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#03001
NO.
STATE OF NEBRASKA
OFFICIAL
JAN 2 2003
DEPT. OF JUSTICE

SUBJECT: Assessment of student learning and reporting of school district performance pursuant to Neb. Rev. Stat. § 79-760.

REQUESTED BY: Kathryn Piller
Member, State Board of Education

WRITTEN BY: Don Stenberg, Attorney General
Charlotte R. Koranda, Assistant Attorney General

You have requested our opinion on the requirements of Neb. Rev. Stat. § 79-760 (Cum. Supp. 2002) for the assessment of student learning and the reporting of school district performance. You have asked us nine questions. Each question, followed by our response, is set forth below.

1. What does 79-760 require school districts to do?

Section 79-760 imposes several requirements on Nebraska school districts. After the assessment experts, hired by the Nebraska Department of Education, identify not more than four model assessments receiving the highest rating, school districts are required to adopt one of the four model assessments. In addition, school districts must determine, on a building basis, the aggregate results of any assessments required by the State Board of Education, and they must report these results to the public in their district and to the Nebraska Department of Education. Finally, although not explicitly stated in § 79-760, it is implied that school districts make their students available for assessment testing and may even be required to administer the tests.

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2. What does 79-760 require the Nebraska State Board of Education to do?

Section 79-760 requires more from the State Board of Education ("State Board") than it does from Nebraska school districts. Section 79-760 imposes the following requirements on the State Board of Education:

- The State Board is responsible for the overall implementation of the statewide system for assessment of student learning and reporting of their performance.
- The State Board must approve measurable model academic content standards.
- The State Board must adopt an assessment and reporting plan and begin implementation of the plan in the 2000-2001 school year, beginning with the assessment of reading and writing.
- The State Board must prescribe statewide assessments of writing that rely on writing samples, beginning in the spring of 2001, with students in each of three grades selected by the State Board.
- The State Board must develop an assessment system and prescribe statewide assessments for the subject areas of reading, mathematics, science, social studies, and history. For the first year, the assessment and reporting system must be based on locally developed assessments in each subject area except writing.
- Following the first assessment in each subject area, except writing, the Nebraska Department of Education[1] ("Department of Education") must contract with independent and recognized assessment experts to review and rate locally developed assessments.
- The Department of Education[2] must identify criteria for rating the model assessments.

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[1]The State Board of Education, together with the Nebraska Commissioner of Education, make up the Nebraska Department of Education and, therefore, the State Board and the Commissioner are both responsible for contracting with assessment experts. Neb. Rev. Stat. § 79-301 (Cum. Supp. 2002).

[2]See footnote 1.

- The Department of Education[3] must report the aggregate results of the assessments on a district or building basis.

- The State Board must adopt criteria for the inclusion of students with disabilities, students entering the school for the first time, and students with limited English proficiency.

- The State Board is required to adopt and promulgate rules and regulations to carry out of § 79-760.

3. What does "Districts shall thereafter adopt one of the four model assessments" mean? Specifically does it mean each district will adopt one state selected test? What is the timeline for selection of one of four model assessments?

Several questions are contained in your question number three. The first and second questions will be answered together. You ask what is meant by, "Districts shall thereafter adopt one of the four model assessments" and then ask whether the quoted language means that each school district will adopt one of the state selected tests.

We believe § 79-760(1) clearly directs school districts to adopt one of the model assessments identified by the assessment experts as receiving the highest ratings. The sentence directly preceding the one you quote, states that the assessment experts shall identify up to four model assessments, and then the following sentence states that school districts shall thereafter adopt one of the four model assessments. The specific statutory language states as follows:

> The assessment experts shall identify not more than four model assessments receiving the highest ratings. Districts shall thereafter adopt one of the four model assessments and may, in addition, adapt their locally developed assessments.

Neb. Rev. Stat. § 79-760 (Cum. Supp. 2002).

Finally, you ask for the time line for school districts to select one of the four model assessments. We did not find any statute imposing a time frame on school districts for selection of their model assessments. A Department of Education rule, however, imposes a time frame on school districts. Appendix E of 92 NAC 10 breaks down the assessment process into steps and provides a deadline for each step therein. Agency regulations, properly adopted and filed with the Secretary of State, have the effect of statutory law. *A*

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[3]See footnote 1.

& D Tech. Supply Co. v. Nebraska Dep't of Revenue, 259 Neb. 24 (2000); *City of Lincoln v. Central Platte NRD*, 263 Neb. 141 (2002).

4. What does "the assessment experts shall identify not more than four model assessments" mean? Does this mean experts will be hired each and every year as the Commissioner of Education told the Nebraska State Board of Education? Or does it mean it will be completed on a certain timeline and not repeated each year?

The language you quote means exactly what is written. It means that, from the assessments provided to the experts, they will select up to four model assessments.

> *Following the first assessment* in each subject area, except writing, the State Department of Education shall contract with independent, recognized assessment experts to review and rate locally developed assessments. The [D]epartment [of Education] shall identify the criteria for rating the model assessments. The assessment experts shall identify not more than four model assessments receiving the highest rating. Districts shall thereafter adopt one of the four model assessments and may, in addition, adapt their locally developed assessments.

Neb. Rev. Stat. § 79-760 (Cum. Supp. 2002) (emphasis added). The language of § 79-760 clearly indicates that the assessment experts are hired "following the first assessment in each subject area." We find no language directing or authorizing the Department of Education to hire assessment experts any time after the first assessments, or on a yearly basis.

5. Who should pay for the mandates in 79-760?

Section 79-760 was last amended in 2000 by L.B. 812, which also created § 79-760.02. L.B. 812 and L.B. 812A, its companion appropriations bill, were approved by the Governor on April 10, 2000. With the passage of L.B. 812A, the Legislature made the following appropriations to aid in carrying out the provisions of L.B. 812.

> Section 1. There is hereby appropriated (1) $1,430,000 from the General Fund for FY2000-01 and (2) $1,430,000 from the General Fund for FY2001-02 to the State Department of Education, for Program 25, to aid in carrying out the provisions of Legislative Bill 812, Ninety-sixth Legislature, Second Session, 2000.
>
> Total expenditures for permanent and temporary salaries and per diems from funds appropriated in this section shall not exceed $15,300 for FY2000-01 or $16,000 for FY2001-02.

We did not find any other statutory reference indicating who should pay for the costs created by § 79-760.

It should be noted, however, that the Legislature is not obligated to make continuing appropriations to pay for the costs created by § 79-760. *See, e.g.,* Op. Att'y Gen. No. 93071 (Sept. 1, 1993) (The constitutional limitation on state indebtedness prohibits a legislative obligation to make future appropriations).

6. What does "the State Board of Education shall implement a statewide system for the assessment of student learning and for reporting the performance of school districts" mean?

The sentence you quote is the first sentence of § 79-760. The meaning of this sentence is created by the remaining statutory language of § 79-760(1). For an understanding of the sentence you quote, see our response to your questions one and two.

7. Is the law so unclear that school districts are unable to know what is required of them?

We do not know whether school districts are unable to know what is required of them. Even if we did have some understanding of school district knowledge of their requirements under § 79-760, we would decline to answer this question because it calls for resolution of a policy question that is appropriately made by the Legislature and is not a question of legal nature.

We can respond, however, to a question asking whether the language of § 79-760 is unconstitutionally vague. We will respond to this question to assist you in understanding the clarity of § 79-760. A Nebraska statute is unconstitutionally vague when it is "so vague that people of common intelligence must necessarily guess as to its meaning and differ as to its application." *Cunningham v. Lutjeharms*, 231 Neb. 756, 763, 437 N.W.2d 806, 812 (1989). To provide adequate due process, a statute must supply "(1) a person of ordinary intelligence a reasonable opportunity to know what is prohibited and, (2) explicit standards for those who apply [it]." *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 183, 498 N.W.2d 102, 106 (1993). Based on this definition, we find that § 79-760 is not unconstitutionally vague. We do not think that people of common intelligence will have to guess as to the meaning of § 79-760, and we find that it contains explicit standards for those who apply it.

8. Does the law impose an unusual and unreal financial burden on school districts?

See our response to question seven.

9. Should the law be rewritten so it is understandable by school districts and the Nebraska State Board of Education?

See our response to question seven.

Sincerely,

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Approved by:

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