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NO.
STATE OF NEBRASKA
OFFICIAL
SEP 29 1993
DEPT. OF JUSTICE

DATE: September 29, 1993

SUBJECT: Ability of the Nebraska School Accountability Commission to Consider Legislative Intent in Developing Curriculum Frameworks and Standards for Nebraska Public Schools

REQUESTED BY: Senator Kate Witek
Nebraska Legislature

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

In the context of the necessity for additional legislation, you have requested an opinion of the Attorney General regarding the ability of the Nebraska School Accountability Commission, under current law, to consider legislative intent in developing curriculum frameworks and standards for Nebraska public schools.

The Nebraska School Accountability Commission (the "Commission") was created in April of 1992. Neb. Rev. Stat. § 79-4,235 (Cum.Supp. 1992). The duties of the Commission are set forth in §§ 79-4,236 and 79-4,237.

> (1) Phase I of the development of the accountability system shall begin September 1, 1992, and end September 1, 1994. <u>The Nebraska School Accountability Commission shall develop broad curriculum frameworks and standards for learner outcomes which shall be based upon the frameworks, standards, and assessments determined by the School Restructuring Commission, including the curriculum areas listed in section 79-4,237</u>. It is the intent of

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> the Legislature that local school boards retain responsibility for the content of the instructional programs within the broad curriculum frameworks.
>
> (2) Phase II shall begin May 1, 1993, and end on May 1, 1996. Phase II shall provide for the development of a reliable, accurate, and educationally sound system of assessing student progress towards achieving the standards for learner outcomes determined pursuant to subsection (1) of this section.

Neb. Rev. Stat. § 79-4,236 (Cum.Supp. 1992).

> The Nebraska Schools Accountability Commission and the State Department of Education may work with other states or a multistate consortium to develop a system of authentic assessment of learner outcomes in mathematics, science, reading, language arts, and social studies. The department shall provide staff support to the commission in all phases. The commission shall also be charged with the development of the accountability system and shall report the progress of such development to the Legislature and the State Board of Education on an annual basis.

Neb. Rev. Stat. § 79-4,237 (Cum.Supp. 1992).

The key statutory language for purposes of your question is the Commission's duty, under Neb. Rev. Stat. § 79-4,236, to "develop broad curriculum frameworks and standards for <u>learner outcomes</u> which shall be based upon the frameworks, standards, and assessments determined by the School Restructuring Commission, including the curriculum areas listed in section 79-4,237." (Emphasis added). The phrase "learner outcomes" or "outcomes" is used eight times in sections 79-4,234 to 79-4,240 (the statutes pertaining to the Commission). However, nowhere in these statutes, or anywhere else in Nebraska law, is the phrase "learner outcomes" defined.

Our analysis of this provision must begin with a review of the rules of statutory construction under Nebraska law.

> A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not

> warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct and unambiguous out of a statute.

Gillam v, Firestone Tire & Rubber Co., 241 Neb. 414, 418, 489 N.W.2d 289, 292 (1992). ***See also County of Douglas v. Board of Regents***, 210 Neb. 573, 577-78, 316 N.W.2d 62, 65 (1982).

However, when a statute is ambiguous, and therefore open to construction, legislative intent must be determined. ***See Iske v. Papio Natural Resources Dist.***, 218 Neb. 39, 352 N.W.2d 172 (1984). Legislative history may be examined to determine this intent. ***Pump and Pantry, Inc. v. City of Grand Island***, 233 Neb. 191, 444 N.W.2d 312 (1989).

Here, the phrase "learner outcomes" is of uncertain meaning, and therefore, ambiguous. The ordinary meaning of the word "outcome" ("something that follows as a result or consequence") is not clearly applicable in the context of § 79-4,236. Rather, sections 79-4,234 to 79-4,240 seem to use the phrase "learner outcomes" in the context of professional jargon, as in the phrase "outcome based education." Thus, the term would not appear to be used in its ordinary sense, but rather in some technical sense which is subject to interpretation.

There can be no doubt the legislature clearly intended the curriculum frameworks and standards developed by the Commission were to have "absolutely nothing to do with psychological or psychiatric assessment," and they were not to be "values oriented."

During legislative floor debate, Senator Ron Withem stated, with respect to the bill which established the Commission and the Commission's duties:

> It establishes a group of citizens in the state who will determine what it is we want kids to learn and a way of assessing what those children learn. Secondly, it . . . <u>has absolutely nothing to do with psychological or psychiatric evaluation</u>. I know that was a concern that has been mentioned to you in some of the phone calls. Has <u>absolutely nothing to do with psychological or psychiatric assessment</u>. Again, there are people in the state that think the schools should not be dealing with students values, attitudes, personalities, should merely be dealing with factual information. Regardless of what your view is on that dichotomy of opinions, <u>this bill has nothing to do with psychological assessment or . . . or psychiatric assessment</u>. . . It's information for state policymakers, for local policymakers. <u>How well do the</u>

> kids in such and such an area in aggregate do in math? How well do they do in communication skills? How well do they do in history? It is not a values oriented. . . This bill has absolutely nothing to do with that. Nor does this bill establish a state curriculum. It's very clear, it's very clear that the intent of this bill is simply to say what skills we want young people to have when they come out of school in academic areas, and to develop methodologies of assessing whether our kids, in the aggregate, have those skills.

Floor Debate on LB 245, 92nd Neb. Leg., 2nd Sess., April 9, 1992 (Statement by Senator Withem).

This legislative history is so clear that it could not be disregarded by the Commission in determining its duties under § 79-4,236 even if the phrase "learner outcomes" was not ambiguous. A general rule of statutory construction is that one should not adhere to the ambiguity rule when it is obvious that the result reached would clearly distort the legislative purposes. Sutherland Stat. Const. § 48.01 at p. 302 (5th Ed.). Guidance in interpreting statutory meaning can also be found in ***National R.R. Passenger Corporation v. National Association of R.R. Passengers***, 414, U.S. 453, 94 S.Ct. 690 (1974), in which the United States Supreme Court determined that "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." (Citation omitted). 94 S.Ct. at 693.

Thus, we conclude the Commission's duties, pursuant to § 79-4,236, to "develop broad curriculum frameworks and standards for learner outcomes. . ." may, and should, be determined with reference to the legislative history of LB 245, Neb. Laws 1992. The legislature, in unequivocal terms, stated its intent that the broad curriculum frameworks and standards for "learner outcomes" to be developed by the Commission not be values oriented or deal with psychological or psychiatric assessment. Section 79-4,237 mentions assessment of "learner outcomes" only in the academic areas of "mathematics, science, reading, language arts, and social studies." Likewise, the legislative history of LB 245 states, "It's very clear, it's very clear that the intent of this bill is simply to say what skills we want young people to have when they come out of school in academic areas, and to develop methodologies of assessing whether our kids, in the aggregate, have those skills." Floor Debate on LB 245, 92nd Neb. Leg., 2nd Sess., April 9, 1992 (Statement by Senator Withem) (emphasis added). Thus, "learner outcomes" which are values oriented or which relate to "attitudes" or which "nurture mental health" or relate to "believing in ones own effectiveness" or "taking pride in one's own accomplishments," etc. exceed the statutory authority of the Nebraska School

Accountability Commission and may not be included in the work product of the Commission notwithstanding the actions of the School Restructuring Commission. The work of the Nebraska School Accountability Commission is strictly limited by statute to academic subjects such as mathematics, science, reading, language arts and social studies.

Sincerely yours,

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Approved by:

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