



Committee Report, Vol. 14, No. 1

**The State Department of Education's
School-based Teacher-led Assessment
and Reporting System (STARS)**

Performance Audit Section

Legislative Audit and Research Office

February 2007

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Prepared by
Angela McClelland
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Legal review
Lance Lambdin
Section Legal Counsel

Performance Audit Section Report

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Table of Contents

- I. Key Findings**

- II. Performance Audit Section Report**

- III. Committee Findings and Recommendations
and Fiscal Analyst's Opinion**

- IV. Background Materials**

Table of Contents



I. Key Findings

Key Findings & Recommendations

Legislative Performance Audit Committee Report

The State Department of Education's School-based Teacher-led Assessment and Reporting System (STARS)

The State Department of Education's (Department's) School-Based Teacher-Led Assessment and Reporting System (STARS) provides academic standards, student assessments, and accountability reporting for Nebraska's public school districts. The Department also uses STARS to meet the requirements of the federal No Child Left Behind Act (NCLB) of 2002. In 2006, concerns arose regarding Nebraska's compliance with the requirements of NCLB, and, by association, STARS. As a result, the Legislative Performance Audit Committee directed the Legislative Performance Audit Section to audit STARS. The Committee directed the Section to assess compliance with state statutes and describe the current status of Nebraska's federal approval for NCLB. The Section's findings and the Committee's recommendations based on those findings follow.

COMPLIANCE WITH THE QUALITY EDUCATION ACCOUNTABILITY ACT

The Quality Education Accountability Act (Act) requires the State Board of Education and the State Department of Education to develop academic standards, assessment, and accountability measures are contained in the. The Committee found that the Board and the Department have complied with some, but not all, of the Act's requirements. The Committee's main findings center around a provision in the Act that requires the Department to select four "model assessments" in designated subject areas. The Department's interpretation of this section of statute differs significantly from that of the Section and the Committee. Specifically, the Section found that:

- the term "assessment" is not defined in the Act, and the Section and the Department disagree on how the term should be interpreted;
- based on legislative intent, the Section interpreted the term "assessment" to mean "test;"
- based upon the Section's interpretation, the Department did not meet the statutory requirement that the consultant select four model assessments in each subject area;
- the Department's interpretation of the four-model assessment requirement in the Act has reduced the potential comparability of test results among the school districts;
- under the Act, school districts are required to adopt one of the model assessments, not choose between adopting a model assessment or adapting their own

- assessments; it is unclear under what circumstances the Legislature intended for districts to adapt their own assessments; and
- the Attorney General's approval of the regulation allowing school districts to use *either* a model assessment *or* their own assessment appears to conflict with a published opinion from that office, which states that districts are required to use the model assessments.

Recommendations

Based on these findings, the Committee recommends that:

- the Department immediately begin the process of identifying four model assessments as required by law; and
- if the Department believes that developing the model assessments is either impossible or undesirable, it should pursue the introduction of legislation to amend the law accordingly.

Also based on these findings, the Committee:

- has introduced a placeholder bill and is considering supporting other legislation to: 1) define the term "assessment" in the Act; and 2) to clarify whether school districts may be permitted to adapt their own assessments in a specific subject area instead of adopting a model assessment in that area; and
- believes that the apparent conflict between statute and regulation may be eliminated if pending legislation is adopted. If it is not, the Committee will consider using the complaint process allowed by the Administrative Procedure Act.

COMPLIANCE WITH THE FEDERAL NO CHILD LEFT BEHIND ACT (NCLB)

In 2006, the Department received notification from the United States Department of Education (USDE) that it was out of compliance with provisions of NCLB and was given *Non-Approved* status for its standards and assessment system. The Department responded to USDE by providing evidence and scheduled the collection of further information that it believes will prove that the Department is in compliance with NCLB by June 2007.

**Legislative Performance Audit Committee
Legislative Audit and Research Office**

February 2007



II. Performance Audit Section Report

Performance Audit Section Report

**The State Department of Education's School-based
Teacher-led Assessment and Reporting System
(STARS)**

February 2007

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CONTENTS

INTRODUCTION	iii
SECTION I: The State Department of Education’s School-Based Teacher-Led Assessment and Reporting System (STARS).....	1
SECTION II: The Department’s Compliance with the Quality Education Accountability Act.....	3
Academic Content Standards	3
Assessment and Reporting System.....	5
SECTION III: Nebraska and the No Child Left Behind Act	15
The No Child Left Behind Act	15
Nebraska and NCLB	15
Remaining Steps to Ensure Approval by USDE.....	17

INTRODUCTION

The State Department of Education's (Department's) School-Based Teacher-Led Assessment and Reporting System (STARS) provides academic standards, student assessments, and accountability reporting for Nebraska's public school districts. The Department also uses STARS to meet the requirements of the federal No Child Left Behind Act (NCLB) of 2002.

Recently, concerns have arisen regarding Nebraska's compliance with the requirements of NCLB, and, by association, STARS. As a result, on 25 July 2006, the Legislative Performance Audit Committee directed the Legislative Performance Audit Section to audit STARS. In general, the Committee directed the Section to assess compliance with state statutes and describe the current status of Nebraska's federal approval for NCLB.

Section I of this report provides an overview of STARS, its administration, and funding. Section II contains our assessment of the Department's compliance with state statutes, and Section III contains our description of the Department's efforts to comply with NCLB. Section IV contains our findings and proposed recommendations.

This audit was conducted in accordance with generally accepted government auditing standards for performance audits. The methodologies used are described briefly at the beginning of each section with further detail included at the end of the report.

SECTION I: The State Department of Education's School-Based Teacher-Led Assessment and Reporting System

The School-Based Teacher-Led Assessment and Reporting System (STARS) consists of several components relating to educational standards for public schools, the assessment of students' progress toward meeting those standards, and reporting the assessment results. STARS is administered by the Department of Education (Department).

The Department, a non-code agency, operates under the direction of the State Board of Education (Board), a constitutional body consisting of eight elected members. The Department is administered by the Commissioner of Education, who is appointed by the Board. Five Department staff members coordinate the statewide administration of STARS; however, much of the responsibility for implementation rests with the state's 254 public school districts.¹

STARS was developed partly through the Department's own efforts and partly in response to state legislation. Prior to 1998, the Department began developing an educational-achievement assessment system, the concept that would become STARS. During the 1998 legislative session, the Legislature enacted the Quality Education Accountability Act,² which contained requirements relating to the adoption of curriculum standards and assessment of student performance. Although the law remained on the books, the Governor vetoed its funding, and it was not implemented at that time.

In late 1999, the Department officially created STARS and began to distribute informational materials about it to the public school districts. The following year, the Legislature amended the Quality Education Accountability Act. The amended Act, which was funded, generally requires the Department to adopt academic content standards,³ develop a system for assessing student achievement toward meeting those standards, and report the assessment results.⁴

The Department incorporated the amended Act's requirements into STARS. It also incorporated the requirements of the 2002 federal No Child Left Behind Act—which contains requirements relating to educational standards and assessments—into STARS.

According to the Department, the program is funded with both state general funds and federal funds. For state FY2005-06, the Department spent about \$1.7 million in state general funds and \$2.7 million in federal funds to administer STARS;⁵ the federal total includes implementation expenses at the district level.

Notes

¹ Total number of districts provided by the State Department of Education, 1 November 2006.

² Neb. Rev. Stat. §§ 79-757 to 79-762.

³ Neb. Rev. Stat. § 79-760.01.

⁴ Neb. Rev. Stat. § 79-760(1).

⁵ Expenditure information provided by the State Department of Education, 7 November 2006.

SECTION II: The Board’s and the Department’s Compliance with the Quality Education Accountability Act

In this section, we report the results of our evaluation of whether the State Board of Education (Board) and the State Department of Education (Department) have complied with the requirements of the Quality Education Accountability Act (Act). In conducting this analysis, we reviewed relevant documents and interviewed personnel in the Department.

The Act requires the Board to adopt academic content standards¹ and develop a system for assessing student achievement toward meeting those standards and reporting the assessment results.² The Act also requires the Department to implement certain elements of the assessment and reporting system,³ and the Department uses the School-based Teacher-led Assessment and Reporting System (STARS) to do so.

We found that the Board and the Department have complied with some, but not all, of the Act’s requirements. Our specific findings follow.

Academic Content Standards

Finding: The Board is in compliance with the statutory requirement to adopt academic content standards.

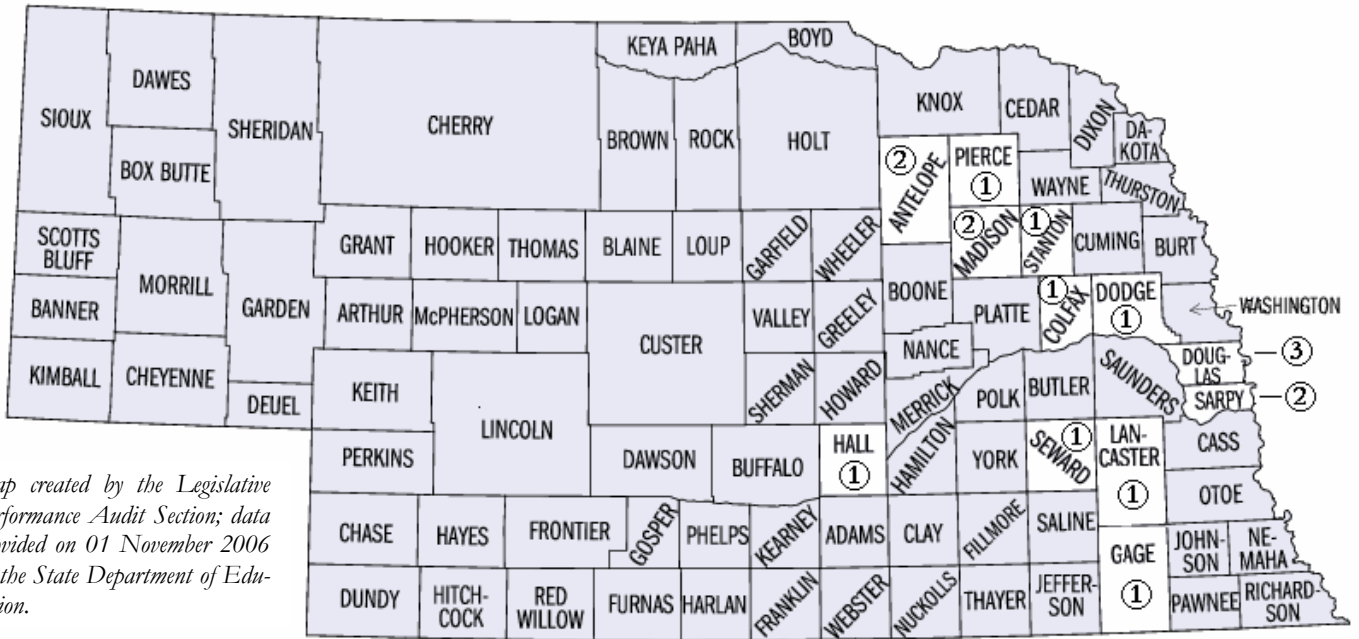
The Act requires the Board to adopt academic content standards for six subject areas: reading, writing, mathematics, science, social studies, and history.⁴ We found that the Board has adopted statewide academic content standards, which are contained in its administrative regulations.⁵ Therefore, the Board is in compliance with this requirement.

Finding: The Board is in compliance with the statutory requirement that academic content standards be clear and measurable.

The Act also requires that the standards adopted “be sufficiently clear and measurable to be used for testing student performance” of content mastery.⁶ We found that the Board has developed academic content standards that comply with this requirement.

The Act also requires each school district to adopt either the state standards or locally developed standards that the Department has determined to be equal to or more rigorous than the state standards.⁷ According to the Department, 237 school districts report assessment results based on state standards, and 17 school districts report assessment results based on local standards that they have adopted.⁸ Map 2.1, on page 4, shows this breakdown.

Map 2.1: State and Local Standards by County in Nebraska



Map created by the Legislative Performance Audit Section; data provided on 01 November 2006 by the State Department of Education.

Counties in WHITE have at least one district reporting results for reading and math based on local academic content standards; the circled number denotes the number of districts doing this as of November 2006.

All school districts in the counties in GRAY report results based on state standards.

School Districts Reporting Results Based on Local Standards	
County	District
Antelope	Elgin Public Schools
	Nebraska Unified District #1 (Clearwater, Orchard, Verdigre)
Colfax	Leigh Community Schools
Dodge	Fremont Public Schools
Douglas	Millard Public Schools
	Omaha Public Schools
	Ralston Public Schools
Gage	Beatrice Public Schools
Hall	Grand Island Public Schools
Lancaster	Lincoln Public Schools
Madison	Madison Public Schools
	Norfolk Public Schools
Pierce	Pierce Public Schools
Sarpy	Bellevue Public Schools
	Papillion/La Vista Public Schools
Seward	Milford Public Schools
Stanton	Stanton Community Schools

Assessment and Reporting System

The Act contains specific assessment and reporting requirements and also sets forth general purposes for the assessment and reporting system.

Assessments

The Act requires the Board to implement an assessment system to measure student performance against the established academic content standards.⁹ The Act requires one statewide assessment for each of three grades relating to writing and multiple assessments relating to reading, mathematics, science, social studies, and history.

Writing Assessments

Finding: The Board is in compliance with the statutory requirement to administer statewide writing assessments.

The Act requires the Board to prescribe a statewide writing assessment and identify three grades to be assessed.¹⁰ The Board selected grades four, eight, and eleven to receive the writing assessments and delegated the authority to develop and administer the assessments to the Department. To implement this requirement, the Department annually administers writing tests, developed by the Department with input from a task force,¹¹ to students in the selected grades. For each grade level, students submit written responses to the Department which are scored at a state scoring center. A random sample of the tests is also scored by an external agency.¹² We found that the Board is in compliance with this portion of the Act.

Assessments for Other Subjects

In addition to the statewide writing assessments, the Act also requires the Board to identify “model” assessments in reading, mathematics, science, social studies, and history, and mandates their use by Nebraska’s public school districts.¹³ The Act requires three steps in the development of model assessments for each subject area. The Act requires:

- 1) School districts to develop their own assessments in each subject area;
- 2) The Department to contract with a consultant to select—from the assessments created by the districts—up to four of the best, or model, assessments in each subject area. The Department must also develop the criteria to be used by the consultant in judging the assessments; and

- 3) Each school district to choose one of the four model assessments per subject to use in its district.¹⁴

The Act does not establish a timeline for the development of these assessments. Because the process for developing the assessments in each subject matter is extensive, the Department has elected to consider one subject area at a time. The Department considered reading in 2000-2001, mathematics in 2001-2002, and revised reading to include speaking and listening in 2002-2003.¹⁵

Development of Four Model Assessments

Finding: The Department did not meet the statutory requirement that the consultant select four model assessments in each subject area.-

For the subject areas considered to date, the Department complied with two out of the three steps required by statute for developing model assessments—it instructed the school districts to develop their own assessments, and it established six criteria to be used in rating the assessments in each subject area. However, we found that the Department did not meet the statutory requirement that the consultant select four model assessments in each subject area.

Instead of developing model assessments, the Department and the consultant “collaboratively decided” to develop four “model practices” for each of the six criteria.¹⁶ The term “model practice” is not mentioned in the Act. However, we reviewed the model practices for reading and would characterize them as guidelines for developing assessments rather than actual assessments themselves.¹⁷ This appears consistent with the Department’s view of the model practices, which it encourages districts to incorporate into their local assessments. (See Appendix B for an example of a model practice.) Since there is no mention of model practices in the Act, we find that the development of those practices does not meet the statutory requirement for the development of four model assessments.

Assessment vs. Test

During the course of this audit, it became evident that our interpretation of the word “assessment” differed substantially from that posited by the Department. We believe that the Legislature intended the use of the word “assessment” throughout the Act to denote an actual test. Conversely, the Department maintains that, in the field of education, the word “assessment” is a term of art, signifying one or more methods of evaluating performance. The Department argues adamantly that, in both common and professional usage, the words “assessment” and “test” have distinctive meanings that preclude their being used interchangeably.

We appreciate that educators do not necessarily equate assessments with tests. Likewise, we acknowledge that the Act offers no definition

of “assessment.” Nevertheless, we find unconvincing the Department’s claim that the assessments required in the Act were not intended by the Legislature to be analogous to tests. We come to this conclusion using two main pieces of evidence.

Finding: The term “assessment” is not defined in the Act, and the Section and the Department disagree on how the term should be interpreted.-

First, although “assessment” is not defined, references within the Act indicate that the Legislature intended the required assessments to be tests. For instance, Section 79-760 of the Act, which sets out the provisions of the assessment system, states that the system “shall *test* student knowledge of subject matter materials covered by the measurable model academic content standards approved by the state board [emphasis added].” Likewise, Section 79-760.01 mandates that the academic content standards adopted by the Board for a minimum of three grade levels be “sufficiently clear and measurable to be used for *testing* student performance with respect to mastery of the content described in the state standards [emphasis added].”

Our second piece of evidence, the legislative history of LB 812—the bill amending the Act—reveals clearly that the Legislature intended for the Act to give rise to a system of statewide assessments through which student achievement could be tracked and measured. During floor debate, the senators used the words “assessment” and “test” interchangeably. In fact, a close reading of the history reveals that they referred to the required evaluations regularly as “tests”. Moreover, when asked during Select File debate to elaborate upon “the difference between a test and an assessment,” then-Chairperson of the Education Committee, Senator Ardyce Bohlke, stated that over the years the word “test” had been replaced with the word “assessment,” but that the words mean the same thing.¹⁸

The Department argues that it is improper to rely upon legislative history to understand statutory language that is clear and unambiguous on its face. While concurring wholeheartedly with the general application of this sound rule of statutory interpretation, we disagree that it is applicable in this particular instance. Professional educators are free to attach a specific meaning to the word “assessment” for use within the confines of their area of expertise; however, neither the public at large nor their elected representatives are bound by such a definition. Rather, as set out in another important rule of statutory interpretation, language used in statute is to be given its “plain and ordinary and meaning,” and considered in its “popular sense.”¹⁹

According to the Department, a “test” is “a paper and pencil measure that is usually a one-time only administration.” An “assessment” is “a system of measures, usually many and in multiple formats...”²⁰ While these definitions may reflect the education profession’s meaning of these two words, they are in no way absolute or unequivocal. *Webster’s New World Dictionary* defines “test” as “an examination, experi-

ment, or trial, as to prove the value or ascertain the nature of something.”²¹ The definition that the dictionary gives for “assessment” is merely “the act of assessing.”²² The verb “assess” is defined primarily in terms of property valuations and taxation; however, an ancillary definition for the word is “to estimate or determine the significance, importance, or value of; evaluate.”²³ Given the generality of these dictionary definitions, it is clear that the plain, ordinary, and popular meaning of the word “assessment” in the Act is far more ambiguous than the Department claims—and it certainly does not exclude being reasonably interpreted to mean a test.

In fact, the Department’s subsequent implementation of the writing assessment requirement in the Act provides tacit recognition of the true legislative intent behind the use of the word “assessment.” Section 79-760(1) calls for the Board to adopt “an assessment and reporting plan and begin implementation of the assessment and reporting system in the 2000-01 school year beginning with the assessment of reading and writing.” To comply with this requirement, the Board relies upon a series of annual written tests. It appears inconsistent for the Department to insist, therefore, that “assessment” means “test” for the purpose of evaluating student reading and writing skills but something entirely different when applied to other academic disciplines.

As mentioned already, we believe that the legislative history to LB 812 reveals that the Legislature intended an assessment made pursuant to the Act to take the form of an actual test. Though the Department disputes this, the findings contained in this audit are reflective of that interpretation.

The Use of Model Versus Locally Developed Assessments

With no model assessments to choose from, school districts could not meet the Act’s requirement that they select model assessments. Instead, they have continued to use their locally developed assessments.

The Commissioner of Education (Commissioner) argues that the Act permits the use of local assessments in place of the model assessments and, consequently, the districts are in compliance with this portion of the Act.²⁴ We disagree with the Commissioner’s interpretation.

The relevant portion of the Act states that:

“Districts shall thereafter adopt one of the four model assessments and may, in addition, adapt their locally developed assessments.”²⁵

According to the general rules of statutory construction set out in the Nebraska Revised Statutes, the word “shall” indicates “mandatory or ministerial action.”²⁶ When the word “may” appears, however, “permissive or discretionary action is presumed.”²⁷ Following these rules, the above provision requires that districts select one assessment from among the four model assessments. Although this provision grants some flexibility to the districts in adapting their local assessments, it does not permit them to use a locally developed assessment *in place of* a model assessment.

The Attorney General has issued an opinion supporting this interpretation. He states:

“We believe that § 79-760(1) clearly directs school districts to adopt one of the model assessments identified by the assessment experts as receiving the highest rating. The sentence [in statute]. . . states that the assessment experts shall identify up to four model assessments, and then the following sentence states that school districts shall thereafter adopt one of the four model assessments.”²⁸

The Act’s legislative history also supports this interpretation. For example, during floor debate on the bill that became the Act, then-chairperson of the Education Committee, Senator Ardyce Bohlke, described how the process would work for the subject of reading:

“Every school district would be allowed to develop their own assessment in reading. At the end of the year all those reading exams would be turned into a national institute that does testing. They would review those and they would come back with a recommendation of the [four] tests in the state that would be the best tests. *From thence forward, schools would select one of those tests, so there would no longer be the possibility of 150 or 200 tests or exams, there would be the possibility of [4]* [emphasis added].”²⁹

We note that interpretation of this provision is somewhat complicated because the administrative regulation adopted to implement the provision contradicts the clear requirement that districts must use the model assessments. This regulation states:

“For each subject area, the district reviews model assessments and procedures identified by the Department pursuant to section 79-760 R.R.S., and *either adopts a model assessment and procedures or adapts locally*

developed assessments and procedures to a model [emphasis added].”³⁰

Finding: The Attorney General’s approval of the regulation allowing school districts to use *either* a model assessment *or* their own assessment appears to conflict with that office’s published opinion, which states that “§ 79-760(1) clearly directs school districts to adopt one of the model assessments...”

As required by the Administrative Procedure Act, which governs the regulation promulgation process, the Attorney General reviewed this regulation for constitutionality and statutory authority, ultimately approving its promulgation by the Department.³¹ Therefore, the Attorney General’s approval of this regulation allowing school districts to use *either* a model assessment *or* their own assessment appears to conflict with the office’s published opinion, which states that “§ 79-760(1) clearly directs school districts to adopt one of the model assessments...”³²

With the permission of the Legislative Performance Audit Committee, the Attorney General’s Office (AGO) reviewed the portion of the Section’s report dealing with this apparent conflict.³³ An AGO representative disagreed with the Section’s assertion that “our [the AGO’s] opinion and the approval of the regulation are in conflict.” Specifically, the representative explained: “[T]he focus of our opinion does not specifically discuss the second clause of that sentence.”³⁴

The AGO appears to be suggesting that if it *had* considered the second clause of the relevant sentence (the clause that allows districts to adapt their local assessments), their opinion might have interpreted the statute as allowing districts to choose from either the model assessments *or* modified versions of their own assessments, as the regulation permits. We find this suggestion questionable. The published opinion states definitively that school districts must choose from among the model tests. If the second part of the sentence is relevant to the interpretation of the first part of the sentence, the opinion should have discussed it. Consequently, the Section maintains that the regulation and statute differ, and the discrepancy between those two legal authorities is problematic.

Despite this disagreement, departmental regulations cannot supersede unambiguous statutory language. Common rules of statutory interpretation dictate that the legislative intent behind statutory language is to be found, when possible, in the “plain and ordinary” meaning of the statutory language itself,³⁵ indicating that no other interpretation is needed—as the Nebraska Supreme Court has observed—to “ascertain the meaning of statutory words which are plain, direct, and unambiguous.”³⁶ Because the Court has determined that the “last expression of legislative will is the law,”³⁷ neither legislative histories nor administrative regulations can supersede or supplant it.

Finding: Districts are required to adopt one of the model assessments, not choose between adopting a model assessment or adapting their own assessments.

Consequently, based on the plain language of the statutory requirement, the relevant Attorney General’s opinion, and the Act’s legislative history, we find that districts are required to adopt one of the

model assessments, not choose between adopting a model assessment or adapting their own assessments. In addition, although an administrative regulation allowing districts either to adopt a model assessment or adapt a locally developed assessment was properly promulgated, the regulation does not supersede the “plain and ordinary” meaning of the statutory language that requires districts to select from among the model assessments.

Finding: It is unclear under what circumstances the Legislature intended for districts to adapt their own assessments.

We acknowledge that it is unclear under what circumstances the Legislature intended for districts to be permitted to adapt their own assessments. The plain meaning of this provision is difficult to discern in light of the requirement that districts adopt model assessments. In addition, neither the Attorney General’s opinion nor the legislative history provide any guidance on interpreting this provision.³⁸ The plain meaning of the statutory language does make clear, however, that no such adaptation alters in any way the primary duty of the districts to adopt model assessments.

Reporting Results

Finding: The Department is in compliance with the statutory requirement that it report aggregate test results.

The Act requires the Department to report the aggregate results of the required assessments (as noted earlier, we have interpreted the Legislature’s use of the term “assessment” in statute to be synonymous with the term “test”). However, the Act does not specify the format in which the results should be reported.³⁹ We found that the Department uses two formats to report test results as required by the Act. Consequently, we found that the Department is in compliance with this requirement.

Finding: The Department’s State of the Schools Report Web site provides a large amount of data in a user-friendly format.

The Department annually reports the results of assessments administered by school districts in its State Report Card and the State of the Schools Report. The State Report Card is a widely distributed summary document that shows the performance average of all Nebraska public school students in reading, writing, and mathematics. The results are separated by grade and demographic groups. The State of the Schools Report—available on the Department’s Web site—provides not only statewide results information, but also results by district and by school in a user-friendly format. Demographic information is available at all levels.

Purposes of the Assessment and Reporting System

According to the Act, the purposes for the assessment and reporting system are to:

- 1) Determine how well public schools are performing in terms of their students’ achievement related to the model state academic standards;

- 2) Report the performance of public schools based upon the results of the above determination;
- 3) Provide information for the public and policymakers on the performance of public schools; and
- 4) Provide for the comparison of Nebraska public schools to their peers and to school systems of other states and other countries.⁴⁰

We found that the Department's assessment and reporting system generally meets these purposes. Student achievement, as it relates to the model state academic content standards, is determined by local assessments and evidenced by the results submitted by the districts to the Department and published on the State of the Schools Report Web site. The results provided in the State of the Schools Report and the State Report Card meet the purposes of reporting performance results and of providing information to the public and to policymakers on the performance of public schools.

Finding: The Department's interpretation of the four-model assessment requirement in the Act, has reduced the potential comparability of the assessment results among the school districts.

The information made available by the Department may also be used for some comparisons among Nebraska schools. However, the Department's interpretation of the four-model assessment requirement in the Act, has reduced the potential comparability among school districts. If all districts selected assessments from four assessments in each subject area, the results would be much more comparable. Instead, the potential exists for each of the 254 school districts to develop their own assessment in each subject area. Although the Department does not track the actual number of assessments in use,⁴¹ some districts do use the same assessment.⁴² Therefore, it is safe say that there are fewer than 254 assessments in use for each subject area, but there are likely to be far more than the four per subject area required by the Act.

Finding: While the Department has made available some descriptions of methodologies for making comparisons of student performance from the data reported, given the large amount of data, the Section encourages the Department to provide as much assistance as possible to help the public understand the data available.

Another issue complicates this potential reduction in comparability. Although the Department makes available a large volume of student demographic and assessment data and some descriptions of comparison methodologies, we found that it does not make available a detailed description of all comparison methodologies, which school districts and, especially, policymakers could use for making suitable comparisons from the data reported.

We also found that the Department provides for state-to-state comparisons through Nebraska's participation in the National Assessment of Educational Progress (NAEP). The Department does not currently provide for comparisons between Nebraska schools and schools in other countries; however, the Department has provided a

reasonable explanation that such comparisons are problematic because of the variations in the educational systems themselves.

Notes

¹ Neb. Rev. Stat. § 79-760.01.

² Neb. Rev. Stat. § 79-760(1).

³ *Ibid.*

⁴ Neb. Rev. Stat. § 79-760.01.

⁵ NAC Title 92, Ch. 10, Appendices A-D.

⁶ Neb. Rev. Stat. § 79-760.01.

⁷ Neb. Rev. Stat. § 79-760.02.

⁸ Standards information provided by the Department 1 November 2006.

⁹ Neb. Rev. Stat. § 79-760(1).

¹⁰ Neb. Rev. Stat. § 79-760(1).

¹¹ STARS Update #1, May 2000, pg. 6.2.

¹² STARS Update #19, *2005-2006 Statewide Writing Assessment Planning Information*, pp. 2-5.

¹³ Neb. Rev. Stat. § 79-760(1).

¹⁴ *Ibid.*

¹⁵ Impara, Buckendahl, and Plake, *Final Report - Evaluating Nebraska's District Assessment Portfolios and Recommending Model Assessments for Reading: 2000 – 2001*, Buros Institute for Assessment Consultation and Outreach - A Division of the Buros Center for Testing, University of Nebraska-Lincoln, November 2001. Buckendahl, Impara, and Plake, *Final Report - Evaluating Nebraska's District Assessment Portfolios and Recommending Model Assessments for Mathematics: 2001 – 2002*, Buros Institute for Assessment Consultation and Outreach - A Division of the Oscar and Luella Buros Center for Testing, University of Nebraska-Lincoln, October 2002. Buckendahl, Impara, Plake, Ferdous, and Haack, *Final Report - Evaluating Nebraska's District Assessment Portfolios and Recommending Model Assessments for Reading, Speaking, & Listening: 2002 – 2003*, Buros Institute for Assessment Consultation and Outreach - A Division of the Oscar and Luella Buros Center for Testing University of Nebraska-Lincoln, November 2003.

¹⁶ Buckendahl, Impara, Plake, Ferdous, & Haack, *Final Report Evaluating Nebraska's District Assessment Portfolios and Recommending Assessments for Reading, Speaking, & Listening: 2002-2003*, November 2003, pg. 3.

¹⁷ Impara, Buckendahl, and Plake, *Report on Model Assessments for Reading 2000-2001*, September 2001, pp. 4-29.

¹⁸ Legislative History, LB 812 (2000), 3 April 2000, pg. 12438.

¹⁹ *Shipler v. General Motors Corporation*, 271 Neb. 194, 216-217, 710 N.W.2d 807, 829-830 (2006).

²⁰ Letter from Commissioner of Education to Senator Chris Beutler, 6 November 2006, pg. 2.

²¹ Webster's New World Dictionary, 2nd Edition. New York: Simon & Schuster, 1982.

²² *Ibid.*

²³ *Ibid.*

²⁴ Conversation with Douglas Christensen, Commissioner, Department Legal Counsel, Director of Statewide Assessment, Administrator of Federal Programs, and Assistant to the Commissioner, State Department of Education, 16 October 2006.

²⁵ Neb. Rev. Stat. § 79-760(1).

²⁶ Neb. Rev. Stat. § 49-802(1).

²⁷ *Ibid.*

²⁸ Atty. Gen. No. 03001 (January 2, 2003).

²⁹ Legislative History, LB 812 (2000), 3 April 2000, pg. 12427. Senator Bohlke's comments were made during the first amendment that proposed model assessments; in that amendment, the total number of model assessments was five. The Act was later amended to reduce that number to four.

³⁰ NAC Title 92, Ch. 10, 005.01D.

³¹ Neb. Rev. Stat. § 84-905.01.

³² Atty. Gen. No. 03001 (January 2, 2003).

³³ The Committee's permission was needed because, by law, the report contents are confidential unless a majority of the Committee approves release of some or all of the report. (Neb. Rev. Stat. § 50-1210(1).)

³⁴ Letter from the Office of the Attorney General, 18 December 2006. AGO representatives stated that AGO only reviews rules and regulations for "constitutionality and statute authority" and not for conformity with the State Constitution or state statutes. AGO also contends that since its review of the portion of Title 92, Chapter 10 at issue occurred before the issuance of the Attorney General's opinion cited above, there is no disparity in meaning between the regulations and the meaning of the relevant clause of statute as stated in the issued opinion.

³⁵ *Shipler v. General Motors Corporation*, 271 Neb. 194, 216-217, 710 N.W.2d 807, 829-830 (2006).

³⁶ *Nebraska Liquor Distributors, Inc. v. Nebraska Liquor Control Commission*, 272 Neb. 390, 393, 722 N.W.2d 10, 13 (2006).

³⁷ *Aligent Health Bergan Mercy Medical Center v. Haworth*, 260 Neb. 63, 71, 615 N.W.2d 460, 467 (2000).

³⁸ The Attorney General's opinion makes no mention of the provision that permits districts to adapt their own tests. In addition, we found only one discussion in the legislative history on this issue, and it suggests that the intention may have been to permit a district to modify its own test if that test were sufficiently similar to one of the model tests. While the discussion explored this possible inter-

pretation, there is no definitive statement that this is the interpretation the Legislature intended. Legislative History, LB 812 (2000), 3 April 2000, pg. 12441.

³⁹ Neb. Rev. Stat. § 79-760(1).

⁴⁰ Neb. Rev. Stat. § 79-760(2).

⁴¹ Telephone conversation with Director of Statewide Assessment, State Department of Education, 6 November 2006.

⁴² For example, according to a study conducted for the Department some districts join together in consortia—such as school districts within an Educational Service Unit—to develop and use one test for a subject area. Isernhagen, *Charting STARS, Voices from the Field*, September 2005.

SECTION III: Nebraska and the No Child Left Behind Act

In this section, we report the results of our examination of the history of Nebraska's efforts to comply with the federal No Child Left Behind Act (NCLB) and the state's current approval status. In conducting this examination, we reviewed relevant documents and interviewed personnel in both the State Department of Education (Department) and the United States Department of Education (USDE).

The No Child Left Behind Act

Signed into law in January 2002,¹ NCLB is a re-authorization of the Elementary and Secondary Education Act of 1965. NCLB contains changes intended to reform educational practices, including: stronger accountability measures; greater flexibility in the use of federal funds; and more choices for parents of children from disadvantaged backgrounds.¹ The end goal of NCLB is for all students to be proficient in reading and mathematics by the 2013-14 school year.²

NCLB requires states to comply with a federally determined schedule of plan submissions and approvals to align their practices with the provisions of NCLB. To meet the goals set by NCLB, states are required, among other things, to set standards for student achievement, administer assessments in reading and mathematics, and hold schools accountable for assessment results.³ Under NCLB, the USDE rates state systems with a scale that ranges from *Fully Approved* to *Not Approved*, with stages in between denoting a need for more evidence or further review of the program. Figure 3.1, on page 14, lists the current USDE approval stages, with descriptions.

Nebraska and NCLB

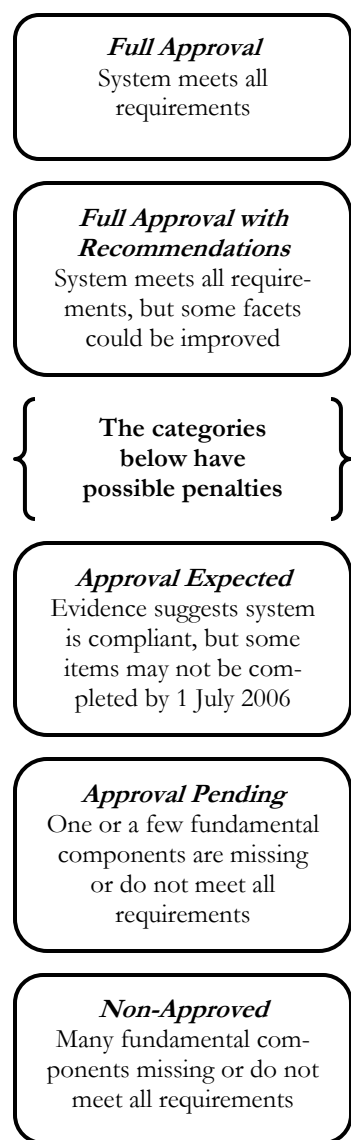
As mentioned in Section I, the Department uses the School-based Teacher-led Assessment and Reporting System (STARS) as the framework for implementing the requirements of NCLB. It is important for the Department to gain federal approval of its system because the state receives a significant amount of federal grant money to implement various aspects of NCLB. In the current two-year federal grant cycle, Nebraska received over \$89 million dollars in NCLB grants.⁴

Following is a description—from 2002 to the present—of the Department's efforts to gain NCLB approval.

Accountability Plan Approval

In January 2003, states were required to submit an accountability plan to USDE, which included evidence that the state had implemented academic content standards, assessments, reporting procedures, and “statewide systems for holding schools and districts accountable for the achievement of their students.”⁵ The Department submitted the state’s accountability plan to USDE and received notice in June 2003 that the plan had received approval.⁶

Figure 3.1: USDE Approval Categories for State Standards and Assessment Systems (Current as of November 2006)



Approval of Standards and Assessments

In addition to the accountability plan approval process, USDE required all states to undergo a federal peer review for specific approval of their standards and assessments.⁷ USDE uses experts in the fields of standards and assessments to conduct the reviews of state-submitted evidence.⁸ Nebraska underwent peer reviews in 2005 and 2006.

In 2005, the reviewers found that the state’s standards and assessment system did not comply with most of the NCLB requirements.⁹ USDE requested additional evidence to resolve the identified non-compliance issues.

In 2006, USDE determined that the state was still out of compliance with many NCLB requirements and that it was unlikely Nebraska’s system would achieve compliance in the 2006-07 school year.¹⁰ As a result, Nebraska received *Non-Approved* status, and USDE stated that it would withhold \$126,741, which is 25 percent of certain administrative funding the state receives under NCLB.¹¹ The USDE also provided the Department with a list of the areas in which Nebraska needed to improve. (Appendix C contains the list.)

Nebraska’s Response to Non-Approval

In response to receipt of Nebraska’s *Non-Approved* status, the Commissioner of Education publicly criticized the USDE peer review practices and announced that the Department would challenge the *Non-Approved* status.¹² Subsequently, the Department requested that the USDE reconsider Nebraska’s status and provided a timeline for addressing the areas in need of improvement noted by USDE.¹³ The Department assured USDE that all but two of the problem areas would be addressed by September 2006.¹⁴ The other two items noted by USDE are scheduled for completion on 15 June 2007.¹⁵

In September 2006, USDE responded favorably to the Department’s request and changed Nebraska’s approval status to *Approval Pending*. USDE noted that although Nebraska was still not meeting one or

more NCLB requirements, it appeared the state could resolve these issues by the end of the 2006-07 school year. The status change prevented the withholding of federal funds; however, Nebraska has been placed under *Mandatory Oversight*, meaning the Department must provide bi-monthly reports to USDE, starting in November 2006, on its progress in implementing its plans to attain full compliance.¹⁶

Remaining Steps to Ensure Approval by USDE

Finding: The Department believes it will meet the final two requirements to obtain approval from USDE.

As noted above, in order to have its standards and assessments system approved by USDE, the Department must prove it has completed two additional tasks by 15 June 2007. First, the Department must complete on-site peer reviews for all public school districts in the state by the end of the 2006-07 school year. Second, it must demonstrate that it has the ability to collect, disaggregate, and report student data to NCLB requirements. The Department believes it will meet both requirements.

Department staff state that they are scheduled to complete the on-site peer reviews by the end of April 2007. USDE staff stated that the peer reviewers commended the Department for its planned review process and noted that USDE has “every reason to believe that Nebraska’s evidence submitted in June will be sufficient.”¹⁷

Meeting the data requirement, according to the Department, has been challenging given the limitations of their current computer system. Department staff stated that completion of a new system, currently in its second year of operation as a pilot program, would allow for improved handling of the required data. Staff stated that even if the data system does not contain enough statewide information to produce a report that meets NCLB requirements by the June 2007 deadline, they believe they will be able to produce a report using other methods and show that the data system will be capable of doing so in the future. USDE staff did not comment on the Department’s reporting capabilities.

Possible Approval Status Outcomes

According to a USDE representative, if USDE determines that the Department’s proof of the above tasks meet USDE’s requirements, it will grant Nebraska *Approved* status for its standards and assessments system.¹⁸ If USDE determines the Department’s submission does not meet USDE’s requirements, it will assign Nebraska *Non-Approved* status.

In a letter to the Department earlier this year, USDE outlined the possible consequences of receiving *Non-Approved* status. The state could be subject to any or all of the following:

- The Department could be required to enter into a Compliance Agreement with USDE to bring the state into full compliance within two years;
- The Department could have significant limitations placed on the flexibility of funding granted by USDE; or
- USDE could withhold certain NCLB administrative funds, which total more than \$600,000.^{19,20}

USDE has made no projections regarding when it will issue its final determination on Nebraska's approval status.

Notes

¹ *A Guide to Education and No Child Left Behind*, U.S. Department of Education, pg. 13. Accessed on 28 September 2006 from: <http://www.ed.gov/nclb/overview/intro/guide/guide.pdf>

² *No Child Left Behind: A Toolkit for Teachers*, U.S. Department of Education. Accessed 31 October 2006 from: <http://www.ed.gov/teachers/nclbguide/nclb-teachers-toolkit.pdf>

³ *No Child Left Behind: A Desktop Reference*, U.S. Department of Education, pg. 9.

⁴ Grant information received from the Department, 2 November 2006. The total noted is from the federal grant period that runs from July 2006 until September 2008.

⁵ *No Child Left Behind: A Desktop Reference*, U.S. Department of Education, pg. 10.

⁶ Letter dated 10 June 2003 from Rod Paige (USDE) to Douglas Christensen (Department).

⁷ Letter dated 22 October 2004 from Raymond Simon (USDE).

⁸ *Standards and Assessments Peer Review Guidance: Information and Examples for Meeting Requirements of the No Child Left Behind Act of 2001* (28 April 2004), U.S. Department of Education. Accessed on 1 November 2006 from: <http://www.ed.gov/policy/elsec/guid/saaprguidance.doc>

⁹ Letter dated 9 December 2005 from Henry Johnson (USDE) to Douglas Christensen (Department).

¹⁰ Letter dated 30 June 2006 from Henry Johnson (USDE) to Douglas Christensen (Department).

¹¹ Letter dated 30 June 2006 from Henry Johnson (USDE) to Douglas Christensen (Department).

¹² Memorandum dated 5 July 2006 from Douglas Christensen (Department) to all Nebraskans.

¹³ Letter dated 28 July 2006 from Douglas Christensen (Department) to Henry Johnson (USDE).

¹⁴ The Department forwarded the information promised to USDE on 7 September 2006.

¹⁵ Timeline of Completed Evidence accompanying letter dated 28 July 2006 from Douglas Christensen (Department) to Henry Johnson (USDE).

¹⁶ Letter dated 15 September 2006 from Henry Johnson (USDE) to Douglas Christensen (Department).

¹⁷ E-mail from the Office of Elementary and Secondary Education - U.S. Department of Education, 1 November 2006.

¹⁸ Telephone conversation with staff from the Office of Elementary and Secondary Education - U.S. Department of Education, 23 October 2006.

¹⁹ Letter dated 24 April 2006 from Henry Johnson (USDE).

²⁰ Administrative funding total for the Department's current Title I federal grant provided by the Department, 2 November 2006.

Performance Audit Committee Recommendations

On 26 January 2007, in accordance with Neb. Rev. Stat. sec. 50-1211(1) of the Legislative Performance Audit Act, the Legislative Performance Audit Committee convened to consider the findings and recommendations contained in the Performance Audit Section's draft report entitled *The State Department of Education's School-based Teacher-led Assessment and Reporting System (STARS)* and the State Department of Education's response to that report. The Committee adopted the following recommendations

The State Board of Education's (Board's) and State Department of Education's (Department's) Compliance with the Quality Education Accountability Act (Act)

Finding 1: The Board is in compliance with the Act's requirements that it: adopt clear and measurable academic content standards (pg. 3); administer statewide writing assessments (pg. 5); and report aggregate results from the writing assessments and assessments of other subject areas (pg. 11). In addition, the Section found that the Department's State of the Schools Report Web site provides a large amount of data in a user-friendly format (pg. 11).

Recommendation: None.

Finding 2: Based upon the Section's interpretation of the term "assessment," which reflects legislative intent, the Department did not meet the statutory requirement that the consultant select four model assessments in each subject area. (pg. 6).

Discussion: The Department agrees that it did not have its consultant select model assessments. Instead, the Department and the consultant "collaboratively decided" to develop four "model practices" for each of the criteria developed to rate model assessments. The Department believes that the model practices meet the statutory requirement for model assessments, arguing that in the field of education the term "assessment" means one or more methods of evaluating performance and is not the same as the term "test."

Finding 3: The term "assessment" is not defined in the Act, and the Section and the Department disagree on how the term should be interpreted (pg. 7).

Discussion: During the course of this audit, it became evident that the Section's interpretation of the word "assessment" differs substantially from that posited by the Department. Performance audit staff believe that the Legislature intended the use of the word "assess-

ment” throughout the Act to denote an actual test. Conversely, the Department maintains that, in the field of education, the word “assessment” is a term of art, signifying one or more methods of evaluating performance. The Department argues adamantly that, in both common and professional usage, the words “assessment” and “test” have distinctive meanings that precludes their being used interchangeably.

The Section appreciates that educators do not necessarily equate assessments with tests. Nevertheless, it finds unconvincing the Department’s claim that the assessments required in the Act were not intended by the Legislature to be tests.

Recommendations: The Committee agrees with the Section’s interpretation of the term “assessment,” and recommends that the Department immediately begin the process of identifying four model tests as required by law. If the Department believes that developing the model tests is either impossible or undesirable, it should pursue the introduction of legislation to amend the law accordingly.

The Committee has introduced a placeholder bill and is considering supporting other legislation to define the term “assessment” in the Act.

Finding 4: The Department’s interpretation of the four-model assessment requirement in the Act has reduced the potential comparability of test results among the school districts (pg. 12).

Recommendation: None.

Finding 5: Under the Act, school districts are required to adopt one of the model assessments, not choose between adopting a model assessment or adapting their own assessments (pg. 10).

Finding 6: It is unclear under what circumstances the Legislature intended for districts to adapt their own assessments (pg. 11).

Recommendation: The Committee has introduced a placeholder bill and is considering supporting other legislation to clarify whether school districts may be permitted to adapt their own assessment in a specific subject area instead of adopting a model assessments in that area.

Finding 7: The Attorney General’s approval of the regulation allowing school districts to use *either* a model assessment *or* their own assessment appears to conflict with that office’s published opinion, which states that “§ 79-760(1) clearly directs school districts to adopt one of the model assessments...” (pg. 10).

Discussion: After the Attorney General has approved regulations, the methods for addressing and remedying any apparent inconsistencies between the regulation and relevant statute are limited. Under the Administrative Procedure Act, court action or an official complaint made by the Legislature’s Executive Board are the only available recourses.¹ Court action, at least in this case, seems impractical. A complaint filed by the Executive Board is more feasible; however, it is worth noting that such a complaint will only lead to the resolution of a discrepancy if the agency with which the complaint is filed chooses to initiate a change in the regulation. Authority for actually changing the regulation, without a change in statute, rests with the agency.

Recommendation: If introduced legislation does not remedy the situation, the Committee will consider using the complaint process allowed by the Administrative Procedure Act.

Finding 8: While the Department has made available some descriptions of methodologies for making comparisons of student performance from the data reported, given the large amount of data, the Section encourages the Department to provide as much assistance as possible to help the public understand the data available (pg. 12).

Recommendation: The Committee will consider requesting, or if necessary amending introduced bills to require, the Department to produce and distribute a guide that outlines legitimate methods for comparing performance results both between schools in one district and among districts.

The State Board of Education’s (Board’s) and State Department of Education’s (Department’s) Compliance with the No Child Left Behind Act (NCLB)

Finding 9: The Department believes it will meet the final two NCLB requirements to obtain approval from the United States Department of Education (pg. 17).

Recommendation: None.

Notes

¹ Neb. Rev. Stat. §§ 84-911 and 84-907.07(10).



IV. Background Materials

BACKGROUND MATERIALS

The “background materials” provided here are materials (in addition to the Section’s report) that were available to the Committee when it issued the findings and recommendations contained in Part III of this report. They include:

- the Section’s draft findings and recommendations (provided for context);
- the agency’s response to a draft of the Section’s report;
- the Section Director’s summary of the agencies’ response;
- Appendix A: Audit Methodology;
- Appendix B: Criteria and Model Practices; and
- Appendix C: Non-Approved Status Letter.

Performance Audit Section Draft Findings and Recommendations (November 2006)

In this section, we present our findings and recommendations based on the analyses discussed in Sections II through III.

The State Board of Education's (Board's) and State Department of Education's (Department's) Compliance with the Quality Education Accountability Act (Act)

Finding 1: The Board is in compliance with the Act's requirements that it: adopt clear and measurable academic content standards; administer statewide writing tests; and report aggregate results from the writing tests and tests of other subject areas. In addition, we found that the Department's State of the Schools Report Web site provides a large amount of data in a user-friendly format.

Recommendation: None.

Finding 2: The Department is not in compliance with the statutory requirement that it have its consultant select four model tests in each subject area.

Discussion: The Department agrees that it did not have its consultant select model tests. Instead of developing model tests, the Department and the consultant "collaboratively decided" to develop four "model practices" for each of the six criteria. The Department believes that the model practices meet the statutory requirement for model assessments, arguing that in the field of education the term "assessment" means one or more methods of evaluating performance and is not the same as the term "test."

Recommendation: The Legislative Performance Audit Committee (Committee) should recommend that the Department immediately begin the process of identifying four model tests as required by law. If the Department believes that developing the model tests is either impossible or undesirable, it should pursue the introduction of legislation to amend the law accordingly.

Finding 3: Under the Act, school districts are required to adopt one of the model tests, not choose between adopting a model test or adapting their own tests.

Finding 4: It is unclear under what circumstances the Legislature intended for districts to adapt their own tests.

Finding 5: The Department's failure to identify model tests as required by the Act has reduced the potential comparability of test results among the school districts.

Recommendations: The Committee should recommend that the Department immediately seek an Attorney General's opinion to resolve the conflict between that office's opinion #03001 and NAC Title 92, Ch. 10, 005.01D.

In addition, the Committee should consider introducing legislation to clarify whether school districts may be permitted to adapt their own test in a specific subject area instead of, or in addition to, adopting a model test in that area.

Finding 6: The Department does not make available a description of methodologies for making legitimate comparisons of student performance from the data reported.

Recommendation: The Committee should consider requesting, or if necessary introducing legislation to require, the Department to produce and distribute a guide that outlines legitimate methods for comparing performance results both between schools in one district and among districts.

The State Board of Education's (Board's) and State Department of Education's (Department's) Compliance with the No Child Left Behind Act (NCLB)

Finding 7: The Department believes it will meet the final two NCLB requirements to obtain approval from the United States Department of Education.

Recommendation: None.

LEGISLATIVE AUDITOR'S SUMMARY OF AGENCY RESPONSE

On 11 December 2006, the State Department of Education (Department) submitted a response to a draft of the Performance Audit Section's report prepared in conjunction with this audit. Neb. Rev. Stat. § 50-1210 requires the Legislative Auditor to "prepare a brief written summary of the response, including a description of any significant disagreements the agency has with the section's report or recommendations." The Legislative Auditor's summary of the response follows.

Of the seven findings included in the draft report, the Department posed strong disagreement with three, namely Findings 2, 5, and 6. These protestations mirrored those made during the 28 November 2006 exit conference.

Findings 2 & 5

These two findings reflect our conclusion that the Department has not met a statutory requirement to develop "four model assessments" for each of several academic subjects. The Commissioner of Education (Commissioner), who responded to the draft audit report, argues that (1) we have mischaracterized the statutory requirement by using the term "test" instead of "assessment" in the language of the finding; and (2) that the Department is complying with the requirement to develop the model assessments.

We agree to change the language in the draft report to address the Commissioner's first concern and have replaced the term "test" with "assessment" in the findings and elsewhere throughout the report. However, we continue to argue that the Legislature intended for "assessment" to mean "test" and to disagree that the Department's actions to develop "model practices" meet the statutory requirement for "model assessments." (This issue is discussed thoroughly in Section II of the draft report.) In response to the Commissioner's comments, we also added discussion to the report to explain more clearly the profound difference of opinion between the Section and the Department on this point.

Finding 6

Finding 6 notes that the Department has not made available a description of methodologies for making legitimate comparisons of student performance from the data reported. The Commissioner responds that: (1) statute does not require the Department to produce such a description; (2) the Department has published a brochure titled, "Know Your Schools in 30 Easy Steps"; and (3) comparing student achievement among schools is inappropriate.

In response to the Commissioner's first point, we agree that this is not a statutory requirement, and we did not characterize it as such in the report. Instead, we suggest that the Department can and should make it easier for policymakers and the public to understand what can and cannot legitimately be compared. Doing so would further the Department's existing efforts to provide "information for the public and policymakers on the performance of public schools" (Neb. Rev. Stat. sec. 79-760 (2) (c)) and to provide for "the comparison of Nebraska public schools to their peers and to school systems of other states and other countries" (Neb. Rev. Stat. sec. 79-760 (2) (d)).

In response to the Commissioner's second point, we acknowledge the Department's creation of the "Know Your Schools in 30 Easy Steps" brochure and the role it plays in helping citizens navigate the reported data. We believe, however, that a more thorough and involved publication, showing all comparisons that could be made from the reported data, is needed.

Finally, in response to the Commissioner's statement that some types of comparisons are inappropriate, we believe that this is exactly the kind of information that needs to be spelled out in an easily understandable guide. Doing so may not entirely prevent inappropriate comparisons, but it would assist those who are trying to make accurate and appropriate comparisons.

APPENDIX A: Audit Methodology

This audit was conducted in accordance with generally accepted government auditing standards for performance audits. The methodologies we used to answer each of the scope statement questions are described briefly at the beginning of each section. This appendix provides additional details.

Section II: The Board and Department's Compliance with the Quality Education Accountability Act

For our assessment of the State Board of Education (Board) and Department of Education's (Department) compliance with the Quality Education Accountability Act (Act), we reviewed the statutory provisions of the Act itself, relevant administrative regulations, and the complete legislative history of LB 812 (2000), the bill that created the basic provisions of the Act. We also interviewed the Commissioner of Education, the Department's Legal Counsel, and other Department staff.

School District Analysis

Map 2.1 was created from a 1 November 2006 listing of the districts that report local standards.

Department's Refusal to Provide Requested Documents

During our research on the Board and Department's compliance with the Act, the Department declined to provide us with legal opinions that we believe were relevant to the audit and should have been made available to us pursuant to § 50-1213(1) of the Legislative Performance Audit Act. In a subsequent request for the withheld materials, the Legislative Performance Audit Committee (Committee) also asked the Department to provide us with "copies of any formal or informal legal opinions and related documents, whether generated internally or obtained through outside counsel, pertaining to the audit topic." The Department acknowledged additional relevant internal legal documents but declined to provide them to the auditors. The Department's continued refusal to surrender the requested materials resulted in the Committee requesting, on October 31, 2006, that the Attorney General issue a formal opinion as to whether a state agency can legitimately assert attorney-client privilege to deny auditors access to information relating to an audited program.

At the time the draft report was written, the Attorney General had yet to rule on the Committee's request, and access to the requested materials remained blocked. However, the auditors believed that,

even in the absence of those documents, the evidence obtained relating to the Department's compliance with the Act was sufficient to prepare the report within generally accepted government auditing standards. Given the unpredictability in determining the length of time that the Committee's request could remain pending, we chose to proceed with the report.

Section III: Nebraska and the No Child Left Behind Act

To assess Nebraska's compliance with the No Child Left Behind Act (NCLB), we reviewed correspondence between the Department and the United States Department of Education (USDE), the federal agency responsible for overseeing state compliance with the NCLB, regarding various stages of the approval process. In addition, we examined USDE materials on NCLB, and interviewed Department staff regarding various compliance issues. For information on the current status of Nebraska's compliance with the NCLB, we spoke with a USDE representative.

APPENDIX B: Criteria and Model Practices

As noted in Section II of the report, this appendix provides additional details regarding the state Department of Education's (Department's) Six Quality Criteria and chosen model practices.

Six Quality Criteria

As required by the Quality Education Accountability Act,¹ the Department established criteria for rating assessments. The Department established Six Quality Criteria that assessments must demonstrate:

- 1) "The assessments reflect state or local standards.
- 2) Students have an opportunity to learn the content.
- 3) The assessments are free from bias or offensive language or situations.
- 4) The level is appropriate for students.
- 5) There is consistency in scoring.
- 6) Mastery levels are appropriate."²

Choosing Model Assessments

As noted in Section II, the Department (with the use of a consultant) considered public school districts' assessments for reading in 2000-2001, mathematics in 2001-2002, and revised reading to include speaking and listening in 2002-2003.³ Instead of developing model tests, the Department and the consultant "collaboratively decided" to develop four "model practices" for each of the six criteria.⁴ The term "model practice" is not mentioned in the Act. However, we reviewed the model practices for reading and would characterize them as guidelines for developing tests rather than tests.⁵ This appears consistent with the Department's view of the model practices, which it encourages districts to incorporate into their local tests.

The following pages are photocopies from the consultant's September 2001 report on reading assessments.⁶ We provide a list of school districts that were designated to be illustrative of one of the Six Quality Criteria. Additionally, we include the four model assessment practices for criterion #1.

Notes

¹ Neb. Rev. Stat. § 79-760(1).

² *STARS Update #17*, March 2005, pg. 45.

³ Impara, Buckendahl, and Plake, *Final Report - Evaluating Nebraska's District Assessment Portfolios and Recommending Model Assessments for Reading: 2000 - 2001*, Buros Institute for Assessment Consultation and Outreach - A Division of the Buros Center for Testing, University of Nebraska - Lincoln, November 2001. Buckendahl, Impara, and Plake, *Final Report - Evaluating Nebraska's District Assessment*

Portfolios and Recommending Model Assessments for Mathematics: 2001 – 2002, Buros Institute for Assessment Consultation and Outreach - A Division of the Oscar and Luella Buros Center for Testing, University of Nebraska – Lincoln, October 2002. Buckendahl, Impara, Plake, Ferdous, and Haack, *Final Report - Evaluating Nebraska's District Assessment Portfolios and Recommending Model Assessments for Reading, Speaking, & Listening: 2002 – 2003*, Buros Institute for Assessment Consultation and Outreach - A Division of the Oscar and Luella Buros Center for Testing University of Nebraska – Lincoln, November 2003.

⁴ Buckendahl, Impara, Plake, Ferdous, & Haack, *Final Report Evaluating Nebraska's District Assessment Portfolios and Recommending Assessments for Reading, Speaking, & Listening: 2002-2003*, November 2003, pg. 3.

⁵ Impara, Buckendahl, and Plake, *Report on Model Assessments for Reading 2000-2001*, September 2001, pp. 4-29.

⁶ Impara, Buckendahl, and Plake, *Report on Model Assessments for Reading 2000-2001*, September 2001.

APPENDIX C: Non-Approved Status Letter

As noted in Section III of the report, this appendix provides additional details regarding the United States Department of Education's (USDE's) notification of non-approval to the State Department of Education (Department).

The following is a photocopy of a letter dated 30 June 2006 from USDE Assistant Secretary Henry Johnson. In his letter, Mr. Johnson notifies the Department of USDE's decision to designate Nebraska's standards and assessment system *Non-Approved*. Mr. Johnson also attached a list of additional evidence needed to change Nebraska's status to *Approved*.

Performance Audit Committee Reports: 1994 to 2006

Performance Audit Reports

The Lincoln Regional Center's Sex Offender Services Program (August 2006)
The Public Employees Retirement Board and the Nebraska Public Employees Retirement Systems: An Examination of Compliance, PIONEER, and Management (August 2006)
The Nebraska Medicaid Program's Collection of Improper Payments (May 2005)
The Lincoln Regional Center's Billing Process (December 2004)
Nebraska Board of Parole (September 2003)
Nebraska Department of Environmental Quality: Administering the Livestock Waste Management Act (May 2003)
HHSS Personal-Services Contracts (January 2003)
Nebraska Habitat Fund (January 2002)
State Board of Agriculture (State Fair Board) (December 2001)
Nebraska Environmental Trust Board (October 2001)
Nebraska Department of Roads: Use of Consultants for Preconstruction Engineering (June 2001)
Department of Correctional Services, Inmate Welfare Fund (November 2000)
Bureau of Animal Industry: An Evaluation of the State Veterinarian's Office (March 2000)
Nebraska Ethanol Board (December 1999)
State Foster Care Review Board: Compliance with Federal Case-Review Requirements (January 1999)
Programs Designed to Increase The Number of Providers In Medically Underserved Areas of Nebraska (July 1998)
Nebraska Department of Agriculture (June 1997)
Board of Educational Lands and Funds (February 1997)
Public Service Commission: History of Structure, Workload and Budget (April 1996)
Public Employees Retirement Board and Nebraska Public Employees Retirement Systems: Review of Compliance-Control Procedures (March 1996)
Leaking Underground Storage Tank Program (December 1995)
School Weatherization Fund (September 1995)
The Training Academy of the Nebraska State Patrol and the Nebraska Law Enforcement Training Center (September 1995)
Nebraska Equal Opportunity Commission (January 1995)
The Interstate Agricultural Grain Marketing Commission (February 1994)

Preaudit Inquiries

Implementation of the Nebraska Information System (NIS) (November 2005)
The Lincoln Regional Center Psychiatrists' Work Commitments (September 2005)
The Nebraska State Patrol's Record of its Investigation of State Treasurer Lorelee Byrd (November 2004)
HHSS Public Assistance Subprograms' Collection of Overpayments (August 2004)
NDEQ Recycling Grant Programs (October 2003)
HHSS Reimbursement and Overpayment Collection (August 2003)
Grain Warehouse Licensing in Nebraska (May 2003)
HHSS Personal-Services Contracts (July 2002)
Livestock Waste Management Act (May 2002)
Nebraska Telecommunications Universal Service Fund (April 2001)
State Board of Health (November 2001)
State Board of Agriculture (State Fair Board) (August 2001)
Game and Parks Commission Cash Funds (August 1999)
Education Technology (January 1998)
Nebraska Research and Development Authority (April 1997)
Nebraska's Department of Agriculture (June 1996)
Nebraska's Department of Correctional Services Cornhusker State Industries Program (April 1996)
DAS Duplication of NU Financial Record-Keeping (February 1995)

