

BEFORE THE NEBRASKA STATE BOARD OF EDUCATION

IN THE MATTER OF
THE COVID-19 PANDEMIC

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NDE Case No. 20-06

DECLARATORY
ORDER

This matter comes before the Board as a result of a Petition for Declaratory Order filed on May 4, 2020, by Dr. Kraig J. Lofquist, Executive Director of the Educational Service Unit Coordinating Council.

On May 8, 2020, the Board determined the matter was properly filed in accordance with 92 NAC 62, the Department of Education's regulations governing declaratory orders, and entered an order directing the Commissioner of Education to prepare an order for the Board to consider in this matter under the provisions of said Rule.

NAMES OF ALL PARTIES TO THE PROCEEDINGS

The Petitioner is Dr. Lofquist, and upon request of the Commissioner, Petitioner's Counsel supplied documentation of serving a copy of the Petition by electronic means, (emails), through the various ESUs to school districts and private schools within their geographic boundaries. This documentation is attached to this Order as Exhibit 1, and contains the names of such entities. Petitioner has indicated to the Department that this method of service was used in large part due to the COVID Pandemic.

THE FACTS UPON WHICH THE PETITION IS BASED

- i. On March 13, 2020, President Trump declared a national emergency and Governor Ricketts declared a state emergency over the COVID-19 pandemic.
- ii. On March 13, 2020, Chief Medical Officer/Director of Public Health Dr. Gary Anthonie entered "Directed Health Measure Order 2020-001" that prohibited "gatherings" at schools in Cass, Douglas, Sarpy and Washington Counties.
- iii. Between March 13, 2020 and the date of filing this petition, Dr. Anthonie 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.
- iv. On April 1, 2020, Dr. Anthonie issued Directed Health Measure 2020-008, which ordered all schools "to cease all in-person instruction through May 31, 2020 . . ."
- v. On April 3, 2020, the State Board adopted a resolution supporting and authorizing the Commissioner of Education, as the executive officer of the Board, and as administrative head of the Department, to facilitate broad flexibility for the operation of schools during this emergency that is effective for one year from adoption by the Board.

vi. On April 20, 2020, Governor Ricketts issued "Executive Order No. 20-20," which waives certain assessment, accountability, and Reading Improvement Act requirements.

vii. At the time of the filing of this Petition, Nebraska school districts and Educational Service Units have been prevented from having students physically present in attendance centers and have shifted to remote or distance learning or enrichment activities for the remainder of the 2019-2020 school year, and may similarly have such arrangements for at least some of the 2020-2021 school year.

GENERAL AUTHORITY OF THE STATE DEPARTMENT OF EDUCATION

The State Board, Commissioner of Education, and the Department are created and provided with the general supervision and administration of the school system of this state by sections 2, 3, and 4 of Article VII of the Nebraska Constitution, and assigned duties by the Legislature generally found in Article 3 of Chapter 79 of the Reissue Revised Statutes of Nebraska.

The intent of . . . the Constitution, was to confer powers upon the state board, which it did not and could not previously have. If this is not so there would have been no purpose in adopting it as an amendment to the Constitution in 1952. The Legislature was already authorized to delegate administrative authority to the state board and the constitutional grant of the general supervision and administration of the school system of the state, and such other activities as the Legislature may direct, necessarily included authority by the Legislature to grant purely legislative power if it was to have any added meaning at all. School Dist No. 8. v. State Board of Education, 176 Neb. 722, 723, 127 N.W.2d 458, 460, (1964).

Generally, for purposes of construction, a rule or order of an administrative agency or political subdivision is treated like a statute. Absent a statutory or regulatory indication to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. A rule is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. Deference is accorded to an agency or political subdivision's interpretation of its own rules unless plainly erroneous or inconsistent. Prokop v. Lower Loup Nat. Res. Dist., 302 Neb. 10, 13, 921 N.W.2d 375, 383, (2019).

In certain circumstances, administrative agencies are permitted to depart from their own regulations. It is within the discretion of an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. Jantzen v. Diller Tel. Co. (In re Application of Jantzen), 245 Neb. 81, 83, 511 N.W.2d 504, 508, (1994). An agency must have sufficient latitude in its operations and in matters under its jurisdiction to exercise that jurisdiction fairly. *Id.*

The Board issues this Order consistent with the purpose of its existing emergency authority resolution conferring authority to the Commissioner and his delegees, and the Board remains

committed to using the full scope of its constitutional authority whether executive, legislative, or judicial, to ensure access to quality educational opportunities by providing relief, flexibility, and clarity to schools, school districts, and educational service units, to the maximum extent permitted by law. In addition to the items contained in this Order and including those contained in this Order, the Board and Commissioner intend to provide flexibility to the fullest extent permitted by law, pursuant to sections 79-305, 79-703, 79-318 & 79-319 and other laws, regulations, and rules, provided that such flexibility will be a benefit to students as well as any Nebraska school, ESU, and ESUCC impacted by COVID-19, unless such school, ESU, or ESUCC has evidenced bad faith as determined by the Commissioner and the Board.

The Board finds that the Commissioner has exercised proper authority in considering the petition, requesting additional information, and presenting recommendations to the Board. The Board desires for this Order to be wholly severable, such that any specific words, clauses, sentences, or provisions deemed unenforceable do not render the entire Order unenforceable.

CONCLUSIONS AND ORDER

Consistent with the authority to issue this Order declaring the “applicability,” as described in sec. 003.03 of Rule 62, of existing statutes, rules and regulations in light of COVID-19 emergency, the Board finds, orders, and declares as follows:

1. With respect to 92 NAC 3 (Rule 3) Secs. 004.04 and 004.06 are “procedural rules” adopted by the Board intended to provide timely information that can be accomplished electronically by schools, and the Commissioner shall encourage innovation and provide reasonable flexibility to any school demonstrating the need for such flexibility in these rules during the 2019-20, and 2020-2021 school years. The Board will consider requests for waivers under Rule 10, Sec. 013 regarding any noncompliance with requirements in Rule 3 due to COVID-19 since noncompliance with Rule 3 constitutes a violation of a mandatory provision of Rule 10;
2. With regard to 92 NAC 4 (Rule 4), these are duties of school districts under *Neb. Rev. Stat*, Sec. 79-734 and Rule 4 itself, and can be accomplished during the 2020-2021 school year without unreasonable impediment. Districts may provide flexibility to parents/guardians concerning the return of textbooks within 15 days after the end of the 2019-2020 school year for the return of textbooks without penalty from NDE.
3. With respect to 92 NAC 10, (Rule 10), and 92 NAC 14 (Rule 14), the Board has already granted accreditation to school districts and school systems for the 2020-21 school year, and granted approval of schools for the 2020-21 school year, under the provisions of these Rules with knowledge that *Neb. Rev. Stat*, Sec. 79-213 already provides these school districts with a means to have the Board accredit the schools due to “epidemic sickness”. The Board directs the Commissioner to promote innovation and provide reasonable flexibility and guidance on the provisions of Rule 10 and Rule 14 for the 2020-21 school year to school systems and school districts.
4. With respect to 92 NAC 11 (Rule 11) which permits school systems to utilize the same affidavit process contained in *Neb. Rev. Stat*, Sec. 79-213 for epidemic sickness, the Commissioner shall provide similar relief as provided under Rules 10 and 14. The Commissioner shall provide reasonable flexibility to any school demonstrating the need for such flexibility in this rule during the 2019-20, and 2020-2021 school years.

5. With respect to 92 NAC 15 (Rule 15), the Commissioner will provide as much flexibility as authorized by law in implementing the Rule for the 2019-2020 and 2020-2021 school years which includes electronic communications accomplishing any of the requirements. The federal requirement for participation in the State ELP assessment was waived for the 2019-2020 school year by the U.S. Department of Education. The Board will consider requests for waivers under Rule 10, Sec, 013 regarding any noncompliance with requirements in Rule 15 due to COVID-19 since noncompliance with Rule 15 constitutes a violation of a mandatory provision of Rule 10;

6. With respect to 92 NAC 47 (Rule 47), the curriculum requirements related to work-based learning and career exploration opportunities do not require physical presence, and may be accomplished anywhere along the workplace experiences continuum, including awareness, exploration, and/or work-based learning activities. Advisory Board meetings may be delayed as long as necessary to prevent the continued spread of COVID-19, and all prior work and guidance provided by the Advisory Board may be utilized during the 2020-2021 school year if the Advisory Board does not meet prior to the conclusion of the 2020-2021 school year. No Career Academy Program will be subjected to a loss of approval for continued operation based on disruptions and/or limitations due to COVID-19, and the Commissioner is encouraged to utilize maximum flexibility under section 005.03 of the Rule.

7. With respect to special education and any rule adopted by the Board, the Board recognizes the regulations in these rules adopted by the Board are governed by federal laws for which any rights must not be prejudiced. The Board reaffirms the work of the Commissioner to date and expects the Commissioner to permit innovation and flexibility in compliance to the extent required by Congress or the U.S. Department of Education considering the impact of COVID-19 on any Complaints made pursuant to Rules 51 or 52. The right of the person or entity to file such a Complaint shall not be infringed.

8. With respect to 92 NAC 84 (Rule 84), the Board has already accredited educational service units for the 2020-21 school year, and Sec. 004 of Rule 84 provides a process allowing for future correction of any prior non-compliance before any recommendation is considered by the Commissioner on accreditation. The Commissioner shall provide reasonable flexibility and guidance on the provisions of Rule 84 for the 2020-21 school year, and the Board will not consider any noncompliance of this rule due to COVID-19 to constitute a violation resulting in the loss of accreditation;


9. With respect to 92 NAC 91 (Rule 91), the Commissioner has already issued guidance on the topic of driver training requirements which the Board supports. The Commissioner shall continue to provide reasonable flexibility and guidance on the provisions of this rule.

10. With respect to state statutory provisions identified in the petition, the Board to the maximum extent permitted by law will not pursue adverse action with regard to any provision of the law that cannot be reasonably addressed due to disruptions caused by the pandemic. However, provisions of the law that can reasonably be addressed by a Nebraska school, school district, ESU, and ESUCC should be addressed. The Commissioner shall continue to provide reasonable flexibility and guidance and may proceed with requests for executive orders from the Governor or changes in statutes from the Legislature as appropriate.

11. With respect to all other matters not expressly addressed in this order or under the express authority of the Commissioner of Education, whether raised in the Petition in this matter or otherwise, the Board declines to address by way of a Declaratory Order all such matters for the reason such matters do not require a response by the Board at this time.

12. The Commissioner shall from time to time during the pandemic and as appropriate continue to address matters presented through guidance in accordance with this order and publish such guidance on the Department's web site.

Signed this 17th day of June 2020.



President, State Board of Education

**Petition to NDE - Notice to schools
May 4, 2020**

**Master Petition Letter
Petition 050420**

ESU 01

ESU 02

ESU 02 2

ESU 03

ESU 04

ESU 05

ESU 05 2

ESU 05 3

ESU 05 4

ESU 05 5

ESU 05 6

ESU 05 7

ESU 05 8

ESU 05 9

ESU 05 10

ESU 05 11

ESU 05 12

ESU 05 13

ESU 06

ESU 07

ESU 08

ESU 09

ESU 10

ESU 11

ESU 13

ESU 13 2

ESU 15

ESU 16

ESU 17

ESU 18 Parochial

ESU 18 2

ESU 19

ESU 19 2

ESU 19/Perkins

ESU 19/Perkins2

Bobby Truhe <bobby@ksbschoollaw.com>
Fri 5/15/2020 10:39 AM

To: Summers, Scott
Cc: Blomstedt, Matt

Scott,

ESU 15 has now been added to the document, which should complete the distribution documentation. If the link did not work or if you need anything else, please just let me know.

Thanks,
Bobby

Bobby Truhe
[KSB School Law](#), PC, LLO
Cornhusker Plaza
301 South 13th Street, Suite 210
Lincoln, NE 68508
Office: (402) 804-8000
Cell: (605) 670-2968

From: Bobby Truhe <bobby@ksbschoollaw.com>
Sent: Thursday, May 14, 2020 3:47 PM
To: Summers, Scott <Scott.Summers@nebraska.gov>
Cc: Blomstedt, Matt <Matt.Blomstedt@nebraska.gov>
Subject: Re: Rule 62 Declaratory Order Petition - ESUCC

Scott,

Every ESU except ESU 15 has sent in its confirmation of delivering the Petition to all member schools. Mostly, this was done by email rather than certified mail due to the pandemic and preferences of the administrators. We are working on getting that confirmation from ESU 15, as well. If that is an issue, please let me know.

Right now, the information from each ESU is linked in a handy Google Doc that ESUCC has put together. Would you like us to simply give you viewing access to that document, so that you can retrieve the information as needed? Or would you prefer that we send it all to you in PDF form?

Thanks,
Bobby

Bobby Truhe
[KSB School Law](#), PC, LLO
Cornhusker Plaza
301 South 13th Street, Suite 210
Lincoln, NE 68508
Office: (402) 804-8000
Cell: (605) 670-2968

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Declaratory Order was served upon Dr. Kraig J. Lofquist, Executive Director, Educational Service Unit Coordinating Council (ESUCC), 6949 S. 110th Street, LaVista, NE 68128 , and Bobby Truhe, Esq/, KSB School Law, PC, LLO, Cornhusker Plaza, 301 South 13th Street, Suite 210, Lincoln, NE 68508 via United States mail, certified mail, return receipt requested, and provided electronically to all necessary parties that the Petitioner indicated were similarly provided a copy of the petition.
