

NEBRASKA DEPARTMENT OF EDUCATION
ADMINISTRATIVE MEMORANDUM #607
ISSUED: JULY, 2007

TO: NDE Staff

FROM: Douglas D. Christensen, Commissioner of Education

SUBJECT: Development of Department Rules and Regulations

For assistance contact the Agency Legal Counsel's Office at 471-0310

PURPOSE

When the Department develops standards which will affect a private right, or interest, or impose a penalty if not followed, those standards shall be put into the format of a State rule/regulation and properly adopted so that they are enforceable. This is required by the State Administrative Procedures Act (Section 84-901 of the Revised Statutes of Nebraska,(R.R.S.) (et. seq.)).

GENERAL POLICY REGARDING RULEMAKING

STATUTORY AUTHORITY

Section 79-318 of the *Revised Statutes of Nebraska* (R.R.S.) authorizes the State Board of Education to adopt rules and regulations for carrying out the Board's responsibilities and those assigned to the State Department of Education by the Legislature. As a constitutional agency, the Department has much broader rulemaking authority than code agencies created by statute. The Administrative Procedures Act, (§84-901, R.R.S. et. seq.), contains the main statutory provisions on how state agency rules are adopted. Under state law, the terms "rules" and "regulations" may be used interchangeably.

METHOD OF CITATION OF RULES

All Department rules are adopted as part of the Nebraska Administrative Code, which is the set of all Nebraska agency regulations. The Department of Education administrative program rules are chapters of Title 92 of the Nebraska Administrative Code. Thus, Rule 21 of the Department of Education is officially cited as Title 92, Nebraska Administrative Code, Chapter 21. The short citation would be 92 NAC 21. The Department of Education Personnel Rules are Title 93 of the Nebraska Administrative Code. The Department of Education Content Standards are Title 94 (Chapter 1 Mathematics Content Standards, Chapter 2 Reading/Writing Content Standards, Chapter 3 Science Content Standards, and Chapter 4 Social Studies Content Standards). The Nebraska Professional Practices Commission uses Title 95 for its rules.

APPLICATIONS & OTHER FORMS AND RULES

1. Except as provided in 2. below, if you require electronic submission of applications or reports and do not permit the submissions to be on paper then the "electronic form" for reporting or applying (screen shot/s) need not be attached to the rule. Simply state in your rule that reports or applications must be submitted electronically to the Department via the website/portal (or similar wording).
2. However, if your program statutes or regulations require the use of a form or application specified by the Department then you must include this form or application in your rule regardless of whether the application or report is to be submitted electronically or on paper. Therefore, please watch for such wording in legislation or regulations that may affect your program. The form or application normally appears as an appendix to the rule.
3. If you permit or require the submission of a report or application on paper and you are not willing under any circumstances to accept the required information on a piece of paper other than the Department form then you must specifically require the use of the Department form and include the form in the rule.
4. If you permit or require the submission of a report or application on paper and, although you would prefer that a Department form be used, you are willing to accept the required information on any piece of paper then you should simply state that forms are available at the Department or are provided by the Department. In such cases, the form does not need to be included with the Rule.

Please also keep in mind the following principles, which have applied to rulemaking and implementation for many years:

1. If you require certain information to be submitted in a report or application in order for an individual or an entity to obtain a benefit or escape a penalty prescribed by your rule then the required information should be listed or described in some way in the rule. This is true for both electronic and paper reports and applications.
2. If you want to require additional information not listed or described in your rule then you must have an independent statutory or regulatory basis for doing so. If you do not have such a basis then you must make clear that the submission of the additional information is optional.

REFERENCE MATERIALS

Each Leadership Council Member in the Department has received a Rule Development Handbook from the Agency Legal Counsel's Office which contains forms, instructions, checklists, and procedures for rule development.

The rule development process to be used by Department staff is provided below.

There are two methods by which hearing drafts of rules or rule revisions may be adopted. The first is when the hearing draft is presented to the Board for its consideration and adoption as an action item at a Board meeting. The second method is when the Board is requested instead to give the Commissioner authority to review and adopt the hearing draft without it having been presented to the Board.

Prior to finalizing plans for a hearing draft, the LC member needs to submit a completed Appendix A to the Commissioner. If the Commissioner determines that it is appropriate and desirable for the Board to provide the Commissioner the authority proceed with a hearing draft without submitting the draft to the Board in full for adoption, Step E is not needed. In cases where the Commissioner has determined it is appropriate to request the authority from the Board to adopt a hearing draft without further presentation to the Board, the LC member is then responsible for submitting the necessary agenda item (an action item) requesting the Board to give the Commissioner authority to adopt a hearing draft, appoint an hearing official, and set a date, time and place for a hearing on the draft rule.

When the Board has given the Commissioner the authority to adopt a hearing draft, the Commissioner's approval is to be obtained at the last stage of the Rule Development Routing process (see Appendix C).

PRE-BOARD STAGE

A. Determination by Commissioner on method by which hearing draft should be adopted (see above explanation and Appendix A).

B. HEARING DRAFT RULE

An initial hearing draft of the rule is prepared by the section responsible for enforcing the rule. A revision of an existing rule shall be prepared in legislative format, with all deletions to the existing rule being lined out and all additions of new language underlined.

Pursuant to §84-907.06 R.R.S., a detailed fiscal impact statement is prepared by the initiating section and attached to the hearing draft. It may be that only general comments can be made about the fiscal impact on affected constituents. After the hearing draft and fiscal impact statement are prepared for review, a cover routing sheet shall be attached to the top of the draft. (A [sample routing sheet](#) is attached.)

C. LEADERSHIP COUNCIL MEMBER REVIEW

The initiating staff member forwards the initial hearing draft to the Leadership Council Member for review and approval.

D. LEGAL COUNSEL REVIEW

The Agency Legal Counsel's Office reviews the hearing draft packet and outlines potential drafting or legal problems, if any. IF problems are noted, the hearing draft is returned to the Leadership Council member for review. He/she should then review the packet and do one of the following:

- (a) Return it to the initiating staff member if he/she determines that there are problems that need to be addressed in which case the entire procedure will start over, or
- (b) Forward it to the Commissioner or Deputy Commissioner after attaching a memo outlining his or her concerns, if any, or satisfaction with the draft as it exists, with copies to the Legal staff performing the prior review.

E. COMMISSIONER/DEPUTY COMMISSIONER REVIEW (AND COMMISSIONER ADOPTION IF APPLICABLE)

If the Commissioner or Deputy Commissioner approves (and the Commissioner adopts, if applicable) the hearing draft and signs the routing sheet, it is returned to the Leadership Council Member to begin the final adoption process. A copy of the hearing draft, fiscal impact statement, and routing sheet is returned to the Agency Legal Counsel's Office and is filed in the rule docket file. The Commissioner/Deputy Commissioner may also request a review by the Department fiscal staff, if appropriate, prior to their approval.

F. SUBMISSION TO THE STATE BOARD (IF APPLICABLE)

The hearing draft, in legislative format, as well as a cover memo from the originating section to the Commissioner, will be provided to the Commissioner's Office to be distributed to all Board members in advance of the meeting at which time the draft is to be scheduled for hearing.

G. RETENTION OF DRAFTS/RE-DRAFTS/RULE DOCKET CREATION

At the time the final hearing draft is prepared for the submission to the Board, a diskette with the rule, both in legislative format and a clean copy, will be provided to the Agency Legal Counsel's Office by the Leadership Council Member. Thereafter, all alterations or changes to the hearing draft will be typed and proofed by the Legal staff. The Legal unit will also create and begin maintaining the Rule Docket required by the Administrative Procedures Act.

PROPOSED RULE BEFORE BOARD OR COMMISSIONER FOR ADOPTION

A. BOARD REVIEW OF DRAFT

If the Board or Commissioner, as applicable, adopts the hearing draft, a hearing is scheduled. Pursuant to §84-907 R.R.S., no rule shall be adopted, amended, or repealed by the Department except after public hearing on the question of adopting, amending, or repealing such rule. The State Board may authorize the Commissioner to appoint a hearing official and set the date and time of the public hearing.

B. NOTICE OF HEARING

Pursuant to §84-907 R.R.S., the Commissioner shall give notice of such hearing at least 30 days prior thereto to the Secretary of State, along with a copy of the hearing draft. The notice is prepared by the Agency Legal Counsel's Office. This notice shall also be published in a newspaper having general circulation in the state and a copy of the notice will be transferred to the Nebraska Department of Education Homepage.

The notice must include:

1. A declaration of availability of such draft or work copies for public examination;
2. A short explanation of the purpose of the proposed rule or the reason for the amendment or repeal of the rule; and,
3. A description, not necessarily a quantification, of the fiscal impact on state agencies, political subdivisions, and persons being regulated, or an explanation of where the description of the fiscal impact may be inspected or obtained.

Pursuant to §84-907 R.R.S., all such hearings must be open to the public and at the time of giving notice, additional copies of the rule, including a list of remote sites, must be made available to the public, in Legislative format, in the Offices of the Secretary of State and at the public hearing.

C. NOTICE TO EXECUTIVE BOARD OF LEGISLATIVE COUNCIL

At the time notice is given to the Secretary of State, the Agency Legal Counsel's Office will forward to the Executive Board of the Legislative Council:

1. A copy of the hearing notice required by §84-907 R.R.S.;
2. If applicable, a draft copy of the rule; and;
3. If not included in the hearing notice, a description of the fiscal impact on state agencies, political subdivisions, and persons being regulated.

D. STAFF-CONDUCTED VIDEO HEARINGS

The Commissioner may be directed by the Board to appoint a staff member to serve as the hearing official at the rule hearing and set the date and time of the hearing. Rule hearings can be held during the State Board of Education monthly meeting or conducted on another date and may also be done by video testimony. If the rule hearing is set to be held through video testimony, the Agency Legal Counsel's Office will provide, to the originating section, a listing of video sites. The originating section is responsible for selecting the hearing video sites, but the Agency Legal Counsel's Office is responsible for contacting and securing the video testimony sites. The originating section is responsible for arranging for volunteers to operate the video equipment during the time of the rule hearings and then notifying the Agency Legal Counsel's Office of the names, addresses, and phone numbers of the volunteers. Volunteers must remain at the video site for the duration of the video testimony. The volunteers will also be responsible for mailing any written testimony submitted at the rule hearing to the Agency Legal Counsel's Office at the conclusion of the hearing. **WARNING:** If a video site has technical failure, or if a volunteer leaves a video testimony site before the conclusion of the hearing, another hearing may need to be held.

E. RULEMAKING HEARING/DECISIONS

Following the hearing, the Board may choose to adopt the rule as proposed, adopt it with Board amendments, reject it, or order continued hearings. However, pursuant to Section 84-907.05 R.R.S., the Department may not adopt a rule that is *substantially different* from the proposed rule contained or referenced in the published notice. (A new hearing is required in such a situation.) The rule will generally be considered for adoption at the next State Board of Education meeting following the public hearing.

RULE ADOPTION

A. PREPARATION FOR FILING OF RULE

Upon the adoption of any rule by the State Board, the originating Leadership Council Member prepares a cover memo to the Governor for the Commissioner's signature and forwards it to the Agency Legal Counsel's Office for submission to the Attorney General, Governor, and Secretary of State. The Agency Legal Counsel's Office will prepare the Commissioner's Certification of the rule and maintain a copy of the entire set of materials, sent to the Capitol offices, in the Rule Docket file. Pursuant to §84-907.04 R.R.S., the Governor's memo shall contain the following:

1. The reasons for adopting the rule;
2. An indication of any change between the text of the hearing draft and the text of the rule adopted, with the reasons for any change; and;

Executive Order 95-6 also requires that the cover memo include:

- (1) A short description of the major and substantive provisions of the rule.
- (2) A description of the need for the proposed rule or amendment, and a description of the effects it will have if promulgated.
- (3) A description of the classes of persons who may be affected by the proposed rule and how they may be affected. This should be included even if the affected persons did not appear at the hearing.
- (4) Identify groups which have commented on the rule or have otherwise expressed an interest in the proposed rule. Give a brief description of their major comments.
- (5) A description of the fiscal impact the rule will have on State Government and on those being regulated.
- (6) If the proposed rule is required by, or is in response to federal or state law or court decisions, attach a copy of the relevant portions of the law or decisions.
- (7) If the rule relates to an issue of unique interest to a specific geographic area and state the reasons.
- (8) Include the name and phone number of a person in the Department who would be able to answer questions concerning the rule.

B. FILING RULE/EFFECTIVE DATE

Upon the adoption, repeal, or amendment of any rule by the Board, the Agency Legal Counsel's Office shall file said changes in the following sequence:

1. With the Attorney General for his/her stamp of approval and signature pursuant to §84-905.01 R.R.S.;
2. With the Governor for his/her stamp of approval and signature pursuant to §84-908 R.R.S.;
3. With the Secretary of State for his/her stamping, signature, and filing pursuant to §84-906 R.R.S.

Pursuant to §84-906 R.R.S., no rule adoption or change shall be valid as against any person until five (5) days after such rule has been signed and filed with the Secretary of State.

PRINTING AND DISTRIBUTION STAGE

A. PUBLICATION/PRINTING

Pursuant to §84-905 R.R.S., the Department is required to cause its rules to be published in such a manner as the Agency shall determine to bring, as far as practicable, the existence and scope of the rule to the attention of all persons affected thereby. The Agency Legal Counsel's Office will handle all rule printing. Staff shall not copy or reproduce regulations without written permission from the Commissioner's Office or the Agency Legal Counsel's Office. A copy of the rule will be made available on the Nebraska Department of Education Homepage (Rules and Regulations) for viewing and/or printing. If a Section wants to include a copy of a rule on their own homepage, a link should be created to NDE's Rules and Regulations website. The Section shall not independently reproduce a rule on the Internet.

B. DISTRIBUTION

Pursuant to §84-905 R.R.S., the Department shall make copies available to all interested parties upon request, either free of charge or at cost. No rule is effective if copies are not available for distribution. Contact the Agency Legal Counsel's Office for information on current distribution procedures.

C. MAINTENANCE OF OFFICIAL RULE DOCKET

A copy of all written petitions, requests, submissions, and comments received by the Department and all other written materials prepared by or for the Department, in connection with the proposal, rule hearing, or adoption of the rule, must be submitted to the Agency Legal Counsel's Office for maintenance of an official Rule Docket, pursuant to §84-906.01 R.R.S. The Rule Docket shall include a copy of the hearing draft as well as the official transcript, audio and/or video tape recording, or stenographic record of any oral presentations made about the rule.

References

Appendix A: [Commissioner's Determination on Adoption of a Rule Hearing Draft](#)

Appendix B: [Rule Development Routing Sheet](#)

Appendix C: Nebraska Department of Education [Rulemaking Checklist](#)

Appendix D: Distribution of Rules and Regulations Flow Chart (Currently available in Administrative Memorandum Notebooks only)