

NCSA
Final Legislative Report
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Nebraska Council
of School Administrators

I. Legislation Passed and Signed into Law

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LB 22	<i>Introduced by:</i> Suttle	<i>Prioritized by:</i> N/A	<i>Topic:</i> Interpreters	<i>Effective Date:</i> July 20, 2002
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LB 22 will give the Commission for the Deaf and Hard of Hearing the authority to license all interpreters employed by state agencies and the judicial system. The bill does not give authority to the commission to license educational interpreters.

At the time LB 22 was originally introduced in the 2001 Session, the measure would have governed all interpreters including educational interpreters working at school districts and ESUs. On General File debate this year, however, Senator Suttle successfully promoted an amendment to eliminate all references to educational interpreters in the bill. (The Department of Education's Rule 51 already covers standards and qualifications of educational interpreters employed by districts and ESUs.)

It should be noted that LB 22 does provide authority to the commission to “make recommendations” to NDE, public school districts, and ESUs regarding policies and procedures for qualified educational interpreter guidelines and training programs, including testing, training, and grievances. In essence, the commission can make suggestions but not require educational entities to comply with those suggestions.

The appropriations (A) bill to LB 22 was of minimal consequence to the implementation of the legislation and was in fact vetoed by Governor Johanns.

LB 29	<i>Introduced by:</i> Redfield	<i>Prioritized by:</i> Redfield	<i>Topic:</i> Labor Organizations	<i>Effective Date:</i> July 20, 2002
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LB 29 relates to questions of representation for public employees who do not hold membership in a labor organization. The measure requires a nonmember to pay his or her “pro rata share” of the labor organization’s actual legal fees and court costs so long as the employee chooses to have the labor organization for representation in a grievance or legal action.

During Select File debate (April 2nd), Senator Redfield stated that labor organizations feel obligated to help nonmembers in their time of need but also believe nonmembers should help with the cost of representation. In some cases, she said, the representation of nonmembers has been a drain on resources for labor organizations that end up passing along higher dues rates to members to account for the increased costs. She said the current situation creates “strife in the workplace” between member and nonmember employees.

LB 57	<i>Introduced by:</i> Redfield	<i>Prioritized by:</i> N/A	<i>Topic:</i> Public Records	<i>Effective Date:</i> October 1, 2002
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LB 57 adds a new section to the Nebraska Revenue Act to exempt from sales tax those public records or reproductions that are subject by law to a record or reproduction fee. An exception to the sales tax exemption is made for those documents developed, produced, or acquired and made available for commercial sale to the general public if the price or reproduction cost of the document is not fixed by state law, rule, or regulation.

Senator Redfield, who sponsored the measure, stated on General File that some governmental entities had found that charging for sales taxes on public records had become overly burdensome.

LB 57 will reduce General Fund sales tax revenues by minimal amounts. The Department of Revenue estimates the reduction at \$87,000 in FY2003 and \$119,000 in FY2004. The sales tax exemption becomes operative on October 1, 2002.

LB 82	<i>Introduced by:</i> Brashear	<i>Prioritized by:</i> Hilgert (2001)	<i>Topic:</i> Criminal Code	<i>Effective Date:</i> July 20, 2002
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On April 11th, the Legislature passed LB 82, one of several omnibus criminal justice bills passed in the 2002 Session. The legislation was passed by a 46-0 vote and was later signed into law on April 17th.

LB 82 makes a number of changes to the Nebraska Criminal Code, including a statutory change introduced on behalf of NCSA relating to the offense of firearms on school grounds. The “firearms provision” increases the penalty against a person who possesses a firearm in a school, on school grounds, in a school-owned vehicle, or at a school-sponsored activity or athletic event. The current sanction for this offense (a Class IV misdemeanor) carries a penalty of a fine (\$100 to \$500) and no possibility of imprisonment.

NCSA argued in the 2001 Session that this penalty should carry a higher sanction in light of the gravity of the offense. On our behalf, Senator Kermit Brashear introduced LB 351 to change the nature of the offense from a Class IV to a Class II misdemeanor, which carries a fine of up to \$1,000 or six months in prison or both. The intent is to give judges and prosecutors more latitude in handling this type of offense. (*The provisions of LB 351 were merged into LB 82 at the end of the last regular session.*)

Other provisions of LB 82 include:

- Section 4 changes the offense of criminal mischief to increase sanctions against a person who damages property of another intentionally or recklessly or intentionally tampers with property of another so as to endanger person or property. LB 82 creates a new subsection concerning situations where the amount of damages ranges between \$250 to \$500. In such cases, the penalty would be a Class II misdemeanor (up to \$1,000 fine, or six months in prison, or both).
- Section 6 amends laws relating to cruelty to animals. LB 82 would separate the acts of abandonment of animals and cruelty to animals as separate offenses. The penalty for the offense of cruelly mistreating an animal would be a Class I misdemeanor for the first offense (one year in prison, \$1,000 fine, or both) and a Class IV felony for any subsequent offense (up to five years in prison, \$10,000 fine, or both).
- Section 9 broadens the definition of “destructive device” to include chemical or biological bombs.
- Section 10 amends the offense of “threatening the use of explosives” to include the placing of inoperative imitation (“fake”) bombs or destructive devices where such act could cause public alarm. The new offense would carry the same penalty, a Class IV felony, as placing a real bomb or destructive device.

LB 251	<i>Introduced by:</i> Schimek	<i>Prioritized by:</i> N/A	<i>Topic:</i> Election Law	<i>Effective Date:</i> July 20, 2002
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LB 251 adds language concerning a vacancy in an elective office if the candidate who receives the highest number of votes was ineligible, disqualified, deceased or for some other reason was unable to assume the office for which he/she was a candidate at the time of the election. The measure also changes the definition of a vacancy on the ballot for the general election. Under LB 251, a vacancy occurs when a candidate, who received a certificate of nomination for a nonpartisan office as a result of a primary election becomes ineligible, disqualified, deceased or is unable to assume office.

LB 251 removes a statutory scheme where if a candidate for a nonpartisan office died or was disqualified prior to election, the second place finisher could be nominated or elected. The provision is replaced with language that would simply create a vacancy on the ballot in the case of a primary election, or a vacancy in the office in the case of a general election. Also, the measure permits candidates who lost in the primary election to petition onto the ballot or file as a write in if there is a vacancy on the ballot.

LB 326	<i>Introduced by:</i> Suttle	<i>Prioritized by:</i> N/A	<i>Topic:</i> Child Development	<i>Effective Date:</i> July 20, 2002
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LB 326 requires the Nebraska Department of Education (NDE), with cooperation from the Department of Health and Human Services (HHS), to develop a packet of materials entitled: "Learning Begins at Birth". This packet is to be distributed by HHS to parents of children born in Nebraska beginning on January 1, 2003. The packet will contain information about topics related to child development, appropriate reading material for parents to read to children, child development charts, activities parents can do with children to stimulate the children's learning processes, information about brain development, how to obtain a library card, childhood diseases and immunizations, the effects of second hand smoke, information about quality child care, etc. The packet may consist of a variety of forms of media including print, videos, audio cassettes, etc.

To assist in underwriting the costs of developing the packet, NDE and HHS may solicit private funding, and material in the packet may contain the names of private companies or products. It is estimated there are 23,500 births each year. The agencies estimate the costs for materials and distribution will be \$5.00-\$8.00 per packet. Annual costs to provide the information are estimated to be \$117,500-\$188,000.

One of the very few appropriation measures to pass in the 2002 Session, LB 326A provides \$78,750 in FY2002-03 and \$164,500 in FY2003-04 to HHS to carry out the provisions of LB 326.

LB 391	<i>Introduced by:</i> Jensen	<i>Prioritized by:</i> Quandahl	<i>Topic:</i> Construction	<i>Effective Date:</i> July 20, 2002
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LEGISLATIVE HISTORY

LB 391 represents a two-year effort to broaden the options available to school officials wishing to pursue school construction projects. The measure was introduced in the 2001 Session and referred to the Government, Military and Veterans Affairs Committee. NCSA provided supporting testimony at the public hearing, as did the Nebraska Association of School Boards (NASB) and various architectural, engineering, and construction firms.

The Government Committee advanced LB 391 to General File on February 27, 2001 by a 7-1 vote. At the time the bill was advanced, it was understood by both proponents and opponents that negotiations would need to take place in order to find more or less common ground on the issues surrounding the legislation.

The central component of LB 391 is the ability of a school district to bypass the normal bidding procedure. Under the normal bidding procedure (i.e., the “design-bid-build” process), school construction involves hiring an architect or engineer to design the project with extensive drawings and specifications, requesting and reviewing construction bids, and then contracting with a construction company to build.

LB 391 on the other hand promotes, in part, the “design-build” process permitting a school district to choose an alternative approach in which the design-builder both designs and provides construction services for the project. The proponents of design-build argued that the process may be particularly useful to (1) save time, (2) fix a single point of responsibility, and (3) save money. Opponents were concerned that subcontractors and perhaps smaller general contractors may be excluded from a fair process to bid for school projects.

Interim Meetings

During the interim after the 2001 Session, proponents and opponents met for the purpose of discussing concerns and agreeing upon compromise language in time for the 2002 Session. The meetings were attended at times by Senator Jim Jensen, who introduced the legislation, and Senator Mark Quandahl, who would later prioritize the measure in the 2002 Session. Ultimately, the meetings were successful in producing an amendment to LB 391 which incorporated the compromises between the parties involved.

Under the compromise package, school districts would be permitted to utilize a “design-build” approach in which a single entity is selected both to design and build the project subject to certain performance-based criteria. The bill would also provide for the use of a “construction management at risk” process, in which a construction manager who builds the project also acts as a design consultant and is bound to complete the project at the contracted price. Procedures would be established under which these delivery systems could be implemented, including the appointment of a selection committee to review proposals. The parties also agreed to limit the total number of permitted projects for the first few years in order to provide data on the success or failure of the process.

General File Debate

The first round of debate on LB 391 began on February 11, 2002 and ended the following session day after more than five hours of discussion over the two-day period.

Senator Jensen said the bill would “fix a single point of responsibility” by bringing a “team concept” to the construction process. While the new processes would not be mandated for school districts, they would provide additional “tools” in their toolbox. “Some school districts may want that flexibility and control,” said Jensen, who also noted that thirty states around the nation already utilize the design-build process.

Several senators, including Senator Floyd Vrtiska, expressed concern that small construction companies would be excluded in the process. Senator Jensen responded by saying the approaches would not prohibit smaller companies from working together with other architects and engineers. “There is nothing that will keep small contractors from entering this,” he said. “It’s not just for big projects.”

Other legislators explored the need for safeguards in the design-build process. Having a competitive bid system, Senator Ron Raikes argued, was a “great protection” to taxpayers who should be assured that “the best deal possible” was achieved on a project. Senator Raikes offered an amendment that would require a 3/4s vote of the local school board to approve the use of the two new delivery systems. The Legislature voted 34-0 to adopt the Raikes amendment. At the end of the lengthy debate, the Legislature voted to advance the measure by a 33-0 vote.

Final Passage

Several other amendments were adopted during Select File debate on April 2nd, and on April 11th the measure was passed by a 40-3 vote. The Governor signed LB 391 into law on April 17th. The bill did not contain the emergency clause and therefore becomes operative on July 20, 2002.

SHORT SUMMARY

As passed by the Legislature, LB 391 creates the Nebraska Schools Construction Alternatives Act and provides statutory regulation for two new construction delivery systems for public schools. These systems are design-build (qualification based selection) and construction management at risk. The new law requires a school to adopt policies and procedures to be followed if the school is to use design-build or construction management at risk (such as preparation of proposals, pre-qualification, selection, evaluation of proposals, etc.).

Design-Build: LB 391 permits school districts to choose an alternative approach, a design-build process, in which the design-builder both designs and provides construction services for the project.

Under the design-build process, the district first hires an architect or engineer (performance-criteria developer) who develops the general project performance criteria. The district then gives

public notice of the project, and solicits design-builders to indicate an interest. From the interested design-builders, the district then selects at least three design-builders as qualified to receive a request for proposal, or at least two if only two design-builders have submitted letters of interest. The district then issues a request for proposals setting forth the performance criteria, budget parameters, and other requirements.

The proposal of a design-builder is based on the qualifications of the bidder and the design-builder's statement of its approach to the design and construction of the project, but does not include detailed drawings and specifications nor a specific cost proposal. Selection is made based on which proposal best meets the criteria in the request for proposals, and consideration of a selection committee's recommendation. A contract is negotiated and then full design and construction is undertaken.

Construction Management At Risk: LB 391 also provides for a "construction management at risk" approach in which the school contracts with a design consultant to provide a facility design and there is no need to hire a performance-criteria developer. Before design work is very far underway, the district selects a contractor to provide construction management and construction services. This allows the builder to have considerable input in the design. When the design is partially complete, the construction manager negotiates the maximum price to the school, and sets a project schedule.

Under construction management at risk, the school also gives notice of the project and solicits proposals from the builders. The district evaluates and ranks the proposals based on the criteria set forth in the request for proposals including consideration of a selection committee's recommendation. The district then attempts to negotiate the terms of the contract starting with the highest ranked construction manager.

Project Limitations: LB 391 provides that no more than 24 contracts may be executed under the Nebraska Schools Construction Alternatives Act. Proponents of the legislation hope to remove this limitation after the merits of the new processes are made evident.

SECTION-BY-SECTION REVIEW

NOTE: Sections 1 to 5 apply to both Design-Build and Construction Management At Risk contracts; sections 6 to 8 apply to Design-Build contracts; sections 9 and 10 apply to Construction Management At Risk contracts; and sections 11 to 15 apply to both Design-Build and Construction Management At Risk contracts.

Section 1 (Citation): LB 391 creates the Nebraska Schools Construction Alternatives Act.

Section 2 (Purpose): The purpose of LB 391 is to authorize a school district to enter into a design-build contract which is subject to qualification-based selection or a construction management at risk contract for a public project if the school district adheres to the procedures set forth in the legislation.

Section 3 (Definitions): For purposes of LB 391:

- (1) “Construction management at risk contract” means a contract by which a construction manager:
 - assumes the legal responsibility to deliver a construction project within a contracted price to the school district,
 - acts as a construction consultant to the district during the design development phase of the project when the district’s architect or engineer designs the project, and
 - is the builder during the construction phase of the project.
- (2) “Construction manager” means the legal entity which proposes to enter into a construction management at risk contract.
- (3) “Design-build contract” means a contract which is subject to qualification-based selection between a district and a design-builder to furnish:
 - architectural, engineering, and related design services for a project pursuant to the act and
 - labor, materials, supplies, equipment, and construction services for a project.
- (4) “Design-builder” means the legal entity which proposes to enter into a design-build contract which is subject to qualification-based selection.
- (5) “Letter of interest” means a statement indicating interest to enter into a design-build contract or a construction management at risk contract for a project.
- (6) “Performance-criteria developer” means any person licensed or any organization issued a certificate of authorization to practice architecture or engineering pursuant to the Engineers and Architects Regulation Act who is selected by a district to assist in the development of (i) project performance criteria, (ii) requests for proposals, (iii) evaluation of proposals, (iv) evaluation of the construction under a design-build contract to determine adherence to the performance criteria, and (v) any additional services requested by the school district to represent its interests in relation to a project.
- (7) “Project performance criteria” means the performance requirements of the project suitable to allow the design-builder to make a proposal. Performance requirements include the following, if required by the project: Capacity, durability, standards, ingress and egress requirements, description of the site, surveys, soil and environmental information concerning the site, interior space requirements, material quality standards, design and construction schedules, site development requirements, provisions for utilities, storm water retention and disposal, parking requirements, applicable governmental code requirements, and other criteria for the intended use of the project.
- (8) “Proposal” means an offer in response to a request for proposals by a:
 - design-builder to enter into a design-build contract for a project or
 - construction manager to enter into a construction management at risk contract for a project.
- (9) “Qualification-based selection process” means a process of selecting a design-builder based first on the qualifications of the design-builder and then on the design-builder’s proposed approach to the design and construction of the project.

- (10) “Request for letters of interest” means the documentation or publication by which a school district solicits letters of interest.
- (11) “Request for proposals” means the documentation by which a school district solicits proposals.
- (12) “School district” means any school district classified under section 79-102.

Section 4 (Adoption of Resolution): Notwithstanding the procedures for public lettings in sections 73-101 to 73-106 or any other statute relating to the letting of bids by a political subdivision, a school district which follows the provisions of LB 391 may solicit and execute a design-build contract or a construction management at risk contract.

The school board must first adopt a resolution selecting the design-build contract or construction management at risk contract delivery system. The resolution will require the affirmative vote of at least 75% of the school board.

Section 5 (Adoption of Policies): The school district must adopt policies for entering into a design-build contract or construction management at risk contract. The policies must require that such contracts include the following:

- (1) Procedures for selecting and hiring on its behalf a performance-criteria developer when soliciting and executing a design-build contract. The procedures must be consistent with provisions of LB 391 and must provide that the performance-criteria developer:
 - (a) is ineligible to be included as a provider of any services in a proposal for the project on which it has acted as performance-criteria developer and
 - (b) is not employed by or does not have a financial or other interest in a design-builder or construction manager who will submit a proposal;
- (2) Procedures for the preparation and content of requests for proposals;
- (3) Procedures and standards to be used to prequalify design-builders and construction managers. The procedures and standards must provide that the school district will:
 - (a) evaluate prospective design-builders and construction managers based on the information submitted to the school district in response to a request for letters of interest and
 - (b) select design-builders or construction managers who are prequalified and consequently eligible to respond to the request for proposals;
- (4) Procedures for preparing and submitting proposals;
- (5) Procedures for evaluating proposals in accordance with sections 8, 10, and 11 of LB 391;
- (6) Procedures for negotiations between the district and the design-builders or construction managers submitting proposals prior to the acceptance of a proposal if any such negotiations are contemplated;

- (7) Procedures for filing and acting on formal protests relating to the solicitation or execution of design-build contracts or construction management at risk contracts; and
- (8) Procedures for the evaluation of construction under a design-build contract by the performance-criteria developer to determine adherence to the performance criteria.

NOTE: Sections 6 to 8 apply to Design-Build contracts.

Section 6 (Letters of Interest): A school district must prepare a request for letters of interest for design-build proposals and must prequalify design-builders as provided below. The request for letters of interest must describe the project in sufficient detail to permit a design-builder to submit a letter of interest. The request for letters of interest must be:

- (a) published in a newspaper of general circulation within the school district at least thirty days prior to the deadline for receiving letters of interest and
- (b) sent by first-class mail to any design-builder upon request.

Letters of interest must be reviewed by the school district in consultation with the performance-criteria developer. The district must select prospective design-builders in accordance with the procedures and standards adopted by the district as described in section 5.

The district must select at least three prospective design-builders, except that if only two design-builders have submitted letters of interest, the district must select at least two prospective design-builders. The selected design-builders will then be considered prequalified and eligible to receive requests for proposals.

Section 7 (Request for Proposals): A school district must prepare a request for proposals for each design-build contract. Notice of the request for proposals must be published in a newspaper of general circulation within the district and filed with NDE at least 30 days prior to the deadline for receiving and opening proposals. The request for proposals must contain, at a minimum, the following elements:

- (1) The identity of the school district for which the project will be built and the school district that will execute the design-build contract;
- (2) Policies adopted by the district in accordance with section 5;
- (3) The proposed terms and conditions of the design-build contract, including any terms and conditions which are subject to further negotiation. The proposed general terms and conditions:
 - must be consistent with nationally recognized model general terms and conditions which are standard in the design and construction industry in Nebraska;
 - may set forth an initial determination of the manner by which the design-builder selects any subcontractor; and
 - may require that any work subcontracted be awarded by competitive bidding;

- (4) A project statement which contains information about the scope and nature of the project;
- (5) Project performance criteria;
- (6) Budget parameters for the project;
- (7) Any bonds and insurance required by law or as may be additionally required by the school district;
- (8) The criteria for evaluation of proposals and the relative weight of each criterion;
- (9) A requirement that the design-builder provide a written statement of the design-builder's proposed approach to the design and construction of the project, which may include graphic materials illustrating the proposed approach to design and construction, but may not include price proposals;
- (10) A requirement that the design-builder agree to the following conditions:
 - (a) An architect or engineer licensed to practice in Nebraska will participate substantially in those aspects of the offering which involve architectural or engineering services;
 - (b) At the time of the design-build offering, the design-builder will furnish to the school board a written statement identifying the architect or engineer who will perform the architectural or engineering work for the design-build project;
 - (c) The architect or engineer engaged by the design-builder to perform the architectural or engineering work with respect to the design-build project will have direct supervision of such work and may not be removed by the design-builder prior to the completion of the project without the written consent of the school board;
 - (d) A design-builder offering design-build services with its own employees who are design professionals licensed to practice in Nebraska will (i) comply with the Engineers and Architects Regulation Act by procuring a certificate of authorization to practice architecture or engineering and (ii) submit proof of sufficient professional liability insurance; and
 - (e) The rendering of architectural or engineering services by a licensed architect or engineer employed by the design-builder will conform to the Engineers and Architects Regulation Act and rules and regulations adopted under the act; and
- (11) Other information which the school district chooses to require.

Section 8 (Evaluation of Proposals): A school district must evaluate proposals for a design-build contract as follows:

- (1) The request for proposals must be sent only to the prequalified design-builders selected as provided in section 6.
- (2) Design-builders must submit proposals as required by the request for proposals. The school district may only proceed to negotiate and enter into a design-build contract if there are at least two proposals from prequalified design-builders.

- (3) Proposals must be sealed and may not be opened until expiration of the time established for making proposals as set forth in the request for proposals.
- (4) Proposals may be withdrawn at any time prior to acceptance. The school district will have the right to reject any and all proposals except for the purpose of evading the provisions and policies of LB 391. The district may thereafter solicit new proposals using the same or a different project performance criteria.
- (5) The district must rank in order of preference the design-builders pursuant to the criteria in the request for proposals and taking into consideration the recommendation of the selection committee (see section 11).
- (6) The district may attempt to negotiate a design-build contract with the highest ranked design-builder selected by the district and may enter into a design-build contract after negotiations. The negotiations must include a final determination of the manner by which the design-builder selects a subcontractor.
 - If the district is unable to negotiate a satisfactory design-build contract with the highest ranked design-builder, the district may terminate negotiations with that design-builder. The district may then undertake negotiations with the second highest ranked design-builder and may enter into a design-build contract after negotiations.
 - If the district is unable to negotiate a satisfactory contract with the second highest ranked design-builder, the school district may undertake negotiations with the third highest ranked design-builder, if any, and may enter into a design-build contract after negotiations.
- (7) The district must file a copy of all design-build contract documents with NDE within 30 days after their full execution. Within 30 days after completion of the project, the design-builder must file a copy of all contract modifications and change orders with the department.
- (8) If the district is unable to negotiate a satisfactory contract with any of the ranked design-builders, the district may either revise the request for proposals and solicit new proposals or cancel the design-build process.

NOTE: Sections 9 and 10 apply to Construction Management At Risk contracts.

Section 9 (Request for Proposals): A district must prepare a request for proposals for each construction management at risk contract in accordance with this section. At least 30 days prior to the deadline for receiving and opening proposals, notice of the request for proposals must be published in a newspaper of general circulation within the district and filed with NDE.

The request for proposals must contain, at a minimum, the following elements:

- (1) The identity of the district for which the project will be built and the district that will execute the contract;
- (2) Policies adopted by the district in accordance with section 5;

- (3) The proposed terms and conditions of the contract, including any terms and conditions which are subject to further negotiation. The proposed general terms and conditions:
 - must be consistent with nationally recognized model general terms and conditions which are standard in the design and construction industry in Nebraska;
 - may set forth an initial determination of the manner by which the construction manager selects any subcontractor; and
 - may require that any work subcontracted be awarded by competitive bidding;
- (4) Any bonds and insurance required by law or as may be additionally required by the school district;
- (5) General information about the project which will assist the school district in its selection of the construction manager, including a project statement which contains information about the scope and nature of the project, the project site, the schedule, and the estimated budget;
- (6) The criteria for evaluation of proposals and the relative weight of each criterion; and
- (7) A description of any other information which the district chooses to require.

Section 10 (Evaluation of Proposals): A district must evaluate proposals for a construction management at risk contract as follows:

- (1) The district must evaluate and rank each proposal on the basis of best meeting the criteria in the request for proposals and taking into consideration the recommendation of the selection committee (see section 11).
- (2) The district must attempt to negotiate a construction management at risk contract with the highest ranked construction manager and may enter into a construction management at risk contract after negotiations. The negotiations must include a final determination of the manner by which the construction manager selects a subcontractor.
 - If the district is unable to negotiate a satisfactory contract with the highest ranked construction manager, the district may terminate negotiations with that construction manager. The district may then undertake negotiations with the second highest ranked construction manager and may enter into a construction management at risk contract after negotiations.
 - If the district is unable to negotiate a satisfactory contract with the second highest ranked construction manager, the district may undertake negotiations with the third highest ranked construction manager, if any, and may enter into a construction management at risk contract after negotiations.
- (3) The district must file a copy of all construction management at risk contract documents with NDE within 30 days after their full execution. Within 30 days after completion of the project, the construction manager must file a copy of all contract modifications and change orders with the department.
- (4) If the district is unable to negotiate a satisfactory contract with any of the ranked construction managers, the district may either revise the request for proposals and solicit new proposals or cancel the construction management at risk process.

NOTE: Sections 11 to 15 apply to both Design-Build and Construction Management At Risk contracts.

Section 11 (Selection Committee): In evaluating proposals, the district must refer the proposals for recommendation to a selection committee. The selection committee must be a group of at least five persons designated by the district. Members of the selection committee must include:

- (a) members of the school board,
- (b) members of the school administration or staff,
- (c) the performance-criteria developer when evaluating proposals from design-builders under section 8 or the school's architect or engineer when evaluating proposals from construction managers under section 10,
- (d) any person having special expertise relevant to selection of a design-builder or construction manager, and
- (e) a resident of the district other than an individual included in (a) to (d).

A member of the selection committee designated under (d) or (e) may not be employed by or have a financial or other interest in a design-builder or construction manager who has a proposal being evaluated and may not be employed by the district or the performance-criteria developer.

The selection committee and the district must evaluate proposals taking into consideration the criteria listed below with the maximum percentage of total points for evaluation which may be assigned to each criterion. The following criteria must be evaluated, when applicable:

- (a) The financial resources of the design-builder or construction manager to complete the project, 10%;
- (b) The ability of the proposed personnel of the design-builder or construction manager to perform, 30%;
- (c) The character, integrity, reputation, judgment, experience, and efficiency of the design-builder or construction manager, 30%;
- (d) The quality of performance on previous projects, 30%;
- (e) The ability of the design-builder or construction manager to perform within the time specified, 30%;
- (f) The previous and existing compliance of the design-builder or construction manager with laws relating to the contract, 10%; and
- (g) Such other information as may be secured having a bearing on the selection, 20%.

The records of the selection committee in evaluating proposals and making recommendations will be considered public records for purposes of section 84-712.01.

Section 12 (Contract Changes): A design-build contract and a construction management at risk contract may be conditioned upon later refinements in scope and price, and may permit the district in agreement with the design-builder or construction manager to make changes in the project without invalidating the contract. Later refinements may not exceed the scope of the project statement contained in the request for proposals.

Section 13 (Bonding and Insurance): LB 391 does not limit or reduce statutory or regulatory requirements regarding bonding or insurance.

Section 14 (Limits on Number of Contracts): LB 391 provides that no more than 24 contracts may be executed under the Nebraska Schools Construction Alternatives Act:

- For contracts under \$2 million, four contracts in each congressional district;
- For contracts of at least \$2 million but under \$10 million, two contracts in each congressional district; and
- For contracts of \$10 million dollars or more, two contracts in each congressional district.

For purposes of this section, the physical location of the project will be considered the location of the contract for that project.

The date the contract is executed will be utilized to determine whether the limitations on contracts imposed by this section have been exceeded. A contract in excess of the limitation on contracts will be void.

Section 15 (Specialty Maintenance Projects): A district may not use a design-build contract or construction management at risk contract for a construction project with locations on parcels of land which are not contiguous except for specialty maintenance projects.

A “specialty maintenance project” is a construction project for the maintenance of an existing facility with a specialty contractor, such as an electrical contractor or plumbing contractor. Parcels are considered contiguous if they would be contiguous but for the existence of a public road.

LB 407	<i>Introduced by:</i> Retirement Com.	<i>Prioritized by:</i> Retirement Com.	<i>Topic:</i> Retirement	<i>Effective Date:</i> (see each section)
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On April 11th, the Legislature passed legislation which would make extensive changes to all five state-wide public employee retirement systems (Judges, State Patrol, State, County, and Schools) and also a few changes to the Class V (OPS) retirement plan. The measure, LB 407, was passed on Final Reading by a 44-0 vote with the emergency clause attached.

Note in the analysis below that various sections of LB 407, as they pertain to the School Employees and/or OPS plans, contain different effective dates. Those sections without specific

operative dates would be effective one day after the Governor signs the measure into law (April 18, 2002). The other sections are operative on July 1, 2002.

LB 407 incorporates five different retirement-related bills (LBs 686, 1019, 1027, 1111 and 1144), in addition to some of the original sections of LB 407 itself. LB 407, as passed, would make the following changes:

- The multiplicity of funds in the School Employees Plan is reduced to one fund - the School Retirement Fund.
- The Employee and Employer rates are fixed at their current levels - any actuarially-required contributions will come from the State.
- With the combination of the various funds, the actuarial valuation method is changed to the “Entry Age Actuarial Method.”
- All persons, regardless of age, are now required to participate in the retirement system, so long as they are permanent employees who work at least 15 hours per week on an ongoing basis.
- Temporary employees and substitutes who are not hired on a regular basis may not participate in the retirement plan.
- Those participating in the plan earn service credit on a monthly basis, with 1,000 hours of service being equivalent to 1 year of creditable service; employees who are salaried receive the same percentage of credit as their percentage of full-time equivalency. No refunds of those who contribute to the plan will be required.
- The 10% cap on annual increases in salary is moved to the definition of compensation - this means that such increases (unless an exception applies) are not counted as “compensation” and do not have contributions made on the excess.
- The definition of “final average compensation” is changed to be the three highest “12-month periods” - so that the value is not tied to fiscal years, thus becoming more like the Judges and State Patrol plans.
- The new tax rollover language is added allowing money to be rolled to and from 457 and 403(b) plans, and a new section allowing trustee-to-trustee transfers is also added.

SECTION-BY-SECTION ANALYSIS

Section 21 (Citation of Plan): Adds four new sections of law to the School Employees Retirement Act (sections 26, 31, 38, and 42). [§79-901] *{Effective April 18, 2002}*

Section 22 (Definitions): The definitions section of the School Employees Plan (§79-902) is modified as follows:

- The definition of “junior school employee” (subsection 10) is eliminated (which means that all regular employees regardless of age are subject to mandatory membership);
- The definition of “school employee” (subsection 11) is modified in order to provide that regular employees, regular retirement employees, and permanent (regular) substitutes are all included in the plan;

- The definition of “senior school employee” (subsection 19) is eliminated;
- The definition of “final average compensation” (subsection 32) is changed so that the three “highest 12 month periods” of salary is used, thus allowing final average compensation to cross fiscal years;
- The 10% cap on salary increases (subsection 37) is placed in the definition of “compensation” so that salary increases over 10%, if not covered by an exception, are excluded from the definition of compensation;
- As per LB 1027, “termination of employment” (subsection 38) is modified in order to close the existing loophole concerning assuming volunteer status immediately after taking retirement followed by re-employment with the same district:
- Termination of employment occurs on the date the member experiences a bona fide separation from service with the member’s current employer;
- The date of termination to signify a bona fide separation is determined by the employer;
- The employer must notify the PERB within two weeks after the termination date;
- Termination of employment does not include ceasing employment if the member subsequently provides service on a regular basis in any capacity (compensated or uncompensated) for any Nebraska school district other than OPS within 180 calendar days after ceasing employment OR if the PERB determines that a purported termination was not a bona fide separation from service with the employer.
- The definition of “substitute employee” (subsection 40) is modified to mean a temporary employee hired on an intermittent basis to replace temporarily absent regular employees.
- A new definition of “participation” is added to the plan - participation would mean qualifying for and making required deposits to the retirement system during the course of a plan year;
- A new definition of “regular employee” is added to define an employee who is hired for full-time service, or part-time schedule on an ongoing basis for 15 or more hours per week;
- A new definition of “temporary employee” is added to define any employee who is not a regular employee.
- *{Effective July 1, 2002}*

Section 23 (Membership): Changes provisions related to membership of the retirement system to harmonize with new and modified definitions noted in section 22. [§79-910] *{Effective July 1, 2002}*

Section 24 (OPS): Governs transfers of the service annuity benefit to members of the Class V (OPS) Retirement Plan -- this section is modified so that it becomes an annual transfer. [§79-916] *{Effective July 1, 2002}*

Section 25 (New Employees): Relates to provisions concerning new employees who apply to the PERB for eligibility and vesting credit for years of participation in another Nebraska governmental plan -- LB 407 merely provides the PERB explicit authority to issue rules and regulations on the granting of eligibility and vesting credit. [§79-917] *{Effective July 1, 2002}*

Section 26 (Enrollment): In a new section, school districts are given the responsibility to enroll all persons who are required to participate in the School Employees Plan. Public schools must:

- ensure that all school employees who qualify for participation will begin annual participation on July 1 of each plan year OR upon the employee's date of hire, if later than July 1, AND
- make all required deposits on behalf of such employees. *{Effective July 1, 2002}*

Section 27 (Bestowal of Service Credit): Amends section 79-927 governing the bestowal of service credit. For hourly employees, members receive 1 year of service credit for 1000 reported hours. For those who work less than 1000 hours, they get 1/1000th of a year of service credit for each hour worked. Those who are salaried receive the share of FTE that they work (i.e., 100% FTE = 1 year of service credit). *{Effective July 1, 2002}*

Section 28 (Rollovers): Updates the definition of eligible retirement plan to coincide with new federal rules - allows money to be rolled-out of the retirement system into 403(b) and 457 plans. [§79-933.01] *{Effective April 18, 2002}*

Section 29 (Rollovers): Provides conforming language to match new federal rules on allowing money to be rolled-into the retirement system from 403(b) and 457 plans. [§79-933.02] *{Effective April 18, 2002}*

Section 30 (Leave of Absence): Provides harmonization with the new definition of termination for purposes of retirement (see Section 22). [§79-933.06] *{Effective July 1, 2002}*

Section 31 (Trustee-to-Trustee Transfers): Creates a new section and provides that the retirement system may accept as payment for purchases of service credit or withdrawn amounts, made pursuant the School Employees Retirement Systems Act, a direct trustee-to-trustee transfer from:

- an eligible tax-sheltered annuity plan as described in section 403(b) of the Internal Revenue Code OR
- an eligible deferred compensation plan as described in section 457 of the code on behalf of a member who is making payments for such credit or amounts.

The amount transferred may not exceed the amount of payment required for the service credit being purchased and the purchase of service credit must qualify as a purchase of permissive service by the member as defined in section 415 of the IRS Code. *{Effective April 18, 2002}*

Section 32 (Payment of Formula Annuities): Amends section 79-934 to harmonize with the consolidation of accounts in the School Employees Plan. The multiplicity of funds in the School Employees Plan is reduced to one fund - the "School Retirement Fund".

NOTE: The purpose of LB 686, one of the bills merged into LB 407, was to take the various accounts in the School Employees Plan and collapse them into one fund to facilitate efficient administration, including the accounts that are used to hold employer contributions, employee contributions, state contributions, and the account from which member retirement benefits are paid. *{Effective July 1, 2002}*

Section 33 (Adjusted Supplemental Retirement Benefit): Amends section 79-947 to harmonize with the new consolidation of accounts in the School Employees Plan (see Sections 32 and 42). *{Effective July 1, 2002}*

Section 34 (Retirement Benefits): Amends section 79-948 to harmonize with the new consolidation of accounts in the School Employees Plan (see Sections 32 and 42). *{Effective July 1, 2002}*

Section 35 (Employee Contributions): Amends 79-958 relating to the employee contribution rate - the employee contribution is made a flat 7.25% of compensation that will not change actuarially. Provides harmonization with the new consolidation of accounts in the School Employees Plan (see Sections 32 and 42). *{Effective July 1, 2002}*

Section 36 (Employer Contribution/Late Fees): The employer contributions specified in section 79-960 are also changed to a flat 101% of employee contributions, and will not change actuarially. This section also changes provisions related to late fees.

Under current law, the PERB may charge the employer a late administrative processing fee, not to exceed \$50, if the deduction report, the monthly remittance report, or the monthly money due is not received and properly completed by the date due.

LB 407 would change the late fee to \$25. In addition, the legislation permits the PERB to charge the employer a late fee of thirty-eight thousandths of one percent of the amount required to be submitted for each day the amount has not been received. The late fee may be used to make a member's account whole for any costs that may have been incurred by the member due to the late receipt of contributions. *{Effective July 1, 2002}*

Section 37 (Employee Late Fee): Under current law (§79-963), a \$50 late fee is assessed against any employee who is qualified for membership and fails or refuses to file, within one calendar year of becoming a member, a membership registration form. LB 407 eliminates this late fee. *{Effective July 1, 2002}*

Section 38 (Annual Actuarial Valuations): Creates a new section to change the actuarial valuation method to the "Entry Age Method" and establish procedures for valuations. *{Effective July 1, 2002}*

Section 39 (State Contributions): Within the School Employees Plan, the State's obligation to pay into the School Employees Plan is updated to harmonize the changes made concerning (i) fund consolidations and (ii) the new actuarial valuation method. [§79-966] *{Effective July 1, 2002}*

Section 40 (Rates of Benefits): Amends section 79-967 to harmonize with the new consolidation of accounts in the School Employees Plan (see Sections 32 and 42). *{Effective July 1, 2002}*

Section 41 (Plan Assets): Amends section 79-968 to harmonize with the new consolidation of accounts in the School Employees Plan (see Sections 32 and 42). *{Effective July 1, 2002}*

Section 42 (School Retirement Fund): This new section creates the School Retirement Fund. The required deposits of the employer, the state, and the employees will be credited to this new fund and all savings annuities, service annuities, and formula annuities will be paid from the fund. Any unexpended balance existing on June 30, 2002, in the (i) School Employers Deposit Account, (ii) the Service Annuity Account, (iii) the School Employees Savings Account, (iv) the Annuity Reserve Account, and (v) the School Employees Retirement System Reserve Fund will be transferred to the School Retirement Fund. *{Effective July 1, 2002}*

Section 43 (Employee Savings Account): Amends section 79-971 to harmonize with the new consolidation of accounts in the School Employees Plan (see Sections 32 and 42). *{Effective July 1, 2002}*

Section 44 (Contingent Account): Amends section 79-973 to harmonize with the new consolidation of accounts in the School Employees Plan (see Sections 32 and 42). *{Effective July 1, 2002}*

Section 45 (Investment of Funds): Amends section 79-976 to harmonize with the new consolidation of accounts in the School Employees Plan (see Sections 32 and 42). *{Effective July 1, 2002}*

Section 46 (District Expenditures): Provides harmony with other changes made in the bill. [§79-977] *{Effective July 1, 2002}*

Section 47 (OPS): This section merges provisions from LB 1144 to incorporate into the Omaha School Employees Retirement System those changes enacted by the federal Economic Growth and Tax Relief Reconciliation Act of 2001. These changes would permit rollover contributions to be accepted by OSERS from tax-sheltered annuities, individual retirement accounts and Section 457(b) governmental deferred compensation plans for the purchase of service credits. These changes do not expand the types of service credits that can be purchased. These changes only permit OSERS to accept funds from additional forms of tax-sheltered retirement savings accounts. [§79-998] *{Effective April 18, 2002}*

LB 460	<i>Introduced by:</i>	<i>Prioritized by:</i>	<i>Topic:</i>	<i>Effective Date:</i>
	Beutler	Price	Reserve Funds/Class Is	(See below)

Reserve Funds: Current law restricts the allowable reserves of school districts to between 20% to 45% of the total general fund budget of expenditures based on the membership of the district. School districts with combined general fund cash reserves, depreciation funds, and contingency funds that are less than the allowable reserve percentage may increase general fund cash reserves each year by 2% of the total general fund budget of expenditures.

LB 460 eliminates the 2% annual growth limit entirely and exempts contingency funds from the reserve limitation entirely. *(Effective July 20, 2002)*

Class I Districts: LB 460 also contains the provisions of LB 1212 which changes current law regarding mergers, dissolutions or reorganizations of Class I districts that are affiliated with Class II or Class III districts. Currently, a vote of the school boards of the impacted school districts is required when a Class I district with 50% or more of the district's valuation that is affiliated with a single Class II or Class III districts opts to merge, dissolve or reorganize. The bill requires the approval of all of the affiliated Class II or Class III school boards when a Class I district with 8% or more of its valuation affiliated with another school district opts to merge, dissolve or reorganize. (*Effective April 18, 2002*)

LB 568	<i>Introduced by:</i>	<i>Prioritized by:</i>	<i>Topics:</i>	<i>Effective Date:</i>
	Wickersham	Speaker Kristensen	Budgets	(See each section)

LB 568 represents one of several Speaker priority bills and revises provisions of the Local Government Budget Act. The measure also revises provisions of the local government audit requirements enforced by the State Auditor.

In 1999, the Legislature passed LB 86, which created the Nebraska Budget Act Advisory Board. LB 86 required the board to hold hearings and, among other duties, offer recommendations on the budget process for political subdivisions. The final report of the board was issued on June 20, 2000. Many of the recommendations were eventually embodied in LB 568, which includes a requirement that the State Auditor develop a plan for implementing on-line filing of budgeted and actual financial information by political subdivisions.

Budget Filing Date: Section 1 of LB 568 moves the date for filing a public budget from a uniform date of not later than August 1st to the date when legal notice of each budget is first published by the local government. Specifically, section 1 provides that the proposed budget statement must be “made available to the public by the political subdivision prior to publication of the notice of the hearing on the proposed budget statement pursuant to section 13-506.” Section 13-506 provides that the notice of the place and time of the hearing must be published at least five days prior to the date set for hearing. (*Effective July 1, 2002*)

NOTE: LB 568 does not change current requirements under section 13-508 which requires each governing body to file and certify a copy of the adopted budget statement with the State Auditor on or before September 20th of each year, or for Class I districts, on or before August 1st of each year.

Proposed Budget Statement Information: Under current law, the proposed budget statement must include information for the “immediate two prior fiscal years” relating to revenue from all sources. Section 1 of LB 568 reduces prior year budget information from two years to one year of information (the “immediately preceding fiscal year”). (*Effective July 1, 2002*)

Budget Statement Hearing: Current law requires each governing body, after the filing of the proposed budget statement with its secretary or clerk, to annually conduct a public hearing on its pro-

posed budget statement. Prior to LB 568, notice of the place and time of the hearing was either published at least five days prior to the date set for hearing in a newspaper of general circulation within the governing body's jurisdiction, or by direct mailing of the notice to each resident within the community.

Section 3 of LB 568 eliminates the option for direct mailing of budget notices to each resident of the community. Under this change in law, a school district must provide notice via publication in a newspaper of general circulation to meet the requirements of section 13-506. Theoretically, nothing would preclude a district from using direct mailing in addition to publication in a newspaper, but the intent is that such direct mailing would not be necessary. (*Effective July 1, 2002*)

CIR Orders: Under current law, judgments against a district (to the extent the judgment is not paid by liability insurance) are excluded from the budget limitations but do not include orders by the Commission on Industrial Relations (CIR). Section 9 of LB 568 harmonizes the “judgment” exception under the levy limits to be in accord with the budget lid exception so that the levy exclusion does not apply to CIR orders. (*Effective February 28, 2002*)

Hazard Abatement Projects: Under current law, a school board may make and deliver to the county clerk an itemized estimate of the amounts necessary to be expended for an abatement of a environmental hazard or accessibility barrier elimination in its school buildings or grounds. The board is required to conduct a public hearing on the itemized estimate prior to presenting the estimate to the county clerk. The law provides that the notice of the hearing may either be published in a newspaper of general circulation within the school district OR be sent by direct mailing to each resident within the district.

Section 10 of LB 568 eliminates the option to provide notice by direct mail. The effect of this change is to require districts to provide notice by newspaper in order to meet the notice requirement in section 79-10,110. (*Effective February 28, 2002*)

Electronic Filing: Section 11 of LB 568 requires the State Auditor to develop and maintain a system for electronic filing of budget information by local governments. It also requires the office to develop and maintain a financial information reporting system that is accessible online by the general public. The plan must describe the technology and staff resources necessary to implement on-line filing and the costs of these resources. The plan must be presented to the Clerk of the Legislature by January 15, 2003. (*Effective February 28, 2002*)

LB 647	<i>Introduced by:</i>	<i>Prioritized by:</i>	<i>Topics:</i>	<i>Effective Date:</i>
	Stuhr	Speaker Kristensen	ESUs/Textbooks	July 20, 2002

LB 647 represented one of 25 Speaker priority bills and originally pertained to ESU at-large elections. After advancement from the Education Committee, LB 647 retained its original objectives but also took on an added component during Select File debate. The additional component con-

cerned another bill, LB 1250, which was merged into LB 647. LB 1250 relates to school textbook purchasing contracts and requirements upon publishers and manufacturers.

ESU At-large Elections: LB 647 addresses the issue of elections for at-large members of ESUs when more than two of the candidates receiving the most votes are from the same county.

Under current law, each ESU board (except ESUs 18 and 19) is composed of one member from each county and four at-large members. The at-large membership is limited to two members from the same county, unless any one county within the ESU has a population greater than 150,000 or the ESU only serves one county. LB 647 would provide that the four candidates who receive the highest number of votes would be elected, unless more than two of those candidates reside within the same county.

If more than two candidates reside in the same county (e.g., “County A”), the candidates from County A that receive fewer votes than the two candidates receiving the most votes from County A would not be elected and a vacancy or vacancies would exist. In the following example, candidates to be at-large members are listed in descending order according to the number of votes received:

1. Candidate Anderson from County A
2. Candidate Jones from County B
3. Candidate Smith from County A
4. Candidate Peters from County A
5. Candidate Brown from County C

In this example, candidates Anderson, Jones, and Smith would be elected and there would be one vacancy. If county A had a population of more than 150,000, then candidates Anderson, Jones, Smith, and Peters would be elected and there would not be a vacancy.

ESU Board Vacancies: Under current law, the remaining members of the board may fill vacancies by appointing any individual residing within the geographical boundaries of the ESU. LB 647 would clarify that the appointed individual must meet the qualifications for the office (e.g., a legal voter of the county in which he/she resides).

School Textbooks: As amended on Select File, LB 647 includes the contents of LB 1250, which was advanced to General File by the Education Committee. The “textbook” provision of LB 647 requires that, beginning January 1, 2003, all contracts for the purchase of textbooks for school districts and ESUs must require the publisher or manufacturer to provide to the district or ESU, at no cost:

- (a) computer files or other electronic versions of each textbook title purchased and
- (b) the right to transcribe, reproduce, modify, and distribute each textbook title purchased in braille, large print if the publisher or manufacturer does not offer a large-print edition, or other specialized accessible media exclusively for use by students in the same district or ESU who are blind or visually impaired.

Textbook purchasing contracts must also provide that:

- (a) Within 30 days after receiving a request from a school district or ESU, the publisher or manufacturer must provide computer files or other electronic versions of each textbook title purchased to the school district or ESU;
- (b) The computer files or other electronic version must maintain the structural integrity of the standard instructional materials, be compatible with commonly used braille translation and speech synthesis software, and include corrections and revisions as may be necessary;
- (c) If the technology is not available to convert a math, science, or other nonliterary textbook into the format prescribed in this section, the publisher or manufacturer will not be required to provide computer files or other electronic versions of the textbook; and
- (d) Upon the willful failure of the publisher or manufacturer to comply with the requirements of the contract, the publisher or manufacturer must reimburse the district or ESU for the cost of creating the computer files or electronic versions.

LB 898A	<i>Introduced by:</i> Kristensen	<i>Prioritized by:</i> N/A	<i>Topic:</i> State Aid Reduction	<i>Effective Date:</i> April 11, 2002
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LB 898A represents the appropriations “companion” piece to LB 898, which relates to reductions in state aid appropriations. The “A” bill contains the \$22,223,160 reduction in funding for the Tax Equity and Educational Opportunities Support Fund (state aid) for FY2002-03. The result of this reduction is to decrease the total funds appropriated for state aid in FY2002-03 from \$650,407,842 to \$628,184,682. (It is the intent of the Legislature to reduce state aid by approximately \$22 million for both FY2003-04 and FY2004-05.)

The Governor signed LB 898A into law on April 10th but vetoed LB 898 itself due to concerns about the provision for a levy exclusion contained in the measure. Without the main bill, LB 898A would simply have reduced state aid with no prescribed method to distribute the loss of aid to school districts. Ultimately, the legislature voted to override the veto of LB 898 on April 11th.

LB 935	<i>Introduced by:</i> McDonald	<i>Prioritized by:</i> McDonald	<i>Topic:</i> Election Law	<i>Effective Date:</i> July 20, 2002
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Absentee Ballots: LB 935 requires that absentee ballots arrive at the county election official’s office by the close of polls on Election Day. The deadline for obtaining absentee ballots is changed to the Wednesday before the election. Currently, absentee ballots can be counted as long as they are received by 10 a.m. on the Thursday following an election, and absentee ballots can be requested up until the Friday before the election. The measure also requires the local board responsible for counting absentee ballots to begin doing so on the day of the election. Finally, the measure permits a registered voter to vote absentee in front of the county election official once absentee ballots were made available.

OPS Boundaries: As advanced to Select File, LB 935 also provides the OPS School Board the authority to make final adjustments to OPS board redistricting proposals offered by the county election commissioner. (The OPS boundary issue was the subject of a separate bill, LB 1273, which was advanced to General File by the Education Committee.)

Bond Elections: LB 935 sets hourly wages for counting boards in school bond elections at the state's minimum wage. The current law set the wage at \$4.25 per hour. The current minimum wage in Nebraska is \$5.15 per hour.

LB 994	<i>Introduced by:</i>	<i>Prioritized by:</i>	<i>Topic:</i>	<i>Effective Date:</i>
	Revenue Committee	Speaker Kristensen	Revenue Laws	April 20, 2002

LB 994 represents the omnibus revenue bill for the Legislature's Revenue Committee. The measure contains provisions relating to greenbelt laws, the Tax Equalization and Review Commission (TERC), off street parking districts, etc. Most pertinent to school officials are the following two sections of the legislation:

Credit Card Payments: Under current law (§ 13-609), political subdivisions may accept credit cards, charge cards, or debit cards, as a method of cash payment of any tax, levy, fine, license, fee, etc. Section 1 of LB 994 further specifies that an official of a political subdivision may accept credit cards, charge cards, or debit cards, whether presented in person or electronically, or electronic funds transfers.

Also under current law, political subdivisions are authorized but not required to impose a surcharge or convenience fee upon the person making a payment by credit card or charge card in order to offset administrative costs charged. Section 1 of LB 994 stipulates that the surcharge or convenience fee may not exceed the surcharge or convenience fee imposed by the credit card or charge card companies or third-party merchant banks which have contracted with the state (as approved by State Treasurer and the Director of Administrative Services).

Finally, if a payment is made electronically by credit card, charge card, debit card, or electronic funds transfer as part of a system for providing or retrieving information electronically, the political subdivision is authorized but not required under LB 994 to impose an additional surcharge or convenience fee upon the person making a payment.

Adjusted Value for School Aid: Section 30 of LB 994 amends the law (§ 79-1016) which provides guidance to the Property Tax Administrator (PTA) in developing adjusted value for school aid purposes. Under LB 994, the PTA would calculate adjusted value using the comprehensive assessment ratio study or other studies developed by the PTA in compliance with professionally accepted mass appraisal techniques. LB 994 authorizes the PTA to adopt and promulgate rules and regulations setting forth standards for the determination of level of value for school aid purposes.

LB 1054	<i>Introduced by:</i>	<i>Prioritized by:</i>	<i>Topic:</i>	<i>Effective Date:</i>
	Government Com.	Government Com.	Election Law	July 20, 2002

LB 1054 represents the work of a special election task force formed in 2001 in response to the controversial 2000 presidential election. The task force forwarded a number of recommendations that were embodied in the legislation. The measure includes provisions related to recount procedures, voting privilege restoration procedures for parolees, and poll worker recruitment, wages, and training.

Provisional Ballot: Section 20 of LB 1054 provides a mechanism for voting if a person is registered to vote but his/her name does not appear in the voter registration register. Under LB 1054, the person will be entitled to vote upon completing a voter registration form at the polling place. The person will then enclose the ballot in an envelope marked "Provisional Ballot" and will sign an oath stating he/she is registered to vote, and indicate when and how he/she originally registered. The election commissioner or county clerk will later verify that the provisional ballot is in proper form and the person has not voted anywhere else. The election official will then investigate whether any credible evidence exists of the person being properly registered to vote. If the election official determines there is existence of such evidence, the ballot will be counted. (Election falsification is a Class IV felony and may be punished by up to five years imprisonment, a fine of up to \$10,000, or both.)

Recall Petitions: Section 26 of LB 1054 pertains to recall petitions and requirements for petition circulators. Section 32-1304 is amended to require circulators, prior to permitting anyone to sign the petition, to state (i) the object of the petition as printed on the petition, (ii) the name and office of the individual sought to be recalled, (iii) the reason or reasons for which recall is sought as printed on the petition, (iv) the defense statement, if any, submitted by the official as printed on the petition, and (v) the name of the principal circulator or circulators.

LB 1073	<i>Introduced by:</i>	<i>Prioritized by:</i>	<i>Topic:</i>	<i>Effective Date:</i>
	Thompson	Thompson	Passenger Restraint	July 20, 2002

LB 1073 changes provisions and penalties relating to child passenger restraint systems and occupant protection systems in motor vehicles. The bill provides that children up to six years of age must use a child passenger restraint system (infant seat or booster seat). Current law requires children under the age of five who weigh less than 40 pounds to use child passenger restraint systems. *NOTE: This section does not apply to school buses but apparently applies to school vans and other school vehicles not deemed to be a bus.*

The bill also requires persons in a vehicle driven by a person with a provisional operator's permit or a school permit to use occupant protection systems (seat belts). LB 1073 becomes effective on July 20, 2002.

LB 1172	<i>Introduced by:</i>	<i>Prioritized by:</i>	<i>Topic:</i>	<i>Effective Date:</i>
	Raikes	Raikes	Student Fees	July 20, 2002

LEGISLATIVE HISTORY

Prior to the start of the 2002 Session, lawsuits had been filed against several districts concerning fees charged to students, the State Board of Education was considering a regulation to prohibit student fees, and interpretations abounded concerning the State Constitution's provision for "free instruction" to children. As the session drew closer, it seemed more and more likely that the issue would rest with the Legislature, specifically the Legislature's Education Committee, to take action on the matter.

After the session began and by the end of bill introduction on January 18th, no less than seven "fee bills" had been filed by various legislators. Speaker Kristensen offered a bill (LB 1059) to provide broad guidelines concerning student fees and to provide a definition of extracurricular activities. On behalf of the Commissioner of Education, Senator Raikes offered a bill (LB 1254) which embodied the recommendations of a special task force on student fees. LB 1254 provided a list of permitted fees and requirements upon districts to implement fee policies and waiver provisions. The bill also required fee waivers for students eligible for free or reduced lunches under federal child nutrition programs.

As chair of the Education Committee, Senator Raikes took the strategy of offering a number of "discussion" bills to offer various ways of viewing the issue along with accompanying solutions. Senator Raikes introduced LBs 1171, 1172, 1173, 1174, and 1175, each offering a different approach to the issue. The bills ranged from very restrictive (i.e., prohibiting student fees) to moderately permissive (i.e., allowing districts to charge fees for a variety of circumstances). Each of the measures included some unique concepts, including provisions to allow a district to hire noncertified coaches for extracurricular activities, establishment of student fee funds for each student, and the waiver of fees for students who qualify for free or reduced lunches.

Attorney General Opinion

After the public hearings for the seven fee bills, the education community awaited the results of an Attorney General (AG) opinion to help guide the Legislature on constitutional issues related to student fees. AG opinion 02004 (issued February 1, 2002) seemed to say that schools could charge fees for extracurricular activities, and the Legislature may authorize or restrict schools from charging fees as deemed appropriate. The opinion stated that items necessary for classroom instruction such as books and lab equipment must be provided free, but fees may be charged for activities outside the classroom. (*See Supplement for text of opinion*)

Advancement from Committee

Given the AG's constitutional interpretation, the Education Committee moved forward on February 26th and advanced LB 1172, the chosen vehicle to implement laws pertaining to student

fees. (Senator Raikes designated LB 1172 as his individual priority measure for the 2002 Session on January 24th.) The committee advanced LB 1172 by a unanimous (8-0) vote.

The committee amendments to LB 1172 eliminated the original provisions of the bill and replaced them with what might be considered a “procedure” for adopting and maintaining a student fee policy.

As proposed under the committee amendments, LB 1172 would permit a district to charge a fee to students for participation in or for equipment or supplies for any school-related activity or any activity sponsored by the district, so long as the fee requirement does not “impinge on a student’s right to free instruction” under the Nebraska Constitution (Article VII, section 1).

The amendments required districts and ESUs to conduct an annual public hearing on their respective student fee policy, whether or not a district intends to charge fees. The purpose of the hearing would be threefold: (1) review the student fees policy; (2) review funds collected from fees in the prior school year; and (3) review use of any applicable fee waivers for the prior school year.

It might be said that the underlying intent of the Education Committee’s proposal was to discourage districts from charging fees through several different mechanisms. First, the amendments placed the burden on school districts to determine what the Nebraska Constitution means by “free instruction”. The measure authorized courts to require districts to pay litigation costs, in certain instances, to the prevailing party to a suit which challenges the district’s student fee policy. Secondly, the amendments placed a limit on the amount of revenue from fees a district may collect without being accountable under the school finance formula. If the amount of collected fees exceeded a certain threshold, the excess would be considered an accountable receipt for purposes of calculating state aid.

General File Debate

The first stage of debate on the issue of student fees began on March 6th but not as most had anticipated. On the day of the debate, Speaker Kristensen filed an amendment to the committee amendments, which essentially replaced the committee’s proposal with the contents of the bill the Speaker had originally introduced (LB 1059). Under the Speaker’s proposal, a definition of extracurricular activities would be provided, and broad guidelines would be implemented to guide districts and ESUs in charging student fees.

The Kristensen amendment was adopted by a 31-10 vote but not before some heated debate, ostensibly over the extent to which the Legislature should be involved in defining fees.

The committee amendments to LB 1172 were under immediate attack by those who favored more clarity and definition over the “procedural” approach taken by the Education Committee.

Calling it a “land mine” affording no direction to schools, Speaker Kristensen criticized the Education Committee’s proposal, which he said would leave districts hanging and wondering how to proceed. The committee proposal, he said, merely restated the vague language found in the State Constitution, referring to the phrase “free instruction” in Article VII, Section 1.

Senator Ron Raikes defended the committee’s work by noting the proposal’s emphasis on local control and district-by-district policy needs. He said the Kristensen amendment simply imposed a “one size fits all” approach to student fees and doesn’t resolve questions concerning what is an “acceptable” fee.

A fair share of the debate focused on the committee’s proposal to place the burden, and to some extent the liability, on school districts to interpret relevant state law and constitutional provisions concerning the act of charging fees to students. The committee proposal permitted a court to make a district pay litigation costs if it was proved a district acted in bad faith in adopting its required student fee policy.

Senator Don Pederson presented arguments against the “litigation costs” provision by stressing the lack of guidance contained in the measure. Mentioning his past membership on a school board, Senator Pederson said the Legislature needs to “minimize the risk to school districts” and provide some direction on the student fee issue. He stated his belief that the Kristensen amendment at least provided some direction to schools.

Senator Bob Wickersham countered on the liability issue by saying the committee proposal confines the risk to each individual district rather than placing the entire state policy on student fees in jeopardy of adverse court action. He said that any type of “list” of acceptable fees placed in statute would be minutely scrutinized by a court if a legal action was brought against the state. The better approach, he insisted, was to allow each district to decide for itself what is acceptable in view of relevant constitutional and statutory provisions.

Even some of the senators who ultimately supported the Kristensen amendment believed there should be a provision in the legislation concerning fee waivers for students unable to pay but wish to participate in a given activity. The Kristensen amendment merely provided that a district “may” waive student fees but offered no other guidance. In response, Senator Kristensen emphasized his belief that districts should have the flexibility to adopt appropriate policies and procedures concerning all aspects of student fees under the limited guidelines of his amendment.

Senator Raikes and other proponents of the committee proposal stressed the need to reduce the use of fees in order to offer all students the same opportunities regardless of financial or economic status. Senator Raikes stressed the lack of safeguards in the Kristensen amendment for financially disadvantaged students.

Ultimately, and after an hour and a half debate, the Kristensen amendment came down to a close 31-10 vote for adoption. The amendment required at least 30 affirmative votes since the contents of his amendment were identical to LB 1059, which was indefinitely postponed (killed) by the Education Committee on March 5th, a day before the General File debate.

After adoption of the Kristensen amendment (and subsequent adoption of the committee amendments as modified), LB 1172 was advanced to the second stage of consideration by a 39-0 vote.

Select File Debate

On March 27th, Senator Raikes filed a new amendment to LB 1172, which, he believed, was more consistent with the desired direction of the Legislature, based upon the General File debate.

The Raikes amendment would essentially divide acceptable versus unacceptable fees based upon an individual student's qualification for free or reduced-priced lunches. Under the amendment, districts and ESUs must exempt all students who "qualify" for free or reduced lunches from requirements to provide certain materials/attire and requirements to pay student fees for:

- (1) Participation in extracurricular activities;
- (2) Admission fees and transportation charges for spectators attending extracurricular activities;
- (3) Specialized equipment or specialized attire for participation in extracurricular activities;
- (4) Materials for course projects meeting written guidelines when, upon completion, the project becomes the property of the student; and
- (5) Musical instruments both for participation in optional music courses that are not extracurricular activities and for participation in extracurricular activities.

A district or ESU may elect to require free/reduced lunch students to pay fees, furnish on their own, or otherwise seek reimbursement for such items as:

- Postsecondary education costs;
- Copies of student files or records;
- Reimbursement to the district or ESU for property lost or damaged by the student;
- Before-and-after-school or prekindergarten services;
- Summer school or night school;
- Minor personal or consumable items for specified courses and activities, including, but not limited to, pencils, paper, pens, erasers, and notebooks; and
- Nonspecialized attire meeting general written guidelines for specified courses and activities if the written guidelines are reasonably related to the course or activity.

The amendment also requires each district and ESU to hold annual public hearings on student fees and adopt policies to outline fees and fee waivers. School entities would also be required to place money collected from fees in a separate account, which could only be utilized for the purposes for which it was collected.

During the relatively short Select file debate on April 2nd, Speaker Kristensen reminded senators that, while the Raikes amendment would give guidance to school districts, any fee could be mis-

used and could still be challenged in court. He further reminded his colleagues that the Nebraska Constitution “errs on the side of a free education.”

The Raikes amendment was adopted with the support of Speaker Kristensen by a 29-0 vote. The bill advanced to the third and final round of consideration by a voice vote after a half-hour debate.

Final Passage and Signed into Law

On April 11th, the Legislature passed LB 1172 by a 40-0 vote. The legislation was signed into law on April 17th. Since LB 1172 did not contain the emergency (“E”) clause, the legislation will become effective 90 days after the session adjourns sine die (which occurred on April 19th). Therefore, LB 1172 becomes operative on July 20, 2002.

SECTION-BY-SECTION REVIEW

Section 1 (Citation): Provides citation for the legislation as the Public Elementary and Secondary Student Fee Authorization Act.

Section 2 (Definitions): For purposes of LB 1172:

- (1) “Extracurricular activities” means student activities or organizations which are supervised or administered by the school district, which do not count toward graduation or advancement between grades, and in which participation is not otherwise required by the school district;
- (2) “Governing body” means a school board of any class of school district or an educational service unit board; and
- (3) “Postsecondary education costs” means tuition and other fees associated with obtaining credit from a postsecondary educational institution. For a course in which students receive both high school and postsecondary education credit or a course being taken as part of an approved accelerated or differentiated curriculum program under sections 79-1106 to 79-1108.03, the course must be offered without charge for tuition, transportation, books, or other fees, except tuition and other fees associated with obtaining credits from a postsecondary educational institution.

Section 3 (Permitted Fees): Except as provided in section 9 of the bill, a governing body may require and collect fees or other funds from or on behalf of students or require students to provide specialized equipment or specialized attire for any of the following purposes:

- (1) Participation in extracurricular activities;
- (2) Admission fees and transportation charges for spectators attending extracurricular activities;
- (3) Postsecondary education costs;
- (4) Transportation as provided in sections 79-241, 79-605, and 79-611;

- (5) Copies of student files or records as provided under section 79-2,104;
- (6) Reimbursement to the school district or ESU for property lost or damaged by the student;
- (7) Before-and-after-school or prekindergarten services offered under section 79-1104;
- (8) Summer school or night school; and
- (9) Breakfast and lunch programs.

Section 4 (Consumable Items): A governing body may require students to furnish minor personal or consumable items for specified courses and activities, including, but not limited to, pencils, paper, pens, erasers, and notebooks.

Section 5 (Clothing): A governing body may require students to furnish and wear nonspecialized attire meeting general written guidelines for specified courses and activities IF the written guidelines are reasonably related to the course or activity.

Section 6 (Project Materials): Except for students who qualify for free/reduced lunches, a district or ESU may require students to furnish materials for course projects meeting written guidelines if:

- (1) Upon completion, the project becomes the property of the student and
- (2) the written guidelines are reasonably related to the course.

Section 7 (Musical Instruments): A governing body may require students to furnish musical instruments for participation in optional music courses that are not extracurricular activities IF the governing body provides for the use of a musical instrument without charge for any student who qualifies for free or reduced-price lunches.

- Participation in a free-lunch program or reduced-price lunch program is not required to qualify for free or reduced-price lunches.
- A district or ESU would not be required to provide for the use of a particular type of musical instrument for any student.
- For music courses that are extracurricular activities, a governing body may require fees or require students to provide specialized equipment, such as musical instruments, or specialized attire.

Section 8 (School Stores): LB 1172 does not preclude or prevent the operation of a school store in which students may purchase food, beverages, and personal or consumable items.

Section 9 (Fee Waivers): Each governing body must establish a policy which waives fees for students who qualify for free/reduced lunches for:

- (1) Participation in extracurricular activities;
- (2) Admission fees and transportation charges for spectators attending extracurricular activities;

(3) Materials for course projects (as disclosed in section 6).

- Participation in a free-lunch program or reduced-price lunch program is not required to qualify for free or reduced-price lunches.
- Each governing body may establish a policy for waiving fees or providing items otherwise required to be provided by students in other circumstances.

Section 10 (Policy): By August 1, 2002, and annually each year thereafter, each school board must hold a public hearing at a regular or special meeting of the board on a proposed student fee policy.

- The hearing must follow a review of (i) the amount of money from fees collected and (ii) the use of waivers for the prior school year.
- The student fee policy must be adopted by a majority vote of the school board and must be published in the student handbook.
- The board must provide a copy of the student handbook to every student at no cost to the student.
- The student fee policy must include specific details regarding:
 - (a) The general written guidelines for any clothing required for specified courses and activities;
 - (b) Any personal or consumable items a student will be required to furnish for specified courses and activities;
 - (c) Any materials required for course projects;
 - (d) Any specialized equipment or attire which a student will be required to provide for any extracurricular activity;
 - (e) Any fees required from a student for participation in any extracurricular activity;
 - (f) Any fees required for postsecondary education costs;
 - (g) Any fees required for transportation costs under sections 79-241, 79-605, and 79-611;
 - (h) Any fees required for copies of student files or records under section 79-2,104;
 - (i) Any fees required for participation in before-and-after-school or prekindergarten services offered under section 79-1104;
 - (j) Any fees required for participation in summer school or night school;
 - (k) Any fees for breakfast and lunch programs; and
 - (l) The waiver policy required under section 9 of the legislation.

Section 11 (Student Fee Fund): Each school board must establish a student fee fund which would be a separate school district fund not funded by tax revenue, into which all money collected from students must be deposited and from which money must be expended for the purposes for which it was collected from students.

Section 12 (Eye Protection): LB 1172 amends section 79-715 to require school entities to provide industrial-quality eye protective devices at no cost to teachers, students, and visitors for courses involving lab instruction.

Section 13 (Severability Clause): LB 1172 provides that if any section of the act or any part of any section is declared invalid or unconstitutional, the declaration will not affect the validity or constitutionality of the remaining portions.

II. Legislation Passed Notwithstanding Gubernatorial Veto

<i>Bill</i>	<i>Introduced by</i>	<i>Prioritized by</i>	<i>Topic</i>	<i>Effective</i>	<i>Page</i>
LB 898	Kristensen	Kristensen	State Aid Reduction	4/12/2002	34
LB 1309	Kristensen	Speaker "major"	Main Budget Bill	4/11/2002	37

LB 898	<i>Introduced by:</i> Kristensen	<i>Prioritized by:</i> Kristensen	<i>Topic:</i> State Aid Reduction	<i>Effective Date:</i> April 12, 2002
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LEGISLATIVE HISTORY

The original version of LB 898, as introduced by Speaker Kristensen, would have increased the local effort rate and thereby reduced the amount of state aid necessary to fund the school finance formula. Even at the start of the 2002 Session, the question was less "if" but "how" state aid would be reduced to help balance the state's biennium budget.

Ultimately, the Education Committee chose to use LB 898, which had already been prioritized by the Speaker, as the vehicle to advance its own method to cut state aid. Using the concept promoted in LB 1252, introduced by Senator Raikes, LB 898 would accomplish a decrease in state aid by adjusting the state aid formula to reduce calculated needs, allocated income taxes and net option funding to school systems by 1.25%. The reduction would be in place for three years and would result in a decrease of state appropriations of about \$22 million each year.

LB 898 was destined to become one of eight bills from three different committees to comprise the budget package of the 2002 Session.

General File Debate

Speaker Doug Kristensen opened the debate on March 21st by noting that state aid to schools escaped cuts during the special session. "No one likes reducing state aid, but the right thing to do is to share the overall reduction in the budget," said Kristensen.

Senator Ron Raikes spoke of the proposed cuts as “an obligation in support of the cause” toward a balanced budget. He reminded his colleagues, however, that during the last special session there were in fact reductions to public education in the form of lost lottery funds, reorganization incentive funds, and departmental (agency) cuts, among others. “This (LB 898) is a continuation of responsible participation in the process” by public education, Raikes said.

Speaker Kristensen anticipated the feelings of some of his peers by noting how difficult it is to reduce state aid during an election year. He emphasized that passage of LB 898 does not mean an automatic property tax increase.

Senator Ed Schrock strongly disagreed with Kristensen. “The bill means a property tax increase or loss of teachers,” Schrock said. “I can’t support a cut in state aid - it’s the wrong time to do it.” However, Senator Curt Bromm agreed with Kristensen. “We have to look everywhere and ask all to bear a part of the burden,” said Bromm, who also said schools will have to make decisions on such things as extracurricular activities and other “unnecessary” activities.

LB 898 advanced to Select File by a 32-12 vote.

Select File Debate

During an evening session on April 8th, the Legislature once again took up debate on LB 898 with relatively positive results for the education community. Prior to the debate, the levy exclusion promised under LB 1085 was under intense scrutiny due to provisions related to tax increases as well as the levy exclusion itself. The levy exclusion would allow some districts to exceed its levy in order to gain back some of the state aid lost under LB 898. Given the uncertainty for the passage of LB 1085, the levy exclusion could conceivably be vetoed while LB 898 would pass (giving schools no opportunity to redeem lost funding).

To address this problem, Senator Raikes successfully promoted an amendment to LB 898 to incorporate the levy exclusion provision into the measure. In this way, the state aid reduction and the levy exclusion would pass as a “package” rather than separate pieces. The Raikes amendment was adopted by a unanimous vote.

Final Passage/Veto

On April 10th, the Legislature voted 46-3 to pass LB 898 with the emergency clause attached. A veto had been threatened and in fact took place the same day as final passage. In a letter to legislators dated April 10th, Governor Johanns explained his action:

With this letter I am returning LB 898 without my signature and with my objections. I am returning LB 898A with my signature.

I have supported the provisions in LB 898 that prescribe the manner in which the Tax Equity and Educational Opportunities Support Act [“TEEOSA”] aid formula would be amended to implement the new level of aid to Nebraska school districts

as we address our State's budget shortfall. However, as amended on Select File, the bill now authorizes school districts to exceed the maximum levy allowed by law without a vote of the people. You have now presented me with legislation I cannot support. I believe that Nebraskans are asking for greater spending restraint at all levels of government. Granting authority to a local school board to exceed the maximum levy without first requiring approval from taxpayers is inconsistent with the State's previously established requirement of allowing only the taxpayers themselves to determine such an important local funding issue.

Further, LB 898 is not required for the Legislature to implement the revised level of funding for state aid to schools under the TEEOSAid appropriation that is contained in LB 898A. The Attorney General has determined that there are no statutes which would prevent or otherwise limit the Legislature's ability to change the amount of state aid that has previously been appropriated to schools.

For these reasons, I urge you to sustain my veto of LB 898.

Sincerely,
(Signed) Mike Johanns
Governor

For its part, the Legislature made quick work of approving Speaker Kristensen's motion to override the veto of LB 898, again with the emergency clause attached, by a 38-5 vote. The vote took place on April 11th, one day after the Governor vetoed the measure.

SUMMARY

State Aid Reduction: LB 898 changes the calculation of state aid to education for 2002-03, 2003-04, and 2004-05. The bill establishes a temporary aid adjustment factor that reduces each local school system's "need", allocated income tax funds and net option funding by 1.25%. The bill reduces the factors used to compute the stabilization factor and small stabilization adjustment by 1.25%. The lop-off provision is adjusted to reflect receipts from other school districts related to annexation. LB 898 also requires the recertification of 2002-03 state aid before May 1, 2002. (The certification date will revert to the February 1st date for 2003-04 and 2004-05.)

The total fiscal impact of the measure will be a \$22,223,160 reduction in state aid in 2002-03. (This figure is reflected in LB 898A, the appropriation bill to LB 898.) The 1.25% decrease in formula need, allocated income tax funds and net option funding will result in a decrease in state aid for the majority of school systems. A few school systems impacted by the stabilization factors will have little or no decrease in state aid. The statewide average decrease in aid from the amount certified in February 2002 is 3.26%.

Levy Exclusion: LB 898 allows school districts to exceed the levy limitation with a 3/4s majority vote of the school board by an amount that is the difference between the amount of state aid that would have been provided without the changes made in LB 898. NDE is to certify the

amount by which the levy can be exceeded by May 15, 2002 for state aid to be received in 2002-03. In 2003-04 and 2004-05, NDE must certify the amount by which a school board can exceed the levy limit on February 15th.

LB 1309	<i>Introduced by:</i>	<i>Prioritized by:</i>	<i>Topic:</i>	<i>Effective Date:</i>
	Kristensen	Speaker “major”	Main Budget Bill	April 11, 2002

LEGISLATIVE HISTORY

LB 1309 was introduced by Speaker Kristensen on behalf of the Governor and embodied the Governor’s proposal for various budget cuts to help resolve the state’s fiscal situation.

With a few minor adjustments, much of what the Governor originally proposed was adopted and advanced by the Appropriations Committee, including a number of cuts to the Department of Education and various education programs. (The state aid reduction was contained in LB 898A rather than LB 1309.)

After a series of failed attempts by individual senators to alter various pieces of the measure during General File debate on March 21st, LB 1309 was advanced by a 28-11 vote. After more debate on Select File, the measure was once again advanced by a 33-7 on March 27th. Finally, on April 3rd, the Legislature approved the measure on Final Reading by a 47-1 vote with the emergency clause attached.

The Governor returned LB 1309 on April 8th with line-item reductions. The General Fund amounts vetoed in LB 1309 total \$74.3 million for the 2001-2003 biennium, including extensive new cuts to NDE operations and programs.

The Appropriations Committee originally recommended overriding approximately \$64.9 million of line-item reductions. However, it was clear by the end of debate on April 9th that the motion to override had little support among senators. The committee returned with a second proposal to override approximately \$44 million of gubernatorial vetoes and this time met with better response from legislators. The second motion was adopted by a slim 30-15 vote (30 affirmative votes required to pass).

With the second motion to override a success, the cuts to NDE operations and programs remained at the original level proposed by the Appropriations Committee. The relevant budget reductions to education under LB 1309 are as follows:

LB 1309 - Reductions to Education

ITEM	FY2002-03 Before LB 1309	LB 1309 Reduction	FY2002-03 After LB 1309
Department Operations	15,431,844	(423,012)	15,008,832
Special Education	150,214,827	(4,050,000)	146,164,827
Aid to ESUs	12,750,648	(402,652)	12,347,996
Gifted Education programs	3,259,131	(102,920)	3,156,211
Early Childhood program	2,432,000	(76,800)	2,355,200
School Lunch	467,875	-0-	467,875
School Breakfast	301,520	-0-	301,520
Textbook loan program	403,014	(12,727)	390,287
Adult Education	239,290	(7,557)	231,733
Option Enrollment Transportation	187,340	(5,916)	181,424
Economic education program	26,125	(825)	25,300
School reorganization studies	19,000	(600)	18,400
Teacher certification reimbursement	712	(23)	689
Teacher World Program	35,385	(1,117)	34,268
Vocational Rehabilitation	1,838,361	-0-	1,838,361
TOTAL	187,607,072	(5,084,149)	182,522,923

III. 2002 Interim Studies

<i>Resolution</i>	<i>Priority</i>	<i>Sponsor</i>	<i>Topic</i>	<i>Page</i>
LR 394	1	Raikes	Formula needs component of formula	39
LR 324	2	Bourne	Review of aid formula/Consolidation	40
LR 371	2	Stuhr	ESU board qualifications/elections	40
LR 465	2	Ed. Com.	Education Innovation Fund/Lottery	40
LR 329	3	Schimek	Immigration status/access to schools	40
LR 391	3	Stuhr	ESU accreditation study	41
LR 423	3	Price	Certification for coaches	41
LR 455	3	Stuhr	Career preparation programs	42

Priority Designation:

- 1 - Full Education Committee involvement and staff support
- 2 - Potential for committee staff support as time and resources permit
- 3 - Responsibility of the resolution's introducer

LR 394	<i>Introduced by:</i> Raikes	<i>Priority:</i> 1	<i>Topic:</i> Formula needs component of formula
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PURPOSE: To study the formula needs component of the state aid formula pursuant to the Tax Equity and Educational Opportunities Support Act and make recommendations for legislation. The study shall consider, but not be limited to, the following:

- (1) The policy goals that the formula needs component of the state aid formula currently supports;
- (2) The policy goals that the formula needs component of the state aid formula should be designed to support in the future;
- (3) The methods used by other states to arrive at the equivalent of formula needs;
- (4) Changes in the calculation of formula needs that would support the policy goals for the future; and
- (5) Other topics as determined by the committee.

LR 324	<i>Introduced by:</i> Bourne	<i>Priority:</i> 2	<i>Topic:</i> Review of aid formula/Consolidation
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PURPOSE: To examine state aid to schools under the Tax Equity and Educational Opportunities Support Act as it relates to increased state spending versus local property tax relief. This study should include, but not be limited to, a review of the efficiencies that might be gained by consolidation, a review of the state aid formula, and a review of the number of administrators per school district versus the number of teachers in each district.

LR 371	<i>Introduced by:</i> Stuhr	<i>Priority:</i> 2	<i>Topic:</i> ESU board qualifications/elections
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PURPOSE: The purpose of this study is to clarify who is eligible to run for positions on the boards of educational service units comprising more than one county. Current statutory language is confusing and needs to be clarified. This study shall include, but is not limited to, consideration of the provisions governing the boards of educational service units and any other issue the committee deems relevant.

LR 465	<i>Introduced by:</i> Education Com.	<i>Priority:</i> 2	<i>Topic:</i> Education Innovation Fund/Lottery
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PURPOSE: To develop potential legislation for the future use of proceeds from the state lottery allocated to the Education Innovation Fund through a study of past uses and potential future uses. The fund has been administered by the Excellence in Education Council since 1994, a period which encompassed a series of legislative changes in the distribution of the proceeds. For FY2001-02 and FY2002-03, the proceeds allocated to the fund are being allocated to the General Fund, except for a portion that is being used for a distance education network completion grant. Without any changes, after FY2002-03 the fund will be allocated with ten percent to be used for a mentor teacher program, sixty percent to be used for quality education incentives, twenty percent to be used for the Attracting Excellence to Teaching Program, and ten percent to be allocated by the Governor through competitive grants.

LR 329	<i>Introduced by:</i> Schimek	<i>Priority:</i> 3	<i>Topic:</i> Immigration status/access to schools
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PURPOSE: Although a child's origin or immigration status does not prevent access to Nebraska elementary and secondary schools, immigration status may prevent a Nebraska high school grad-

uate who was born outside of the United States from obtaining a college education at a public institution. The purpose of this resolution is to accomplish the following:

- (1) Review Nebraska laws that prevent undocumented immigrants from qualifying for resident tuition;
- (2) Identify practices by public and private colleges and universities in Nebraska regarding the education of undocumented immigrants with special attention to scholarships and other financial assistance that may be available;
- (3) Gather information on tuition rates for both resident and nonresident state students at private and public colleges and universities in Nebraska;
- (4) Gather information on the number of Hispanic students in Nebraska's secondary schools and estimates of how many may be undocumented immigrants;
- (5) Project estimates of how many undocumented students may be foregoing a college education because of the requirement that they pay nonresident tuition;
- (6) Gather information regarding the admission application process or other impediments to undocumented students who want to attend a Nebraska college or university at the resident rates;
- (7) Review federal legislation and laws dealing with resident tuition for undocumented immigrants;
- (8) Review other states' legislation and laws dealing with tuition for undocumented immigrants; and
- (9) Study court decisions regarding this particular aspect of immigration law.

LR 391	<i>Introduced by:</i> Stuhr	<i>Priority:</i> 3	<i>Topic:</i> ESU accreditation study
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PURPOSE: The purpose of this study is to consider the benefits and procedures of accrediting educational service units.

LR 423	<i>Introduced by:</i> Price	<i>Priority:</i> 3	<i>Topic:</i> Certification for coaches
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PURPOSE: The purpose of this study is to analyze the effects of not requiring persons employed to coach or supervise extracurricular activities to hold a valid Nebraska certificate or permit to teach, the relationship between certification and coaching, and the need to require criminal background checks to ensure the safety of the children in the schools of the State of Nebraska.

LR 455	<i>Introduced by:</i> Stuhr	<i>Priority:</i> 3	<i>Topic:</i> Career preparation programs
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PURPOSE: To examine state policies relating to education and career preparation programs in Nebraska. This study shall include, but not be limited to, the following:

- (1) Delivery systems of career and technical education in Nebraska on the secondary and post-secondary levels; and
- (2) Articulation agreements between secondary and postsecondary institutions.

IV. Supplement

AG Opinion:

Student Fees And The Right To Free Instruction In The Public Schools

(February 01, 2002)
opinion 02004

SUBJECT: Student Fees And The Right To Free Instruction In The Public Schools

REQUESTED BY: Douglas D. Christensen, Commissioner of Education

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

In connection with your responsibilities as Commissioner of Education, and at the request of the State Board of Education, you have presented a series of questions concerning the issue of student fees in light of the Constitutional provision regarding free instruction in the public schools.

More specifically, you have presented a series of 13 questions concerning the meaning of free instruction and various aspects of the Department's and/or school districts' authority with regard to charging various student fees.

The Nebraska Constitution provides, in relevant part, "The Legislature shall provide for the free instruction in the common schools of this State of all persons between the ages of five and twenty-one years." Neb. Const. art. VII, § 1 (emphasis added). Due to the perceived lack of any definition of what constitutes "free instruction" under the Nebraska Constitution we conducted a thorough review of the case law and Attorney General's Opinions from around the nation regarding similar free education provisions in other states. Then, to confirm the perceived absence of direction on the issue from our own courts, we reviewed every reported decision in which the Nebraska Supreme Court mentioned the "free instruction" requirement contained in the Nebraska Constitution.

To our surprise we found that the answers to your questions lie not in the considerable body of case law from foreign jurisdictions, but rather in the jurisprudence of our own Nebraska Supreme Court. Far from being silent on the issue, the Court has set forth an extensive body of law on this subject spanning an entire century. The current school fee "crisis," it seems, is not so much a matter of errant school districts as it is a matter of widespread misunderstanding of the Nebraska Constitution.

The key to the issue of student fees under the free instruction clause is the distinction between a self-executing Constitutional provision and a non-self-executing provision. The Nebraska Supreme Court has made it quite clear that the free instruction provision in Article VII, § 1 of the Nebraska Constitution is not self-executing. The following discussion will consider the implica-

tions of this fact on the issue of student fees. The Opinion will then proceed to address each of your specific questions.

Article VII, § 1 Is Not Self-Executing

Due to recent litigation, and the publicity and concern it has generated, it is now rather well understood by the public that the Nebraska Constitution contains a provision granting to every Nebraska child from age 5 to 21 years old the right to “free instruction in the common schools” of the State. It is widely assumed this provision, in and of itself, creates an enforceable cause of action or constitutional entitlement to completely free education in the public schools.

This assumption is mistaken. The right to “free instruction in the common schools” is not a fundamental Constitutional right. See *Kolesnick v. Omaha Pub. Sch. Dist.*, 251 Neb. 575, 581, 558 N.W.2d 807 (1997). In fact, the free instruction provision is not even self-executing. *Peterson v. Hancock*, 155 Neb. 801, 810, 54 N.W.2d 85 (1952). See also *Op. Att’y Gen. No. 97029* (May 21, 1997). This means the provision, in and of itself, imposes no duty on school districts nor does it bestow on children an enforceable Constitutional right, in the absence of action by the Legislature to implement the Constitutional provision. See *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 1006-1007, 620 N.W.2d 763 (2001) (“A constitutional provision is not self-executing . . . if the language of the constitutional provision is directed to the Legislature. . .”). See also *Patteson v. Johnson*, 219 Neb. 852, 857, 367 N.W.2d 123, 127 (1985). Legislation is necessary to implement rights contained in a non-self-executing constitutional provision. Otherwise, “there are no remedies available for enforcement of such rights.” *Lamm*, 260 Neb. at 1007. This has been the consistent view of the Nebraska Supreme Court with respect to the free instruction provision since 1897.

In *State ex rel. Shineman v. Bd. of Educ.*, 152 Neb. 644, 42 N.W.2d 168 (1950), the Court examined the free instruction clause of the Nebraska Constitution and concluded as follows:

The Constitutional provision is clearly directed to the Legislature. We held in *State ex rel. Walker v. Bd. of Commissioners*, 141 Neb. 172, 3 N.W.2d 196, that a constitutional provision is not self-executing if the language of the Constitution is directed to the Legislature, or if it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect. With reference to this provision we said in *Affholder v. State*, 51 Neb. 91, 70 N.W. 544, that the method and means to be adopted in order to furnish free instruction to the children of the state have been left by the Constitution to the Legislature. Clearly, legislation is necessary to carry into effect the Constitutional provision. It is not a self-executing provision. It follows that relators must find statutory authority to sustain this contention. *Id.* at 647-648. (emphasis added).

The context of the *Shineman* case is particularly significant. In this case parents sued a school district to compel the district to establish a kindergarten for students who attained the age of five years, but not six years, on or before October 15. Such students were not old enough to be admitted to first grade. The parents’ suit was based on the express Constitutional provision for free instruction of all persons between five and 21. Notwithstanding the explicit language of the

Constitution, the Court found the parents' claim must fail in the absence of a statute implementing the right. The Court found the matter of creating a kindergarten program to be discretionary with the school district in accordance with state statutes governing classification of students and establishment of grades. *Id.*

The *Shineman* decision was consistent with Nebraska case law dating to 1897. In *Affholder v. State*, 51 Neb. 91, 70 N.W.544 (1897), the plaintiffs sued a local school board to require the board to furnish free textbooks to the district's school children in accordance with an 1891 statute. *Id.* at 92. The Court reviewed the Constitutional provision for free instruction and concluded as follows:

Section 6, Article 8 [now Article VII, section 1], of the Constitution of Nebraska provides: 'The Legislature shall provide for the free instruction in the common schools of this state. . . .' What methods and what means should be adopted in order to furnish free instruction to the children of the State has been left by the Constitution to the Legislature. Prior to the passage of the Act under consideration instruction in all public schools was gratuitous, and by this Act the Legislature has seen fit to require the various school districts to purchase text-books necessary to be used in the schools. We do not think the term 'text-books' should be given a technical meaning, but that it is comprehensive enough to and does include globes, maps, charts, pens, ink, paper, etc., and all other apparatus and appliances which are proper to be used in the schools in instructing the youth. . . ." *Id.* at 93 (emphasis added).

Thus, the Court clearly held that the method and means of providing free instruction is up to the Legislature. Furthermore, the Court noted that prior to enactment of the statute requiring school districts to furnish the textbooks and supplies, only "instruction" in all public schools was free. In other words, the Court distinguished between tuition free "instruction" and free textbooks, maps, globes, pens, paper, and other "necessary" supplies. This means that free textbooks and other necessary supplies are encompassed within the parameters of the constitutional right to "free instruction" only because the Legislature has determined that they should be. This concept is not unfamiliar to college students who pay for instruction (tuition) separately from books and supplies. Another significant case is *State ex rel. Baldwin v. Dorsey*, 108 Neb. 134, 187 N.W. 879 (1922). In *Baldwin* the Court noted, "the Legislature jealously guards its supervision to the end that the Constitutional provision for free instruction in the public schools shall in all respects be fulfilled. Neb. Const. art. VII, § 6." *Id.* at 137. The *Baldwin* case involved the right of non-resident students to attend school without being charged additional tuition for optional courses. The Legislature had enacted a statute authorizing school districts that received non-resident students (receiving districts) to charge sending districts \$1.50/week for each non-resident pupil accepted. *Id.* at 136. At issue was whether the receiving district could charge more than \$1.50 where the school offered courses beyond those required by the State:

In the case before us the evidence . . . discloses that the high school course at the Hebron school included several subjects which were not embraced in nor required by the high school manual, and hence it was not required that such subjects be taught in the high school in order to qualify it to accept pupils and to receive the statutory tuition fees from the school districts from which they were sent. It follows that a high school district that receives non-resident pupils from another

school district, and which adds subjects or course of study which are not required by the high school manual, may not for that reason require the sending school district to pay tuition fees for its high school privileges in excess of the tuition fee fixed by the Legislature. Neither the parent nor the guardian of a non-resident pupil, under the facts of the present case, can be required to pay a tuition fee to a receiving school district. *Id.* at 137.

Thus, the Court concluded the Legislature, as the guardian of free instruction in the public schools, had decreed that no more than \$1.50/week/pupil could be charged (to sending districts) for non-resident student tuition even where the receiving district offered subjects and courses of study that were not part of the required state course of study or manual. Furthermore, the parents or guardians of the non-resident child could not be charged a tuition fee for the extra subjects. This case once again stands for the proposition that the boundaries of what constitutes “free instruction” are left to the Legislature to decide and generally will not be disturbed by the courts. See also *Farrell v. Sch. Dist. No. 54*, 164 Neb. 853, 84 N.W.2d 126 (1957). In *Farrell*, the Court stated, “Article VII, section 6, of this State’s Constitution provides: ‘The legislature shall provide for the free instruction in the common schools of this State of all persons between the ages of five and twenty-one years.’ This provision of the Constitution leaves all matters pertaining to schools and school districts . . . with the Legislature.” *Id.* at 858.

Nebraska case law on this matter continues into more recent years. In 1988, the Court stated: “The Legislature is faced with the duty imposed on it by Neb. Const. art. VII, § 1, to furnish ‘free instruction in the common schools of this State of all persons between the ages of five and twenty-one years.’ Since 1899, the Legislature has attempted in various ways to satisfy that duty. . . .” *Ewing v. Scottsbluff Cty. Bd. of Equal.*, 227 Neb. 798, 801, 420 N.W.2d 685 (1988).

Finally, in 1993, Justice White wrote as follows: “From an analysis of Article VII of our Constitution, certain conclusions are readily apparent. Among them: (1) the Constitution does not define what constitutes “instruction,” leaving that to be defined by the Legislature . . . (3) in determining whether “free instruction” has been denied, the courts may review the action of the Legislature and decide whether the instruction provided [by the school district] compares with the constitutional command. . . .” *Gould v. Orr*, 244 Neb. 163, 170, 506 N.W.2d 349 (1993)(White, J. dissenting, in part). (emphasis added).

With this foundation, we will attempt to answer each of the 13 specific questions presented.

1, 3. Q: What is “free public instruction?” What is “free education?”

A: The definitions of “free public instruction” and “free education” depend, as a legal matter, upon their context. If used in a statute containing defined terms, for example, they would have the meaning ascribed by the statutory definition. Outside such a context, the words would have their ordinary and common meaning. However, this answer is of little assistance in addressing your concerns. Although not stated, we assume your question pertains to the use of these terms in the Administrative Code. As used in section 001-01 of 92 NAC 19 we believe the term “free public education” is synonymous with “free instruction in the common schools of this State” as

used in Article VII, section 1 of the Nebraska Constitution. This conclusion is based on the context of section 001-01 and the apparent intent to use the terms interchangeably.

Furthermore, at least one Judge of the Nebraska Supreme Court has equated a “common school” with a “free public school.” Judge Shanahan stated, “A common school is ‘a free public school now usu[ally] including primary and secondary grades.’” *State ex rel. Spire v. Beermann*, 235 Neb. 384, 402, 455 N.W.2d 749 (1990) (Shanahan, J., dissenting) (quoting Webster’s Third New International Dictionary, Unabridged 459 (1981)). This further supports the conclusion that “free public instruction” is synonymous in Nebraska law with “free instruction in the common schools.” Likewise, we conclude the term “free education” in the Administrative Code, unless otherwise defined, is synonymous with “free instruction” in the Constitution.

Q: What is “free instruction,” as referenced in 92 NAC 19?

A: Section 003 of 92 NAC 19 provides that “A public school district shall, upon request, enroll and provide free instruction to any person between the ages of 5 and 21 who has not completed high school. . . .” Based on a reading of Section 003 in the context of Chapter 19 as a whole, and especially in light of Section 001.01, we conclude that “free instruction” in Section 003 has the same meaning as “free instruction in the common schools” as used in Neb. Const. art. VII, § 1.

3. Q: What is “free education?”

A: See answer 1, above.

4. Q: What is a “free public education,” as referenced in 92 NAC 19?

A: For the reasons discussed above, we conclude “free public education” as referenced in 92 NAC 19 has the same meaning as “free instruction in the common schools” as used in Neb. Const. art. VII, § 1. See *Spire v. Beermann*, 235 Neb. at 402 (Shanahan, J., dissenting)(equating “common school” with a “free public school”).

Q: What is the authority of school districts to charge a student fee?

A: The powers and duties of a school district are narrow and specifically tailored by statute. The Nebraska Supreme Court has stated, “school boards are creatures of statute, and their powers are limited. Any action taken by a school board must be through either express or an implied power conferred by legislative grant.” *Busch ex rel. Knave v. Omaha Pub. Sch. Dist.*, 261 Neb. 484, 488, 623 N.W.2d 672 (2001) (emphasis added). As the Supreme Court has stated, “A school district is a creation of the Legislature. Its purpose is to fulfill the constitutional duty placed upon the Legislature. . . .” *Campbell v. Area Vocational Technical Sch. No. 2*, 183 Neb. 318, 323, 159 N.W.2d 817 (1968) (quoting 78 C.J.S., *Schools and School Districts*, § 24, p.656). *Accord Banks v. Bd. of Educ. of Chase County*, 202 Neb. 717, 719-720, 277 N.W.2d 76 (1979) (quoting *Campbell*) (emphasis added).

School districts are expressly authorized to charge fees for reproducing student files, Neb. Rev.

Stat. § 79-2,104(2); for protective eye wear (for labs and vocational courses), Neb. Rev. Stat. 79-715(1)(b) and for before-and-after school programs, Neb. Rev. Stat. § 79-1104. Conversely, they are prohibited from charging fees for textbooks, equipment, and supplies necessary for the schools of the district, Neb. Rev. Stat. § 79-734, as well as for transportation, Neb. Rev. Stat. § 79-611.

Neb. Rev. Stat. § 79-215(1) provides that resident students “shall be admitted to any such school district upon request without charge.” Similarly, section 79-215(10) provides, “No tuition shall be charged for students who may be by law allowed to attend the school without charge.” Thus, it is clear no tuition “fees” may be charged by school districts except as specifically authorized by statute.

It could be argued that since the Legislature has specifically authorized fees for copying student files and for protective eye wear, etc., no other fees are permitted, on the theory that what is not specifically included is thereby excluded. However, it can also be argued that Neb. Rev. Stat. §§ 79-734 and 79-611 support an opposite conclusion. Since the Legislature saw the need to expressly prohibit fees for transportation, textbooks, and “necessary” equipment and supplies, it may be inferred that fees for other items are not prohibited. We are of the opinion that the latter view is more persuasive. This conclusion is supported by *Affholder v. State*, 51 Neb. 91 (1897), as well as *Att’y Gen. v. East Jackson Pub. Sch.* 372 N.W.2d 638 (Mich. App. 1985).

Furthermore, the Legislature arguably has provided school districts broad enough authority in Neb. Rev. Stat. § 79-526 to charge student fees in certain circumstances. This statute provides as follows:

The school board . . . has responsibility for the general care and upkeep of the schools, shall provide the necessary supplies and equipment, and except as otherwise provided, has the power to cause pupils to be taught in such branches and classified in such grades or departments as may seem best adopted to a course of study which the board shall establish with the consent and advice of the State Department of Education. . . . The board shall make rules and regulations as it deems necessary for the government and health of the pupils and devise any means as may seem best to secure the regular attendance and progress of children at school.

Neb. Rev. Stat. § 79-526. This conclusion is supported by *Dykeman v. Bd. of Ed. of Sch. Dist. of Coleridge, Cedar County*, 210 Neb. 596, 599 316 N.W.2d 69 (1982) (“The board of education is given the general authority to manage and direct the schools within the district. This includes the power to conduct non-teaching and extra curricular duties as a part of the educational program.”). See also *Att’y Gen. v. East Jackson Pub. Sch.*, 372 N.W.2d 638 (Mich. App. 1985). In addition, this statute arguably limits the duty of school districts with regard to expenses. As quoted above, Neb. Rev. Stat. § 79-526 requires only that school boards “shall provide the necessary supplies and equipment.” (emphasis added). Likewise, Neb. Rev. Stat. § 79-734 provides, “School boards . . . shall purchase all textbooks, equipment, and supplies necessary for the schools of such district. . . .” (emphasis added). See also *Affholder*, 51 Neb. at 93 (“by this Act the Legislature has seen fit to require the various school districts to purchase textbooks necessary to be used in the schools”) (emphasis added). By implication, these Nebraska statutes require

school districts to pay only for expenses which are “necessary” rather than optional.

Admittedly, the statutes are less than clear and our conclusion is not without some doubt. However, we believe this conclusion is warranted and further supported by the longstanding practice of the local school districts and apparent acquiescence by the Department of Education. The Nebraska Supreme Court has held that “[l]ong-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law.” *Belitz v. City of Omaha*, 172 Neb. 36, 45, 108 N.W.2d 421 (1961). Thus, a strong argument can be made that school districts do have authority to charge student fees for optional or non-necessary items. Nonetheless, clear direction from the Legislature in this regard would provide certainty and clarity to this question. See *Ewing*, 227 Neb. at 810 (discussing the authority of the Legislature to delegate legislative powers to the State Department of Education to supervise and administer the state school system).

Q: For purposes of drafting future Department rule clarifications, does “free instruction,” as referenced in the Nebraska Constitution, and the current 92 NAC 19, encompass optional non-credit extracurricular programs such as football, marching band, debate, and vocational student groups such as FFA?

A: Not necessarily. Under Nebraska law, free instruction includes what the Legislature says it includes (through legislation), or what the Department says it means under authority delegated from the Legislature. If the programs in question are not required by the Legislature through state law or regulation, they are not encompassed within the constitutional right to free instruction. As your office would be in a better position to ascertain the current scope of required instruction than this office, we decline to list specific programs.

6A: Q: Does the Department currently have any authority to promulgate a rule to provide school districts with the ability to charge fees or costs for such programs?

A: See response to question 7.

6B: Q: If the Department does not currently have that rule-making authority, may the Legislature give the Department that authority?

A: Yes. As discussed above, the constitutional provision for free instruction is not self-executing, and the Legislature may determine the scope of what free instruction includes.

6C: Q: Are such programs part of a “free public education?”

A: See response to questions 4 and 6.

6D: Q: Could the Department promulgate a rule to allow a district to require that students provide supplies and equipment, such as uniforms or instruments, as a condition for participation in such programs, in light of Section 79-734 R.R.S.?

A: Yes, but only for those supplies and equipment that are not “necessary” pursuant to Nebraska law. See response to question 5.

6E. Q: If a district may be given authority to charge fees for such programs, must provisions be made for fee waivers for students who are unable to pay the fees, so they are not excluded from participation on financial status?

A: No, so far as the state and federal constitutions are concerned, but the Legislature may wish to consider doing so as a matter of public policy. “Optional” programs, as discussed above, are not encompassed within the right to free instruction unless specified by the Legislature. Also, there is no constitutional right to participate in sports or other optional activities. See *Farver v. Bd. of Educ. Of Carroll County*, 40 F.Supp.2d 323, 324 (D. Md. 1999) (“The right to participate in extra curricular activities, as distinguished from the right to attend school, is not considered to be a protected interest under the Fourteenth Amendment.”).

Your question does raise the issue of equal protection. However, financial status is not a suspect classification. Therefore, it seems likely a district could articulate a rational basis for any perceived disparate treatment (ie. budget constraints and limited funding). We have not undertaken an analysis of federal regulations, if any, concerning financial status discrimination, but would do so upon request.

Note: There may be distinctions between whether an optional course is encompassed within the right to free instruction for purposes of tuition and for purposes of fees for materials used in the course. See *Affholder*, 51 Neb. at 93. The Legislature may prohibit tuition for non-required instruction while permitting fees for materials. *Id.*

Q: Could the Department promulgate a rule change that states a school district, upon enrollment, “shall provide the programs and services of the school district to a student without charge, except as otherwise specified by law?”

A: Yes, provided such rule is within the existing authority of the Department as delegated by the Legislature. Such a rule is clearly within the authority of the Legislature under Neb. Const. art. VII, § 1. We will explore the existing authority of the Department in this regard further if requested to do so.

Q: In light of Section 79-734 R.R.S. and the current 92 NAC 19 may a school district charge a “lab” or “materials” fee for supplies or equipment as a requirement for a student to take a class?

A: Not if the supplies or equipment are “necessary” supplies or equipment. For example, if the lab fee was for materials essential to instruction in a required course, it would be impermissible.

Conclusion

The Nebraska Constitution delegates to the Legislature the task of determining what “free instruction” will be available to Nebraska school children. Therefore, the answers to the various ques-

tions about what supplies or services a school district must provide at the district's expense, and what fees a district may charge must be found in the Nebraska statutes.

Generally speaking, it is our opinion that under current law a school district must provide free instruction for all courses which are required by state law or regulation and must provide all things necessary for that instruction, such as lab equipment, textbooks and so forth, without charge or fee to the student. For other activities which are not required by law or regulation, such as athletics, cheerleading, and chess club, the school district may require students to provide their own equipment and may charge fees, but the district is not required to do so. The Legislature, if it chooses to do so, may amend the law to either expand or limit the authority of school districts to charge fees.

Sincerely,

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