body wrapping, permanent depilitation, tattooing,
16 artificial tanning of the skin; personal services incidental to
17 performance in theatrical or musical productions or media
18 appearances; any personal services performed incidental to
19 mortuary practice; and massage services; and hair braiding, hair
20 braiding services, and hair braiders, as defined in subparts 17a
21 to 17c. Ordinances by local units of government that prohibit
22 hair braiding, hair braiding services, or hair braiders, as
23 defined in subparts 17a to 17c, or regulate any matter relating
24 to licensing, testing, or training of hair braiding, hair
25 braiding services, or hair braiders are preempted by this part.

26 2110.0100 UNREGULATED SERVICES.

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

1 Subp. 2. Disclosure of courses. Each school shall clearly
2 identify those courses and clinical experiences in its
3 curriculum which are not required by the department and which
4 pertain to services not licensed by the state. These courses
5 shall be clearly identified in all recruitment advertising and
6 written material used for the purposes of soliciting prospective
7 students.

8 Nonrequired courses and unregulated services shall be
9 conspicuously identified in all written material, in type of the
10 same size as the course or service name.

11 No more than one percent of the total instructional time
12 and clinical experience in unregulated services shall not be
13 included in the minimum hours of schooling required for
14 licensure.

15 2110.0500 CURRICULUM APPROVAL AND CONTENT.

16 Each cosmetology school shall have a curriculum approved by
17 the department to provide instruction, divided into daily lesson
18 plans. The curriculum shall include theory and practical
19 application of skills, including the instruction set forth in
20 parts 2105.0600 and 2110.0510 to 2110.0540. No more than one
21 percent of the total curriculum time may be dedicated to the
22 teaching of unregulated services.

23 2110.0680 CERTIFICATION OF STUDENT HOURS.

24 Certification of student hours shall be as follows:

25 A. All student hours shall be recorded, on a daily
26 and a monthly basis.

1 B. The daily record of hours shall list the number of
2 hours earned by each student and the nature of training
3 received, designating all clinical experiences; shall be signed
4 by the instructor who provided or supervised the training; shall
5 be signed by the student; and shall be based on the hours
6 actually recorded on the student's timecard.

7 Each student shall register on the timeclock at the
8 beginning and end of each school day and at the beginning and
9 end of lunch breaks. Timecards which are improperly punched or
10 inadvertently altered, or contain any error may be corrected and
11 that correction initialed by the student, the school manager,
12 and the appropriate instructor.

13 Original timecards shall be deemed to be the property of
14 the school. A student, within ten days of a request, is
15 entitled to receive copies of his or her timecards from the
16 school. The school may not withhold copies of his or her
17 timecards after a proper request has been made.

18 C. Each school shall complete and maintain a monthly
19 report for each student, summarizing the hours completed for
20 that month, and signed by the school owner or manager. A copy
21 of the report shall be given to the student within five days of
22 the end of each month.

23 D. No school or student shall alter the content or
24 the number of hours completed by a student unless because of
25 error and signed by both parties.

26 E. Except as provided in parts 2110.0100, subpart 2,
27 and 2110.0500, students shall receive credit only for hours

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1 spent in training for licensed cosmetology services.

2 F. No student shall receive credit for more than
3 eight hours of training per calendar day.

4 G. Each student must be given a morning and afternoon
5 break and at least one-half hour for lunch, or one hour for
6 lunch and no breaks.

7 H. It shall be made clear to the students in
8 materials designed to elicit their enrollment and at the time of
9 enrollment, the circumstances under which Saturday and evening
10 training will be held.

