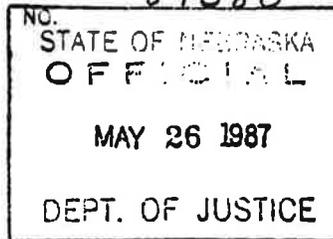


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: May 26, 1987

SUBJECT: Whether a conventional 12 or 15 passenger van, modified to seat 10 passengers or less in addition to the driver, meets Federal motor vehicle safety standards when used to transport students to and from school or school-related activities.

Whether a convention 12 or 15 passenger van, modified to seat 10 passengers or less in addition to the driver, must meet the Nebraska state standards applicable to "conventional school buses" regardless of whether it must meet Federal motor vehicle safety standards for school buses.

REQUESTED BY: Joe E. Lutjeharms, Commissioner of Education
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WRITTEN BY: Robert M. Spire, Attorney General
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INTRODUCTION

Neb.Rev.Stat. §79-328 (1986 Cum.Supp.) empowers the State Board of Education to adopt reasonable standards governing vehicles used for the transportation of school children. This power, however, differs relative to the seating capacity of the vehicle. For vehicles "with a manufacturer's rated seating capacity of eleven or more passengers," the Board must adopt standards governing "the general design, equipment, color, operation, and maintenance." Neb.Rev.Stat. §79-328(13) (a) (emphasis added). For vehicles "with a capacity of ten or less passengers per vehicle, however, the Board is limited to the adoption of standards governing "the equipment, operation and maintenance" of the vehicle. Neb.Rev.Stat. §79-328(13) (b) (emphasis added).

The regulations adopted by the Department of Education under the authority of Neb.Rev.Stat. §79-328(13) also distinguish two

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types of vehicles, but on the basis of the number of passengers for which the vehicle was "designed," rather than the "manufacturer's rated capacity" of the vehicle:

004.01. Conventional School Bus shall be a motor vehicle . . . designed for carrying 11 or more passengers . . . which at any time would be used to carry school children and school personnel exclusively
. . . .

and

004.03. Small Vehicle shall be a motor vehicle . . . designed for carrying 10 or less passengers excluding the driver which at any time would be used to carry school children and school personnel exclusively
. . . .

92 N.A.C. §32-004 (emphasis added). In general, "conventional school buses" must be constructed, equipped and painted in the manner generally associated with a school bus (i.e., yellow, flashing lights, etc.). See 92 N.A.C. Chapter 32. A "small vehicle," however, can be a passenger car, station wagon or van with a few relatively minor modifications, such as the addition of an approved first aid kit and a fire extinguisher. See 92 N.A.C. §§32-093 through 32-096.

Discussion

(1) Federal Motor Vehicle Safety Standards

The Motor Vehicle and Schoolbus Safety Amendment of 1974 mandated that school bus safety standards be added to the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §1391 et seq. These amendments added extensive regulations relating to the construction and performance of school buses, including standards relating to emergency exits, interior occupant protection, floor strength, seating systems, crash worthiness, vehicle operating systems, windows, windshields and fuel systems. 15 U.S.C. §1392(i)(1)(A). See also 49 C.F.R. §571. For purposes of these amendments, a school bus is defined as:

[A] passenger motor vehicle which is designed to carry more than 10 passengers in addition to the driver, and which the Secretary [of Transportation] determines is likely to be used significantly for the purpose of transporting primary, pre-primary and secondary school

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students to or from such schools or events related to such schools.

15 U.S.C. §1391(14) (emphasis added).

The National Traffic and Motor Vehicle Safety Act of 1966 has, among other requirements, a prescription that:

[e]very manufacturer or distributor of a motor vehicle . . . shall furnish . . . at the time of delivery of such vehicle . . . by such manufacturer or distributor the certification that each such vehicle . . . conforms to all applicable Federal motor vehicle safety standards . . . in the form of a label or tag permanently affixed to such motor vehicle.

15 U.S.C. §1403. The regulations promulgated by the Department of Transportation specifying the content and other requirements for the label or tag prescribed in 15 U.S.C. §1403 state that it shall indicate: (1) The name of the manufacturer; (2) the month and year of manufacturer; (3) the gross vehicle weight rating; (4) the gross axle weight rating; (5) a statement that the vehicle conforms to all applicable Federal motor vehicle safety standards in effect on the date of manufacture; (6) the vehicle identification number; and (7) "the type classification of the vehicle as defined in [49 C.F.R. §571.3] (e.g., truck, MPV, bus, trailer)." 49 C.F.R. §567.4(g).

It is noteworthy that there is no Federal requirement that motor vehicles be labeled or tagged as to the "manufacturer's rating seating capacity" of the vehicle. In fact, the vehicle type classification as defined in 49 C.F.R. §571.3 (e.g., truck, MPV, bus, schoolbus, trailer) appears to be the only Federally required classification or certification of motor vehicles with respect to the number of persons or passengers which the vehicle is designed to carry.

Section 571.3, referred to in 49 C.F.R. §567.4(g) as the source of vehicle type classifications, sets forth the definitions applicable to Federal motor vehicle safety standards, including the Motor Vehicle and Schoolbus Safety Amendments of 1974. Paragraph (a) of Section 571.3 states: "Statutory definitions. All terms defined in [15 U.S.C. §1391] are used in their statutory meaning." 49 C.F.R. §571.3(a). In other words, 49 C.F.R. §571.3, by its terms, incorporates the definition of a "Schoolbus" contained in 15 U.S.C. §1391(14) as "a passenger motor vehicle which is "designed" to carry more than 10

passengers in addition to the driver." 15 U.S.C. §1391(14)
(emphasis added).¹

Section 571.3(b) defines vehicle type classifications other than "schoolbus." Under this section, a "bus" is "a motor vehicle . . . designed for carrying more than 10 persons." 49 C.F.R. 571.3(b) (emphasis added). A "multipurpose passenger vehicle" is "a motor vehicle which is designed to carry 10 persons or less which is constructed either on a truck chassis or with special features for occasional off-road operation." 49 C.F.R. §571.3(b) (emphasis added). The term "MPV" used as an example of a vehicle type classification in 49 C.F.R. §567.4(g) (7) almost certainly refers to a multipurpose passenger vehicle, as defined in 49 C.F.R. §571.3(b). See 49 C.F.R. §567.4(g) (7) (quoted supra at 4).

¹Section 571.3(b) can be read to conflict with 15 U.S.C. §1391(14) in that Section 571.3(b) defines a "school bus" as "a bus that is sold, or introduced in interstate commerce, for purposes that include carrying students to and from school or related events . . ." and also defines a "Bus" as a "motor vehicle . . . designed for carrying more than 10 persons." 49 C.F.R. §571.3(b). Compare 15 U.S.C. §1391(14) ("schoolbus" defined as a passenger motor vehicle which is designed to carry more than 10 passengers in addition to the driver).

However, 49 C.F.R. §571.3(a), which expressly incorporates the statutory definition of a school bus (15 U.S.C. §1391(14)), resolves any doubt that a passenger motor vehicle which is designed to carry no more than 10 passengers in addition to the driver is not a school bus for purposes of complying with Federal motor vehicle safety standards.

²Note that if a "schoolbus" is in fact a motor vehicle which is designed to carry more than 10 passengers in addition to the driver (see note 1, supra at 4, discussing the resolution of any conflict between 15 U.S.C. §1391(14) and 49 C.F.R. §571.3(b)) and a "multipurpose passenger vehicle" is a motor vehicle designed to carry 10 persons or less, then a motor vehicle which has a seating capacity of exactly 10 students in addition to the driver would be classified as a "bus" (i.e. "a motor vehicle . . . designed for carrying more than 10 persons") but would not be classified as a "schoolbus."

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Taken at its face value, it could be argued that the definition of a school bus as a vehicle "designed" to carry more than 10 persons in addition to the driver indicates that a conventional 12- or 15-passenger van used to carry school students to and from school or school-related events must meet motor vehicle safety standards applicable to school buses, regardless of whether or not the number of seating positions in the van has been reduced to 10 or less positions in addition to the driver. A more detailed analysis of the Federal regulations, however, indicates that the term "designed" should not be taken at face value only.

As noted above, Federal regulations require that manufacturers install a permanently affixed label or tag to each vehicle they manufacture, certifying that the vehicle conforms to applicable Federal motor vehicle safety standards and, in addition, indicating the type classification of the vehicle, as defined in 49 C.F.R. §571.3(e.g., whether the vehicle is "designed" as a "schoolbus," "bus," "MPV," etc.) However, the type classification of a vehicle and the safety standards which are applicable once the vehicle is in operation are not necessarily set at the time of the vehicle's manufacture. On the contrary, the regulations requiring the manufacturer to identify each motor vehicle by type classification and to certify that it meets Federal motor vehicle safety standards applicable to that vehicle type, expressly accommodate changes in vehicle type classification due to a modification of the vehicle.

The modification of a motor vehicle which has already been labeled in compliance with Federal motor vehicle safety standards is expressly provided for in 49 C.F.R. §567.7 which states:

A person who alters a vehicle that has previously been certified in accordance with [certification and labeling requirements for motor vehicles], other than by the addition, substitution or removal of readily attainable components such as mirrors or tire and rim assemblies, or minor finishing operations such as painting, or who alters the vehicle in such a manner that its stated weight ratings are no longer valid, before the first purchase of the vehicle in good faith for purposes other than resale, shall allow the original certification label to remain on the vehicle, and shall affix to the vehicle an additional label of the type and in the manner and form discussed in [the certification and labeling regulations] containing the following information:

(a) The statement: "This vehicle was altered by (individual or corporate name) in (month and year in which alterations were completed) and as altered it conforms to all applicable Federal motor vehicle safety standards affected by the alteration and in effect in (month, year)." The second date shall be no earlier than the manufacturing date of the original vehicle, and no later than the date alterations were completed

(c) If the vehicle as altered has a different type classification from that shown on the original certification label, the type as modified shall be provided.

49 U.S.C. §567.7 (emphasis added).

As discussed, the definitions of "schoolbus," "bus" and "multipurpose passenger vehicle," are based on whether the vehicle in question is "designed" to carry a certain number of passengers, and these definitions, in turn, determine the type classification of the vehicle. Since the vehicle's type classification can be altered, it must follow that the use of the term "designed" in the Federal statutes and regulations distinguishing a "schoolbus" from a "bus" or a "multipurpose passenger vehicle" does not prevent the School District from using conventional 12- or 15-passenger vans which have been modified to seat 10 passengers in addition to the driver to transport students to school or school related events. Thus, it appears that the long standing practice of having the motor vehicle dealer remove the seating positions necessary to reduce the capacity of the vans to 10 passengers in addition to the driver is expressly provided for by the Federal regulations.

Moreover, it appears that the practice of purchasing a conventional 12- or 15-passenger van, which the manufacturer has certified and labeled as a "bus," and which is then modified by the dealer to a seating capacity of 10 passengers in addition to the driver (but not less than 10 in addition to the driver) does not result in any requirement that the dealer or any other person re-label or re-certify the vehicle. This is because a 12- or 15-passenger van which is modified to seat exactly 10 passengers in addition to the driver is properly classified as a "bus." See note 2, supra at 5 (motor vehicle seating 10 passengers in addition to the driver is a "bus" and not a "school bus" or "multipurpose passenger vehicle"). If the van was certified and labeled as a "bus" prior to modification and if the modifications

did not result in a change in the van's vehicle type classification, then it must follow that no recertification or relabeling of the van with respect to its vehicle type classification, is required.

However, it appears from the face of 49 C.F.R. 567.7 that if a school district wishes to modify a motor vehicle in a manner which would necessitate recertifying and relabeling the vehicle (e.g. if the seating capacity of a conventional 12- or 15-passenger van were to be reduced to less than 10 passengers in addition to the driver, which would necessitate reclassification from a "bus" to a "multipurpose passenger vehicle") then this modification, recertification and relabeling of the vehicle must be performed by the manufacturer or dealer, rather than by the school district itself. This is because 49 C.F.R. §567.7 on its face contemplates that a modification of a motor vehicle which affects its vehicle type classification or its compliance with Federal motor vehicle safety standards would take place "before the first purchase [of the vehicle] in good faith for purposes other than resale." 49 C.F.R. §567.7 (quoted supra at 6). Since the school district does not purchase the vans for resale, 49 C.F.R. §567.7 does not on its face sanction alteration of the vans by the school district itself, as opposed to modification by the manufacturer or dealer of the vehicle. Therefore, if conventional 12- or 15-passenger vans were sold by the manufacturer or dealer "for purposes that include carrying students to and from school or school related events," 49 C.F.R. §571.3(b) (discussed supra at note 1), then the vans would be required to meet Federal motor vehicle safety standards at the time of the sale. Any sale of a conventional 12- or 15-passenger van to the school district prior to a reduction of the seating capacity to 10 or less in addition to the driver, therefore, would not meet Federal regulations.

(2) Nebraska State Motor Vehicle Safety Standards

It is obvious from the legislative history of the Neb.Rev.Stat. §79-328 that this statute and 92 N.A.C. §§32-004.01 and 32-004.03 are intended to be consistent with, and, in fact, are patterned after the Federal motor vehicle safety standards, discussed above. Direct evidence of this is found in discussions of the most recent amendments to Neb.Rev.Stat. §79-328(13) in the Committee records of the Nebraska State Legislature, Committee on Education. The most recent amendments to Section 79-328(13) in the Committee records of the Nebraska State Legislature, Committee on Education. The most recent amendments to Section 79-328(13), passed in 1981, dealt directly with the statutory basis for the regulatory distinction of a "conventional school

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bus" from a "small vehicle," expressed in 92 N.A.C. §§32-004.01 and 32-004.03. They amended Neb.Rev.Stat. §79-328(13) (then Neb.Rev.Stat. §79-328(12)) as follows:

79-328. The State Board of Education shall have the power and it shall be its duty: . . . (12) With the advice of the Department of Motor Vehicles, to adopt reasonable standards, not inconsistent with existing statutes governing: (a) The general design, equipment, color, operation, and maintenance of any vehicle with a manufacturer's rated seating capacity of eleven or more passengers used for the transportation of school children; and (b) the equipment, operation, and maintenance of any vehicle with a capacity of ten or less passengers used for the transportation of school children . . .

Laws 1981, LB 316 § 1 (emphasis added).

Since the Federal motor vehicle safety standards discussed above were promulgated prior to these events, it would appear that Neb.Rev.Stat. §79-328(13) does not authorize state regulations inconsistent with those standards. Furthermore, according to the Introducer's Statement of Purpose of LB 316, 1981: "The new provision would be consistent with Federal standards." Nebraska State Legislature, Eighty-Seventh Session, Introducer's Statement of Purpose, LB 316 (January 29, 1981) (emphasis added).

Testimony at a public hearing on LB 316 also indicates that Neb.Rev.Stat. §79-328(13) was, in fact, based on Federal motor vehicle safety standards. At this hearing, Dr. Larry Vontz, representing the State Board of Education, stated that: "[T]he request [to amend Neb.Rev.Stat. §79-328(13) as described above] is made on behalf of Federal requirements which are now or will very shortly come into effect for all school districts, not only in Nebraska but across the nation." Minutes of Committee on Education, February 24, 1981, at 1. At this same hearing, Mr. Peter Soderquist, also employed with the Department of Education and evidently responsible for the drafting of the amendment, testified that:

[W]e are changing the seating capacity of the small vehicle from 11 to 10 to comply with the federal regulations which are now in effect. . . .

The federal regulations has [s.i.c.] been in effect some time which reduced it to the 10 persons, and then

we're simply bringing up our regulations to meet the federal regulations. By the means of the emergency clause, we would not have an interim period in which our rules would not be effective.

Id. at 5.

As discussed in the previous section on Federal motor vehicle safety standards, the Federal standards apparently sanction the use of conventional 12- or 15-passenger vans, modified to seat 10 or fewer passengers in addition to the driver, for the purpose of transporting students to or from school or school related activities. It is also apparent from the directly preceding discussion that Neb.Rev.Stat. §79-328(13) and the Nebraska motor vehicle standards in 92 N.A.C. Chapter 32 distinguishing "conventional school buses" from "small vehicles" are based on the Federal motor vehicle safety standards and that even if 92 N.A.C. §§32-004.01 and 32-004.03 were not based on the Federal standards, the intent of Neb.Rev.Stat. §79-328(13) is that the Federal standards control. Therefore, there should be no question that Neb.Rev.Stat. §79-328(13) and the Nebraska motor vehicle standards should be construed consistent with the Federal standards and no question that the School District may use conventional 12- or 15-passenger vans which have been modified, by the removal of seats to a seating capacity of 10 or fewer passengers, in addition to the driver, to transport students to and from school or school related activities.

(3) Summary of Federal Standards

In adopting motor vehicle safety standards for school buses and school bus equipment, the Congress has allowed an exception for pupil transportation vehicles which are "designed" to carry fewer than 10 persons, plus the driver. 20 U.S.C. §1391(14). Such vehicles, of course, must meet the other federal safety standards applicable to vehicles of their type.

As applied to the modified standard vans, the legal question is whether the vehicle remains "designed" to carry 12 or 15 passengers if sufficient seating has been removed to enable the vehicle to carry only 11 or fewer passengers (including the driver). It is our conclusion, that the federal law and regulations expressly allow a manufacturer, distributor or dealer to alter the vehicle equipment to meet the federal safety standards "before the first purchase of the vehicle in good faith for purposes other than resale. . . ." 49 C.F.R. §567.7 (1985). Thus, a dealer or manufacturer can remove seats from a van before selling or leasing it to a school district to meet the "under 10

passengers and driver" requirement for a vehicle used to transport students which is not a "school bus," just as a dealer, distributor or manufacturer can convert a standard van to a 16 passenger "school bus" and recertify the vehicle as having the new type classification.

The removal of seats from a 12 or 15 passenger van, however, does not entail a new certification label. The seating capacity is not shown on the label, and the modified standard van continues to meet the federal safety standards for a "bus" type classification which was the original manufacturer's vehicle type classification (as opposed to a "school bus"). [49 C.F.R. §571.3 (1985)].

(4) Summary of Nebraska Statutes and Regulations

Neb.Rev.Stat. §79-348(13) (Cum.Supp. 1986) authorized the State Board of Education to adopt reasonable standards governing these matters which are "not inconsistent with existing statutes . . ." The term "existing statute" should embrace governing federal statutes and regulations as well as pertinent Nebraska authorities. As noted above, the Introducer's Statement for L.B. 316, 1981 Legislature (source of this provision), stated the express purpose of the legislation was to make the Nebraska requirements "consistent with Federal standards." Thus, any rules adopted under this authority should be drafted or construed consistently with the federal safety requirements. Moreover, 15 U.S.C. §1392(d), as amended in 1982, imposes a federal supremacy requirement such that:

"[N]o state . . . shall have any authority to establish, or to continue in effect, with respect to any motor vehicle . . . any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the federal standard."

Thus, the Nebraska rules must be identical to any applicable federal safety requirements.

Section 79-328(13) directs the State Board of Education to regulate the "equipment, operation, and maintenance" of all vehicles owned or leased by school districts for the transportation of students, as well as the "general design [and] color" (i.e., "school bus" standards) for such vehicles having a "manufacturer's rated seating capacity of 11 or more passengers . . ." The term "manufacturer's rated seating capacity" is not defined elsewhere in state or federal statutes or regulations.

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We have contacted the Society of Automotive Engineers and learned that they also do not define this term.

(5) Suggestion

Since the stated purpose of L.B. 316, 1981 Legislature, was to conform with the Federal standards, and because the 1982 Federal legislation requires "identical" state standards, the term "manufacturer's rated seating capacity" must be construed to mean passenger seating capacity either as installed by the manufacturer or as modified by a distributor or dealer. Thus, the Board is authorized and directed by §79-328(13) to regulate the general design and color of 12 or 15 passenger standard vans used by Nebraska school districts to transport students only if such vans have not been modified to seat fewer than 11 passengers plus a driver. The Board, of course, is directed to regulate the equipment, operation and maintenance of the modified standard vans used by school districts for pupil transportation.

Accordingly, the regulation of the State Board of Education which defines the term "conventional bus" should be amended as follows:

"004.01 Conventional School Bus shall be a motor vehicle with motive power, except a trailer, designed or modified by the manufacturer, distributor, or dealer for carrying 11 or more passengers, excluding the driver, meeting or exceeding Neb. Chapter 32 which at any time would be used to carry school children and school personnel exclusively"

The regulation defining the term "Small Vehicle" should be amended as follows:

"004.03 Small Vehicle shall be a motor vehicle with motive power, except a trailer, designed or modified by the manufacturer, distributor or dealer for carrying 10 or less passengers excluding the driver, meeting or exceeding 91 NAC 32-093 through 32-096, which at any time would be used to carry school children exclusively;"

These amendments would clarify the identical nature of the Nebraska regulatory requirements with the Federal standards and regulations. They would also eliminate confusion on the part of many districts. Nebraska school districts should be advised that when ordering 12 or 15 passenger model standard vans or when contracting to lease these vehicles, they should specify that the

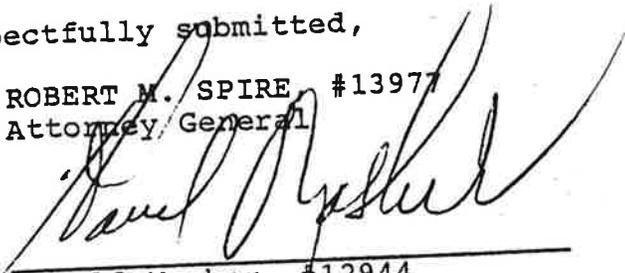
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dealer or leasing company is to remove the appropriate seating so as to reduce capacity to 10 passengers plus a driver. The districts may, however, accept delivery of the removed seats for separate storage if they contemplate resale of the van at some time in the future. A subsequent purchaser who does not use the standard van for the purpose of transporting school students could reinstall the removed seat in compliance with the Federal safety standards. This enhances the resale value of the vans for the school districts.

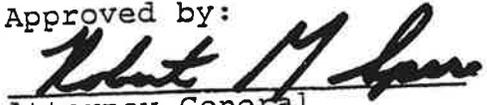
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