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16-001
NO.
STATE OF NEBRASKA
OFFICIAL
JAN 15 2016
DEPT. OF JUSTICE

SUBJECT: Defining "Textbooks" for Purposes of the Textbook Loan Program

REQUESTED BY: Senator Bob Krist
Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
Leslie S. Donley, Assistant Attorney General

You have requested an opinion from this office with respect to a legal interpretation of Neb. Rev. Stat. § 79-734(2) (2014). This statute requires public school boards to purchase and loan textbooks, upon individual request, to children who are enrolled in kindergarten to grade twelve of a private school approved for legal operation by the State Board of Education. You state in your opinion request letter that the Nebraska Department of Education ("Department") is interpreting the word "textbook," as that term is used in § 79-734(2) and the accompanying regulation, "in a manner that provides public school students with educational materials that are not allowed for private school students under the textbook loan program." You indicate that you are considering introducing legislation to define "textbook" under § 79-734(2), but would like us to clarify whether legislation is necessary in light of the department's regulatory definition of "textbook" and the 2008 amendments to the definition. You state that if legislation is necessary, "[our] opinion would help to clarify the nature and extent of the ambiguity in the statute." Finally, you state that your opinion request has no financial implications, but rather seeks a clarification as to what "textbooks" are to be provided to private school children once the appropriation has been determined.

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The statute pertinent to your inquiry, Neb. Rev. Stat. § 79-734, provides:

> (1) School boards and boards of education of all classes of school districts shall purchase all textbooks, equipment, and supplies necessary for the schools of such district. The duty to make such purchases may be delegated to employees of the school district.
>
> (2) School boards and boards of education shall purchase and loan textbooks to all children who are enrolled in kindergarten to grade twelve of a public school and, upon individual request, to children who are enrolled in kindergarten to grade twelve of a private school which is approved for continued legal operation under rules and regulations established by the State Board of Education pursuant to subdivision (5)(c) of section 79-318. The Legislature may appropriate funds to carry out the provisions of this subsection. A school district is not obligated to spend any money for the purchase and loan of textbooks to children enrolled in private schools other than funds specifically appropriated by the Legislature to be distributed by the State Department of Education for the purpose of purchasing and loaning textbooks as provided in this subsection. Textbooks loaned to children enrolled in kindergarten to grade twelve of such private schools shall be textbooks which are designated for use in the public schools of the school district in which the child resides or the school district in which the private school the child attends is located. Such textbooks shall be loaned free to such children subject to such rules and regulations as are or may be prescribed by such school boards or boards of education. The State Department of Education shall adopt and promulgate rules and regulations to carry out this section. The rules and regulations shall include provisions for the distribution of funds appropriated for textbooks. The rules and regulations shall include a deadline for applications from school districts for distribution of funds. If funds are not appropriated to cover the entire cost of applications, a pro rata reduction shall be made.

For purposes of the textbook loan program, the Department has defined "textbook" to mean

> a book or electronic media (DVDs, audio CDs, CD-ROMs, audiotapes, videotapes, etc.) which is designated for use by individual students in classroom instruction as the principal source of study material, in any of grades kindergarten through grade 12 in the public school of each school district. The following are not to be considered textbooks: library books, teacher's editions, workbooks and other similar consumable materials, and any book or material designated for classroom, and not individual use (e.g.

> "Big Books" and the like). Multiple texts which are the principal source of study material for a given course of study are textbooks.

Title 92, *Nebraska Administrative Code*, Chapter 4—"Regulations for Textbook Loans to Children Enrolled in Private Schools in Nebraska," § 002.03 (effective date January 19, 2008) ("Rule 4").

ADDITIONAL BACKGROUND

In your opinion request letter, you note that educational materials for students in kindergarten through grade 12 have changed dramatically since the regulatory definition of textbook was promulgated in 2008. You indicate that in this computer age, publishers are moving towards "e-books" and other "electronic materials" that have either replaced or supplemented traditional textbooks. You further state that in some instances traditional hardbound textbooks are being replaced "with a 'subscription' of hard copy 'work texts,' a series of write-in textbooks that are issued annually for six years." You explain that these work texts combine instructional course material with interactive questions and exercises for students. You state that the Department has taken the position that "e-books" are not analogous to "electronic media," as referenced in Rule 4, and that the "work texts" referenced above are analogous to "workbooks or other similar consumable materials," thereby excluding such materials from the textbook loan program. You state that public schools' increased use of these new materials has diminished the number of traditional textbooks available to private school students through the textbook loan program.

DISCUSSION

Based on Neb. Rev. Stat. § 79-734 and Rule 4, we now address your inquiry. You have posed a series of questions, which we address as follows:

A. <u>How is the word "textbook" defined as it is used in § 79-734(2)?</u>

"Textbook" is not defined in § 79-734, in Chapter 79, or anywhere else in statute. In 1989, the Department adopted Rule 4 pursuant to the authority given to it with the enactment of 1986 Neb. Laws LB 757, § 1. In 2008, the Department amended its definition of "textbook" in Rule 4 to include "electronic media (DVDs, audio CDs, CD-ROMs, audiotapes, videotapes, etc.)"—tangible items that the Department determined could be loaned, returned and maintained in a separate inventory in accordance with program requirements.

In your opinion request letter, you suggest that since the word "textbook" is not defined in § 79-734, one must look to the word's "plain and ordinary meaning" for its definition. In Nebraska, in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and

unambiguous. *Swift and Company v. Nebraska Department of Revenue*, 278 Neb. 763, 773 N.W.2d 381 (2009). Statutory language is to be given its plain and ordinary meaning, and an appellate court's duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Pettit v. Nebraska Dept. of Correctional Services*, 291 Neb. 513, 522, 867 N.W.2d 553, 560 (2015). In that regard, you indicate that the *Merriam-Webster [Online] Dictionary* defines "textbook" as "a book used in the study of a subject: as (a) one containing a presentation of the principles of a subject; (b) a literary work relevant to the study of a subject."[1] You further note that "[t]he definition of 'book' includes not only 'a set of printed sheets of paper that are held together inside a cover: a long written work,' but also 'a long written work than can be read on a computer.'" *See* http://www.merriam-webster.com/dictionary/book. You then assert that it "seem[s] that NDE and school boards generally interpret the word 'textbook' as including electronic materials and work texts, as I have been informed that these materials are being provided to individual public schools students across the state."

However, we do not believe it is necessary to construe the word "textbook" when a regulatory definition for textbook already exists. Rather, it seems to us that the question to address is whether the current definition of textbook could be construed to include "electronic materials and work texts." For purposes of construction, a rule or order of an administrative agency is treated like a statute. *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 1009, 653 N.W.2d 846, 851 (2002); *State v. McIntyre*, 290 Neb. 1021, 1031, 863 N.W.2d 471, 480 (2015). In the absence of anything to the contrary, language in a rule or regulation is to be given its plain and ordinary meaning. *Melanie M. v. Winterer*, 290 Neb. 764, 775, 862 N.W.2d 76, 86 (2015). A regulation is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *State v. Woods*, 255 Neb. 755, 764, 587 N.W.2d 122, 128 (1998). In addition, an agency is to be given deference in its interpretation of its own regulations unless plainly erroneous or inconsistent. *Upper Big Blue Natural Resources District v. Nebraska Dept. of Natural Resources*, 276 Neb. 612, 618, 756 N.W.2d 145, 149 (2008).

The plain and ordinary language in section 002.03 provides that "textbooks" shall not only include books but also "electronic media." *Merriam-Webster's [Online] Dictionary* defines "electronic" in part as "operating through the use of many small electrical parts (such as microchips and transistors); produced by the use of electronic equipment; operating by means of a computer: involving a computer or a computer system." "Medium" is defined as "[*b plural usually media*] (1) a channel or system of communication, information, or entertainment--compare mass medium; (2) a publication or broadcast that carries advertising; (3) a mode of artistic expression or communication; (4) something (as a magnetic disk) on which information may be stored."[2] Section 002.03 further provides that the books or electronic media subject to loan are those used by school districts as their "principal source of study material." In this regard, "principal"

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1 *See* http://www.merriam-webster.com/dictionary/textbook (accessed January 4, 2016).
2 *See* http://www.merriam-webster.com/dictionary/textbook (accessed January 13, 2016).

means "2. chief; most important or considerable; as, the *principal* topics of debate; [or] the *principal* points of law . . . ." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1430 (2nd ed. 1983) (emphasis in original). These definitions, read in conjunction with the language from the statute ("designated for use") and regulation ("principal source of study material"), supports a conclusion that the definition could encompass a full panoply of electronic materials, including work texts. We note further that the inclusion of "etc." at the end of listed items in the parenthetical describing "electronic media," i.e., "DVDs, audio CDs, CD-ROMs, audiotapes, videotapes," suggests that the list is illustrative, but not exhaustive.

To be clear, our conclusion in this regard begins with the fundamental premise that § 79-734(2) establishes a textbook ***loan*** program. We fully recognize that any items which may fall under the regulatory definition of textbook must be workable within the other provisions of Rule 4, which dictates how items are made available (Rule 4, § 004), returned to the lending school district (Rule 4, § 003.01) and maintained in a separate inventory (Rule 4, § 004.07). And while our interpretation of § 002.03 differs from that of the Department, we do not believe the Department's own interpretation is plainly erroneous or inconsistent. Finally, while we may have concluded that these electronic materials may reasonably fall under the regulatory definition of textbook, we do not have sufficient facts to fully address whether these particular materials could, in fact, be loaned, returned, maintained, etc., in the manner authorized by § 79-734(2) and specified in Rule 4.

B. Should the word "textbook" in § 79-734(2) be defined differently depending on whether it is used with reference to public school children or private school children?

Please see our response to question A above. We believe that a reasonable construction of section 002.03 would allow school districts to purchase and loan electronic materials and work texts to private school children, provided the program requirements in Rule 4 are met.

C. If "textbook" is defined the same in terms of public school and private school children, is there another statutory provision that would allow school boards to provide "textbooks" or other educational materials to public school children that are not authorized under § 79-734(2) for private school children?

Please see our responses to questions A and B above. Since we have concluded that electronic materials and work texts could fall under the current regulatory definition of "textbook," we do not believe it is necessary to address the question presented.

We note that your opinion request letter includes several statutory provisions purportedly cited by the Department "to justify providing educational materials to individual public school students that are not offered to private school students under § 79-734(2)." You indicate that, based on your observations, you do not believe these

provisions appear to support the Department's position. However, we will point out that several statutes allow school districts to select and purchase items for the benefit of their students. Generally speaking, a school district is a body corporate and has both the express powers granted to it in law and implied powers necessary to enable them to perform their duties. *See* Neb. Rev. Stat. § 79-405 (2014); *Cowles v. School District No. 6,* 23 Neb. 655, __, 37 N.W. 493, 496 (1888). School districts have authority to purchase a large number of things that are reasonably related to their educational mission including, but not limited to, "textbooks." School districts have express authority (1) to select "available materials and equipment to be used" (Neb. Rev. Stat. § 79-101(12)); to contract for the provision of "instructional materials, supplies and equipment" (Neb. Rev. Stat. § 79-515); to "provide the necessary supplies and equipment" (Neb. Rev. Stat. § 79-526(1)); and to purchase "all . . . equipment, and supplies necessary for the schools of [the] district" (Neb. Rev. Stat. § 79-734(1)). School districts' ability to purchase other educational materials is authorized under these statutes and their implied powers.

D. Based on the answers to questions A-C, is it necessary to amend § 79-734(2) in order to expand the types of educational materials available to private school children to include educational materials that currently are being provided to public school children, or would an amendment of the applicable regulations, Rule 4, be sufficient?

We believe that the plain and ordinary language of the regulatory textbook definition, as it currently exists, could be construed to include electronic materials and work texts. Thus, amending § 79-734(2) is likely unnecessary. We note, however, that several other states have amended their textbook loan program statutes to expressly include electronic or digital materials.[3]

E. If it is not necessary to amend § 79-734(2) to provide private school children with the same educational materials as are provided to public school children, then could Rule 4 as currently written be interpreted to allow private school children access to electronic media and subscription "work texts" that currently are being accessed by and provided to public school children?

Please see our responses to questions A-D.

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[3] For example, the State of Iowa defines "textbook" to include "[e]lectronic textbooks, including but not limited to computer software . . . ." Iowa Code Ann. § 301.1 (West 2015). South Dakota defines "textbook" as "any instructional materials that constitute the principal source of teaching and learning for a given course of study including print and digital materials . . . ." S.D. Codified Laws Ann. § 13-34-23 (2015). Illinois Compiled Statutes Annotated § 5/28-15 allows "furnishing free textbooks or electronic textbooks." Minnesota law defines "textbook" as "any book or book substitute, including electronic books as well as other printed materials delivered electronically . . . ." Minnesota Statutes Annotated, § 123B.41 (West).

CONCLUSION

We believe that Rule 4 could reasonably be construed to encompass electronic materials and work texts under the definition of "textbooks" in section 002.03. Our conclusion herein is premised on the fundamental concept that § 79-734(2) establishes a *loan* program, and that any electronic materials are subject to the operational requirements set out in Rule 4 relating to loaning, returning, and maintaining separate inventory, etc., of items. We further emphasize the fact that several states have amended their respective textbook loan program statutes to expressly clarify their authority to include electronic or digital materials or computer software in their programs. Ultimately, the decision to expressly expand the textbook loan program in this manner is a matter for the Legislature.

Sincerely,

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Approved by:

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