

BEFORE THE STATE BOARD OF EDUCATION

**IN THE MATTER OF THE COVID-19
PANDEMIC**

**RULE 62 PETITION FOR
DECLARATORY ORDER**

1. The Petitioner’s name and address is Dr. Kraig J. Lofquist, Executive Director, Educational Service Unit Coordinating Council (ESUCC), 6949 S. 110th Street, LaVista, NE 68128 Petitioner meets requirements of NDE Rule 62.003.02, which allows “any person” to petition the State Board of Education and Rule 62.003.06 which permits submission by political subdivisions so long as the Petition is subscribed and verified by me as duly authorized agent of ESUCC.

2. Persons who or entities which may have a specific interest in the applicability of the statute, rule, regulation, or order include all school districts, public and private, and Educational Service Units in the State of Nebraska, which are known to and governed by NDE.

3. The material facts and specific circumstances are as follows:

- a. On March 13, 2020, President Trump declared a national emergency and Governor Ricketts declared a state emergency over the COVID-19 pandemic.
- b. On March 13, 2020, Chief Medical Officer/Director of Public Health Dr. Gary Anthone entered “Directed Health Measure Order 2020-001” that prohibited “gatherings” at schools in Cass, Douglas, Sarpy and Washington Counties.
- c. Between March 13, 2020 and the date of filing this petition, Dr. Anthone and Governor Ricketts entered various other Executive Orders and Directed Health Measures that either limited “gatherings” in schools or closed precluded in-person student instruction and other activities.
- d. On April 1, 2020, Dr. Anthone issued Directed Health Measure 2020-008, which ordered all schools “to cease all in-person instruction . . .”
- e. On April 20, 2020, Governor Ricketts issued “Executive Order No. 20-20,” which waives certain assessment, accountability, and Reading Improvement Act requirements.
- f. At the time of the filing of this Petition, Nebraska school districts and Educational Service Units have been effectively shut down for six weeks or more. These districts have been forced to shift entirely to remote or distance learning or enrichment activities for the remainder of the 2019-2020 school year and may similarly for the 2020-2021.

- g. Nebraska school districts have been asked to submit continuity of learning plans.
 - h. Several Nebraska school districts are struggling to plan for ending the school year; to implement summer learning programs; and to plan for the 20-21 school year without assurances, clarification, and guidance on doing so.
 - i. Nebraska school districts and Educational Service Units need clear, specific and definitive guidance and direction on how various statutes, rules and regulations will be interpreted, enforced and otherwise applied, and what other requirements (if any) the State Board of Education will impose on Nebraska school districts and Educational Service Units when making enforcement and other decisions for the 19-20 and possibly the 20-21 school year, should the impact of COVID-19 continue.
4. The rules of law which apply are as follows:
- a. NDE Rule 3, which includes a number of requirements that may not be feasible, realistic or safe to meet or satisfy, including but not limited to:
 - i. Rule 3.004.04, which states, “within the first 30 days of each school year, starting in 1997-98, the school district administration shall make available to classroom teachers an initial “list” of K-12 students who meet the district criteria for learners of high ability and the areas of high capacity of each of those students”; and
 - ii. Rules 3.004.05 and 3.004.06, which contain requirements for high ability learners; and
 - iii. Rule 3.008.01 and its subsections, which require school district serving high ability learners to establish procedures for both formative and summative evaluation to determine the effectiveness of the district-wide plan for services extended to the learners with high ability; and
 - iv. Rule 3.010.01 states, “In addition to other penalties which may be provided by law for noncompliance with the requirements of Section 79-1105 through 79-1108.03 R.R.S. and the requirements of this Rule, a school district’s failure to comply with the identification requirements of Section 79-1108 R.R.S. and Section 004 of this Rule shall be treated as if it were a violation of a

mandatory provision of 92 NAC 10, and may subject the district to loss of accreditation as provided in that chapter.”

- b. NDE Rule 4, which includes a number of requirements that may not be feasible, realistic or safe to meet or satisfy, including but not limited to:
 - i. Rule 4.004.01 and its subsections, which require rules and regulations for distribution of textbooks and management of funds; and
 - ii. Rule 4.004.02, which requires notification.
- c. NDE Rule 10, which includes a number of requirements that may not be feasible, realistic or safe to meet or satisfy, including but not limited to:
 - i. Rule 10.002.12’s reference to an “instructional unit” as 15 clock hours (900 minutes) of classroom instruction in a course offered in the secondary school; and
 - ii. Rule 10.003.06’s requirement of instructional hours; and
 - iii. Rule 10.003.07’s requirement that each school submit a statement “affirming compliance or specifically noting any noncompliance with” Rule 10; and
 - iv. Rule 10.003.12’s requirement that students recite the Pledge of Allegiance during the school day; and
 - v. Rule 10.004’s various “Curriculum and Standards” requirements, including Rule 10.004.04D’s references and requirements for multi-site and distance learning options and the maximum number of instructional units provided by distance learning; and
 - vi. Rule 10.005.02A’s requirement that schools keep student attendance, when attendance may be impossible to determine in an entirely remote learning environment; and
 - vii. Rule 10.006’s various “Media and Technology Resources” requirements, including the requirement that library and media resources be made available to students during the entire school day; and
 - viii. Rule 10.007.06A2’s requirement that any certification employee evaluation policy changes be approved in advance by the Commissioner or designee, when schools cannot practically

secure prior approval by the end of this semester to evaluate certificated employees remotely; and

- ix. Rule 10.007.07A's requirement for staff development, including that each teacher participates in at least ten hours of staff development each year, when teachers have been discouraged from gathering at school and/or some teachers may lack the technology or Internet connectivity to attend remote professional development; and
 - x. Rule 10.009's various "Continuous School Improvement" requirements; and
 - xi. Rule 10.010's various accountability to the school community requirements; and
 - xii. Rule 10.011.01's requirement that "school facilities and the general environment are safe, orderly, and supportive of quality learning for all students. A positive atmosphere for learning supports and reflects the work of students;" and
 - xiii. Rule 10.011.01C's requirement that each school has a safety and security committee meeting to review safety and security plans, when persons are discouraged from meeting and some committee members may not have the technology or Internet connectivity to attend remote committee meetings; and
 - xiv. Rule 10.013 allows school districts to request a waiver for certain provisions of Rule 10; and
 - xv. Rule 10.014 states that schools not in compliance with Rule 10's requirements may be subject to probation or loss of accreditation.
- d. NDE Rule 11, which includes a number of requirements that may not be feasible, realistic or safe to meet or satisfy, including but not limited to:
- i. Rule 11.005.01's requirement of instructional hours; and
 - ii. Rule 11.005.02's requirement of instructional hours; and
 - iii. Rule 11.005.03's developmental and culturally appropriate curriculum, practices and assessments requirements; and
 - iv. Rule 11.005.04's requirements for child outcome data; and

- v. Rule 11.005.05's requirement for an annual review of staff development plan; and
 - vi. Rule 11.006.01 requirements that program staff have contact with each enrolled family at least three times per month with a requirement that a minimum of 120 minutes will be face-to-face contact with the family; and
 - vii. Rule 11.006.05's requirement of annual review of staff development plan for all home visiting specialists and home visitors working in home-based programs who have regular contact with children and their families.
- e. NDE Rule 14, which includes a number of requirements that may not be feasible, realistic or safe to meet or satisfy, including but not limited to:
- i. Rule 14.004.01, which requires, "Each school shall provide the following instruction annually between July 1 and June 30 for the grades it offers: (a) for grades through eight, the time equivalent to at least 1,032 hours, (b) for grades nine through twelve, the time equivalent to at least 1,080 hours, and (c) if kindergarten is provided, the time equivalent to at least 400 hours"; and
 - ii. Rule 14.004.02's requirement for staff development hours; and
 - iii. Rule 14.005.05 requirements for elementary program; and
 - iv. Rule 14.007.01 and its subsections, which require minimum instructional units and delivery of instructional units; and
 - v. Rule 14.007.02 requirements for junior high grade instruction.
- f. NDE Rule 15, which includes a number of requirements that may not be feasible, realistic or safe to meet or satisfy, including but not limited to:
- i. Rule 15.004's language instructional educational requirements that may not be as effective or realistic in a distance or remote-only learning environment.
 - ii. Rule 15.006.01 requiring, "Each school district shall ensure that all English learners have meaningful access to academic content standards and participate in the assessments required by Section 005 of 92 NAC 10. Each school district shall provide appropriate linguistic accommodations for English learners participating in the assessments"; and

- iii. Rule 15.006.02 requiring, “Each school district shall ensure that all English learners have meaningful access to the state’s English language proficiency standards and participate in the annual state English language proficiency assessment”; and
 - iv. Rule 15.006.03 requiring, “Each school district shall ensure that all English learners with disabilities be provided with appropriate linguistic accommodations as well as any accommodations as documented in the Individual Education Plan (IEP) or 504 Plan.”
 - v. Rule 15.008.01 and its subsections which require annual reviews of school district programs under the rule; and
 - vi. Rule 15.009.01 which requires compliance with all provisions of the rule for accreditation under Rule 10.
- g. NDE Rule 47, which includes a number of requirements that may not be feasible, realistic or safe to meet or satisfy, including but not limited to:
- i. Rule 47.003.02’s curriculum requirements for Career Academies; and
 - ii. Rule 47.003.04’s advisory board requirements.
- h. NDE Rule 52, section 008 and its subsections, which appear likely to be impacted by the request from Secretary Betsy DeVos under the CARES Act for flexibility from Congress.
- i. NDE Rule 84, which includes a number of requirements that may not be feasible, realistic or safe to meet or satisfy, including but not limited to:
- i. Rule 84.003.02 and 84.008.01’s requirement that Educational Service Units provide core services to all member school districts; and
 - ii. Rule 84.004.06’s statement that an Educational Service Unit that fails to comply with Rule 84’s requirements may be placed on probation or lose accreditation; and
 - iii. Rule 84.006.02 and its subsection’s requirements for continuous improvement, on-site visitations, reports, and others.
- j. NDE Rule 91, which includes a number of requirements that may not be feasible, realistic or safe to meet or satisfy, including but not limited to:

- i. Rule 91.003.02D's requirements for an individual to maintain status as a qualified pupil transportation driver; and
 - ii. Rule 91.003.03E's requirement that every district provide a minimum of two (2) hours of in-service training for all pupil transportation vehicle drivers; and
 - iii. Rule 91.004.05's requirement that every district provide at least two emergency evacuation drills per year.
- k. Neb. Rev. Stat. § 79-213 allows each school district to submit a sworn statement to the State Board of Education requesting that said district not lose accreditation or state funds if said district cannot complete the required number of instructional hours because of an epidemic sickness.
- l. Neb. Rev. Stat. § 79-1003.01 provides for state funding and financial assistance for school districts that offer summer school programs. Such aid is calculated on a per-student basis for students who attend summer school "for at least twelve days" for the days that students attend "for at least three hours and less than six hours per day."
- m. Neb. Rev. Stat. § 79-1142 includes several special education requirements and provisions for special education reimbursements.
- n. Neb. Rev. Stat. §§ 79-1138 and 79-1160 allow the State Board of Education to develop rules and regulations to carry out special education services.
- o. Neb. Rev. Stat. § 79-713 directs the Commissioner of Education to prepare and develop teaching aids and materials for comprehensive health education.
- p. Neb. Rev. Stat. §§ 79-201, *et seq.*, includes various compulsory attendance requirements.
- q. Neb. Rev. Stat. § 79-211 requirements for minimum school term.
- r. Neb. Rev. Stat. § 79-212 requirements for kindergarten program hours.
- s. Neb. Rev. Stat. §§ 79-214 and 79-217 and related statutory requirements for physical and visual examinations, birth certificates, and immunizations prior to attendance.
- t. Neb. Rev. Stat. § 79-248 requirements for pupil health inspections and others.

- u. Neb. Rev. Stat. § 79-267 and its jurisdictional requirements that misconduct occur on school grounds, in a school vehicle, or at a school activity, in particular as it relates to participation via remote learning, which may include using school district property.
- v. Neb. Rev. Stat. § 79-273 and the requirement for attendance at student discipline hearings, including attendance remotely.
- w. Neb. Rev. Stat. § 79-703 requires the State Board and Commissioner of Education to undertake certain accreditation standards, review and committee processes.
- x. Neb. Rev. Stat. § 79-705 requirements for State Fire Day, Fire Recognition Day, and others.
- y. Neb. Rev. Stat. § 79-709 and premiums awarded by county boards at fairs and other places within the county.
- z. Neb. Rev. Stat. § 79-2603, *et seq.*, includes various Nebraska Reading Improvement Act requirements.
- aa. Neb. Rev. Stat. § 79-2,145 requires the State Board of Education to develop rules and regulations related to school security standards.
- bb. Neb. Rev. Stat. § 79-721, *et seq.*, includes various multicultural education requirements.
- cc. Neb. Rev. Stat. § 79-729 requirements for high school graduation.
- dd. Neb. Rev. Stat. §§ 79-757, *et seq.*, which contains the Quality Education Accountability Act.
- ee. Neb. Rev. Stat. § 79-1128 permits the State Board of Education to withhold state funds for a district that does not offer “continuous special education programs acceptable to the State Board of Education.”
- ff. Neb. Rev. Stat. § 79-724 requires various American Civics requirements, including student requirements prior to graduation and certain reviews of curricular items each year.
- gg. Any other laws, rules, or regulations that require specific training or reviews for students, staffs, or others contained in Chapter 79 or NDE’s regulations, rules, or guidance, to the extent those trainings or reviews are waivable and were not completed due to the impact of COVID-19 for the 19-20 school year and may be impacted by COVID-19 for the 20-21 school year.

5. The Petitioner's demands for relief are as follows:
- a. That the State Board of Education enter a declaratory order within thirty days (pursuant to NDE Rule 62.005.02) to resolve these unsettled questions.
 - b. That such declaratory order definitively, specifically and clearly address how the aforementioned laws and regulations apply to Nebraska school districts and Educational Service Units impacted by COVID-19, how said laws or regulations will be interpreted or applied, and whether said laws or regulations will be waived, suspended, modified, or otherwise not enforced for the period of time that school districts and Educational Service Units have been and may be impacted by COVID-19.
 - c. That such declaratory order definitively, specifically and clearly address how the State Board of Education and Nebraska Department of Education will implement, enforce or decline to enforce, waive, account or otherwise require or not require schools to comply with the following:
 - i. How the State Board of Education and Nebraska Department of Education will implement, account or otherwise require schools to comply with the requirements that schools count or account for the "twelve days" and "three hours" requirements under Neb. Rev. Stat. § 79-10,114, given that summer school programs may be starting soon after the filing of this Petition;
 - ii. To what extent will the State Board of Education and Nebraska Department of Education reimburse schools for special education services, including those eligible for reimbursement pursuant to Neb. Rev. Stat. § 79-1142, such as special education paraeducators, in light of the shutdown in the middle of the school year;
 - iii. How compulsory and other attendance requirements are to be calculated, determined or accounted for in an entirely remote or distance learning environment, and how schools are to comply with Neb. Rev. Stat. §§ 79-201 and 79-202 in the middle of the shutdown;
 - iv. How the accreditation process under Neb. Rev. Stat. § 79-703 will operate in light of the shutdown in the middle of the 2019-2020 school year;
 - v. Whether schools are required to comply with the Nebraska Reading Improvement Act's requirements during any summer learning session; and

- vi. Whether and to what extent school districts are required to track or account for instructional hours that have occurred or will occur during the COVID-19 impact.
- d. That such declaratory order confirm that no school district will lose state funds for any violations of Neb. Rev. Stat. § 79-1128 if such violations were a result of COVID-19.
- e. That the State Board of Education approve all sworn requests for continued accreditation and no loss of state funds under Neb. Rev. Stat. § 79-213.
- f. That, pursuant to Rule 62 section 003.05F, Petitioner requests that the State Board of Education and/or Commissioner of Education waive, suspend or otherwise not enforce any other laws and regulations to the fullest extent permitted by law, pursuant to Neb. Rev. Stat. §§ 79-305, 79-703, 79-318 & 79-319 and other laws, regulations, and rules, that will benefit any Nebraska school district or Educational Service Unit and ESUCC impacted by COVID-19.

VERIFICATION

STATE OF NEBRASKA)
) ss.
 COUNTY OF Sarpy)

Kraig J. Lofquist, being first duly sworn, states that he is the Petitioner in the above entitled matter; that he has read the foregoing **Petition for Declaratory Order**; and that the allegations of fact therein are true.

Kraig J. Lofquist
 Kraig J. Lofquist

SUBSCRIBED AND SWORN to before me on this 4 day of May, 2020.

Debra A. Hericks
 Notary Public

