

# OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

**DIRECTOR**  
Dan L. Cartin

**DEPUTY DIRECTORS**  
Sharon L. Eubanks  
Julie A. Pelegrin

**REVISOR OF STATUTES**  
Jennifer G. Gilroy

**ASSISTANT DIRECTORS**  
Duane H. Gall  
Deborah F. Haskins

**PUBLICATIONS COORDINATOR**  
Kathy Zambrano



COLORADO STATE CAPITOL  
200 EAST COLFAX AVENUE SUITE 091  
DENVER, COLORADO 80203-1716

TEL: 303-866-2045 FAX: 303-866-4157  
EMAIL: OLLS.GA@STATE.CO.US

**MANAGING SENIOR ATTORNEYS**  
Jeremiah B. Barry Jason Gelender  
Christine B. Chase Robert S. Lackner  
Michael J. Dohr Thomas Morris  
Gregg W. Fraser

**SENIOR ATTORNEYS**  
Jennifer A. Berman Nicole H. Myers  
Brita Darling Jery Payne  
Edward A. DeCecco Jane M. Ritter  
Kristen J. Forrestal Richard Sweetman  
Kate Meyer Esther van Mourik

**SENIOR ATTORNEY FOR ANNOTATIONS**  
Michele D. Brown

**STAFF ATTORNEYS**  
Kip Kolkmeier Yelana Love

## MEMORANDUM

**TO:** Committee on Legal Services

**FROM:** Thomas Morris and Bethanie Pack, Office of Legislative Legal Services

**DATE:** March 24, 2017

**SUBJECT:** Rules of the State Board of Education, Department of Education, concerning the operation, maintenance, and inspection of school transportation vehicles, 1 CCR 301-26 (LLS Docket No. 160435; SOS Tracking No. 2016-00397).<sup>1</sup>

### Summary of Problems Identified and Recommendations

Sections 24-4-103 (12.5)(a)(II) and (12.5)(a)(IV), C.R.S., require that, to incorporate by reference all or any part of a code, a rule must identify the code by citation and date, identify the address where the code is available for public inspection and where copies of the code are available, and state that the rule does not include any later amendments to the code. But the state board of education did not include these requirements when referencing the Code of Federal Regulations in Rules 4204-R-2.02(d), 4204-R-5.01(a), 4204-R-5.02(c), 4204-R-6.02(b), 4204-R-11.12, and 4204-R-16.02. **Because these rules conflict with the statute, we recommend that Rules 4204-R-2.02(d), 4204-R-5.01(a), 4204-R-5.02(c), 4204-R-6.02(b), 4204-R-11.12, and 4204-R-16.02 of the rules of the**

---

<sup>1</sup> Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2017, unless the General Assembly acts by bill to postpone such expiration.

**state board of education concerning the operation, maintenance, and inspection of school transportation vehicles not be extended.**

Section 24-4-103 (4)(b)(III), C.R.S., requires that a rule be clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation. But Rule 4204-R-15.03(e) requires that chemical containers be kept to “a reasonable size”, a vague and subjective requirement that would be difficult for the regulated party to understand. **Because this rule conflicts with the statute, we recommend that Rule 4204-R-15.03(e) of the rules of the state board of education concerning the operation, maintenance, and inspection of school transportation vehicles not be extended.**

Section 24-4-102 (15), C.R.S., defines a rule as an agency statement declaring law or policy or setting forth the procedure or practice requirements of an agency, and section 24-4-103 (1), C.R.S., states that an agency’s rules are binding. But Rule 4204-R-18.01 requires compliance with a school bus operator guide that was not adopted as part of the rules, circumventing the “State Administrative Procedure Act”<sup>2</sup> (APA) process for notice and hearing when adopting rules. **Because this rule requires compliance with a guide that should have been promulgated in accordance with the APA, we recommend that Rule 4204-R-18.01 of the rules of the state board of education concerning the operation, maintenance, and inspection of school transportation vehicles not be extended.**

Section 22-51-108, C.R.S., requires the state board of education to promulgate rules regarding the length of bus routes. But the state board of education did not address the length of bus routes in its related rules, particularly in Rule 4204-R-17.00. **Because the state board of education failed to promulgate rules addressing the length of bus routes, we recommend that Rule 4204-R-17.00, concerning route planning – student loading and discharge, including Rules 4204-R-17.01 to 17.14, of the rules of the state board of education concerning the operation, maintenance, and inspection of school transportation vehicles not be extended.**

---

<sup>2</sup> Article 4 of title 24, C.R.S.

## Analysis

### 1. Rules that improperly incorporate by reference the Code of Federal Regulations conflict with the statute.

To incorporate by reference all or any part of a code that has been adopted by an agency of the United States, a rule must comply with the incorporation by reference statute, particularly sections 24-4-103 (12.5)(a)(II) and (12.5)(a)(IV), C.R.S., which state:

**24-4-103. Rule-making - procedure - definitions – repeal.** (12.5) (a) A rule may incorporate by reference all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association, if:

(II) The reference fully identifies the incorporated code, standard, guideline, or rule by citation and date, identifies the address of the agency where the code, standard, guideline, or rule is available for public inspection, and states that the rule does not include any later amendments or editions of the code, standard, guideline, or rule;

(IV) The rule states where copies of the code, standard, guideline, or rule are available for a reasonable charge from the agency adopting the rule and where copies are available from the agency of the United States, this state, another state, or the organization or association originally issuing the code, standard, guideline, or rule; and

Rules 4204-R-2.02(d), 4204-R-5.01(a), 4204-R-5.02(c), 4204-R-6.02(b), 4204-R-11.12, and 4204-R-16.02 (see **Addendum A**) contain references to the Code of Federal Regulations, but these rules do not include the dates on which those sections of the code were adopted, where the code is available for public inspection, where copies of the code are available for a reasonable charge, and a statement that the rule does not include any later amendments or editions of the code. Because these rules do not comply with the incorporation by reference statute, they should not be extended.

### 2. Rule 4204-R-15.03(e) conflicts with the statute because it is vague and subjective, making it difficult for a regulated party to understand.

Section 24-4-103 (4)(b)(III), C.R.S., requires that a rule be clearly and simply stated for the purpose of understanding compliance with the regulation:

**24-4-103. Rule-making - procedure - definitions - repeal.** (4) (b) All proposed rules shall be reviewed by the agency. No rule shall be adopted unless:

(III) To the extent practicable, the regulation is clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation;

However, Rule 4204-R-15.03(e) fails to meet this statutory requirement because it is not clearly and simply stated:

**4204-R-15.00 Transportation of Miscellaneous Items**

15.03 All chemicals and cleaning supplies carried on a school transportation vehicle must meet the following precautions:

15.03(e) Containers and quantities of products are kept to a reasonable size.

The requirement that containers be kept to a “reasonable size” is vague and unclear, making it difficult for a regulated party to comply with the rule. Because this rule is not clearly and simply stated, it conflicts with the statute and should not be extended.

**3. Rule 4204-R-18.01 circumvents the APA process for adoption of rules by requiring compliance with a guide that was not adopted as part of the rules.**

If an executive branch agency, such as the State Board of Education, is authorized or required to promulgate rules to implement a statute, the agency must comply with the requirements of the APA. An agency may, however, think that a statement by the agency is merely a guideline, a policy, or a procedure and therefore is not subject to the APA.

According to sections 24-4-102 (15) and 24-4-103 (1), C.R.S., rules are binding statements of law or policy that set forth procedures and practice requirements for a regulated party:

**24-4-102. Definitions.** As used in this article, unless the context otherwise requires:

(15) "Rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. "Rule" includes "regulation".

**24-4-103. Rule-making - procedure - definitions - repeal.** (1) When any agency is required or permitted by law to make rules, in order to establish procedures and to accord interested persons an opportunity to participate therein, the provisions of this section shall be applicable. Except when notice or hearing is otherwise required by law, this section does not apply to interpretative rules or general statements of policy, which are not meant to be binding as rules, or rules of agency organization.

Thus, if an agency is authorized or required to adopt rules, it must follow the APA. The only situation in which the agency is not required to follow the APA is if the statements the agency is adopting do not fit within the definition of a rule. Based on the language in section 24-4-103 (1), C.R.S., if the statements of an agency are not simply interpretative or general statements of policy or if they are meant to be binding as rules, then the agency must promulgate the statements as rules in compliance with the APA procedures.

However, Rule 4204-R-18.01 circumvents the APA process by requiring compliance with an operator guide that was not adopted as part of the rule:

**4204-R-18.00 Emergency Evacuation Drills**

18.01 **Emergency evacuation drills shall be conducted** with students by all school transportation vehicle operators and school transportation paraprofessionals at least twice during each school year, **following the procedures in the Colorado Department of Education School Bus/Multifunction Bus/Motor Coach Bus Operator Guide.** [Emphasis added]

18.01(a) One drill shall be conducted in the fall and the second drill conducted in the spring.

18.01(b) Substitute and Multifunction operators of 16 or greater capacity (counting the driver) vehicles shall be trained how to conduct the emergency evacuation drills.

Because the rule states that emergency evacuation drills shall be conducted following the procedures in the guide, the guide becomes binding; noncompliance with the guide is a violation of the rule. Therefore, the guide should have been adopted as part of the rule. By not complying with the APA process, the rule circumvents the APA protections of notice and a public hearing. For this reason, 4204-R-Rule 18.01 conflicts with the statute by circumventing the APA process and should therefore not be extended.

**4. The board failed to promulgate rules regarding the length of bus routes, as required by statute.**

Section 22-51-108, C.R.S., grants rule-making authority to the state board of education for promulgating rules regarding student transportation. The statute then lists the standards of safety the rules must address, one of them being the length of bus routes.

**22-51-108. Rules.** The state board of education shall promulgate rules for the administration of this article. Such rules shall include reasonable and adequate standards of safety in the maintenance and operation of buses, the maintenance of records by school districts, the state charter school institute,

and facility schools, **the length of bus routes**, the number of children to be transported in the various types of buses, and such other rules pertaining to pupil transportation as will promote the welfare of the students and afford reasonable protection to the public. [Emphasis added]

The state board of education addresses matters closely related to the length of bus routes under Rule 4204-R-17.00 (see **Addendum B**), such as route planning and the location of student stops, but it fails to promulgate rules that specifically address the length of bus routes. Because the state board of education did not promulgate rules that include standards of safety in the length of bus routes as required by statute, all of Rule 4204-R-17.00, including 4204-R-17.01 to 17.14, should not be extended.

## **Recommendations**

We therefore recommend that Rules 4204-R-2.02(d), 4204-R-5.01(a), 4204-R-5.02(c), 4204-R-6.02(b), 4204-R-11.12, 4204-R-15.03(e), 4204-R-16.02, 4204-R-17.00, including 4204-R-17.01 to 17.14, and 4204-R-18.01 of the rules of the state board of education concerning the operation, maintenance, and inspection of school transportation vehicles not be extended because they conflict with the statute or fail to address an issue that the statute requires the rules to address.

# **Addendum A**

## **COLORADO RULES FOR THE OPERATION, MAINTENANCE AND INSPECTION OF SCHOOL TRANSPORTATION VEHICLES**

### **1 CCR 301-26**

**Rules 4204-R-2.02(d), 4204-R-5.01(a), 4204-R-5.02(c), 4204-R-6.02(b), 4204-R-11.12, and 4204-R-16.02**

#### **4204-R-2.00 Applicability of Rules**

2.02 These rules are not intended to include:

2.02(d) Student transportation under public transportation programs subject to the Code of Federal Regulations 49 CFR 390 to 399.

#### **4204-R-5.00 School Transportation Vehicle Operator Requirements**

5.01 School transportation vehicle route operators (transporting students to and from school or from school to school) driving a School Bus with the capacity of 16 or greater passengers (counting the driver) and school transportation vehicle operators, other than route operators, driving vehicles with the capacity of 16 or greater passengers (counting the driver), including a School Bus, Multifunction Bus and Motor Coach Bus, shall meet or exceed the following requirements:

5.01(a) The operator shall possess a valid commercial driver's license (CDL) with the proper class and endorsements for size and type of vehicle(s) to be driven and the associated Medical Examination Report pursuant to 49 CFR 391.43.

5.02 School transportation vehicle route operators (transporting students to and from school or from school to school) driving vehicles with the capacity of 15 or fewer passengers (counting the driver), including Type A Multifunction Bus and Small Vehicle, shall meet or exceed the following requirements:

5.02(c) The operator shall have a current physical examination (not to exceed two years) consistent with the requirements of 49 CFR 391.43.

#### **4204-R-6.00 School Transportation Annual Inspector Requirements**

6.02 School transportation annual inspectors shall meet or exceed the following requirements:

## **Addendum A**

- 6.02(b) The school transportation annual inspector shall provide a Brake Inspector Qualification Certificate meeting the requirements of 49 CFR 396.25 to the school district or service provider.

### **4204-R-11.00 Maintenance and Repair**

- 11.12 If brake adjustment or repair is needed, the work shall be completed by or supervised by a DOT or equivalent qualified brake inspector meeting the requirements of 49 CFR 396.25.

### **4204-R-16.00 Maximum Driving Time for School Transportation Vehicle Operators**

- 16.02 The school district or service provider may comply with part 395 of the Federal Motor Carrier Safety Regulations (FMCSR) in place of this section.

## **Addendum B**

### **COLORADO RULES FOR THE OPERATION, MAINTENANCE AND INSPECTION OF SCHOOL TRANSPORTATION VEHICLES**

#### **1 CCR 301-26**

##### **4204-R-17.00 Route Planning – Student Loading and Discharge**

- 17.01 School transportation small vehicles, Type A Multifunction Buses with 15 or fewer passenger capacity (counting the driver) and School Buses (Types A, B, C, and D) may be used to transport students to and from school. Multifunction Buses Type B, C and D and Motor Coach Buses shall not be used to transport students to and from school.
- 17.02 The location of student stops shall consider factors including:
- 17.02(a) Ages of the students.
  - 17.02(b) Visibility.
  - 17.02(c) Lateral clearance.
  - 17.02(d) Student access.
  - 17.02(e) Control of other motorists.
    - 17.02(e)(1) Student stops for Type A Multifunction Buses with 15 or fewer passenger capacity (counting the driver) and school transportation small vehicles should be located off of the roadway whenever possible.
- 17.03 School transportation vehicle operators shall stop at least 10 feet away from students at each designated stop. The school transportation vehicle operator shall apply the parking brake and shift the vehicle into neutral or park prior to opening the service door of a bus or passenger door(s) of a small vehicle.
- 17.04 The school transportation vehicle operator shall stop as far to the right of the roadway, highway or private road as possible before discharging or loading passengers, allowing sufficient area to the right and front of the vehicle but close enough to the right to prevent traffic from passing on the right so students may clear the vehicle safely while in sight of the operator.
- 17.04(a) Exception: The school transportation vehicle operator may block the lane of traffic when passengers being received or discharged are required to cross the roadway.

## **Addendum B**

- 17.05 Student stops shall not be located on the side of any major thoroughfare whenever access to the destination of the passenger is possible by the use of a road or street which is adjacent to the major thoroughfare.
- 17.06 If students are required to cross a roadway, highway or private road on which a student stop is being performed, they are prohibited from crossing a roadway, highway or private road constructed or designed to permit three or more separate lanes of vehicular traffic in either direction or with a median separating multiple lanes of traffic. This does not include crossing the roadway, highway or private road with the assistance of a traffic controls signal or with the assistance of a crossing guard.
- 17.07 Four-way hazard lamps shall be used on private property such as parking lots.
- 17.08 Alternating flashing red warning signal lamps shall not be activated within 50 feet of an intersection if the intersection is controlled by a traffic control signal.
- 17.09 Routes shall be planned as to:
- 17.09(a) Eliminate, when practical, railroad crossings.
  - 17.09(b) Have stops be a minimum of 200 feet apart since alternating flashing amber warning signal lamps must be activated a minimum of 200 feet in advance of the stop.
    - 17.09(b)(1) Exception: Student stops located in areas where wildlife may create a high risk of threat to students' safety while they are waiting and/or walking to a student stop, may designate student stops less than 200 feet apart upon detailed written approval by the school district board of education and/or their designee. A copy of the written approval shall be kept in the school transportation office and route operators shall be given written notice of the exception and have it indicated on route sheets.
- 17.10 Pursuant to Section 42-4-1903(2), C.R.S., school transportation vehicle operators are not required to actuate the alternating flashing red warning signal lamps on a school bus when the student stop is at a location where the local traffic regulatory authority has by prior written designation declared such actuation unnecessary and when discharging or loading passengers who require the assistance of a lift device and no passenger is required to cross the roadway. Further, Type A Multifunction Buses with 15 or fewer passenger capacity (counting the driver) and school transportation small vehicles do not have the functionality to control traffic. In these instances, the school transportation

## **Addendum B**

- vehicle operator shall stop as far to the right off the roadway as possible to reduce obstruction to traffic, activate the four-way hazard warning lamps a minimum of 200 feet prior to the student stop, continue to display the four-way hazard warning lamps until the process of discharging or loading passengers has been completed, and deactivate the four-way hazard lamps before resuming motion. Students are prohibited from crossing any lanes of traffic to access the student stop or after disembarking.
- 17.11 School transportation vehicle operators shall not relocate a student stop without approval of the school district or service provider.
- 17.12 School transportation vehicle operators of School Buses, Multifunction Buses and Motor Coach Buses, whether transporting students or not, shall apply the following procedures during the process of approaching, stopping and crossing railroad tracks:
- 17.12(a) Activate the four-way hazard lamps not less than 200 feet from the railroad crossing to alert other motorists of the pending stop for the crossing.
  - 17.12(b) Stop the bus within 50 feet but not less than 15 feet from the nearest rail.
  - 17.12(c) When stopped, the bus should be as far to the right of the roadway as possible and should not form two lanes of traffic unless the highway is marked for four or more lanes of traffic.
  - 17.12(d) Use a prearranged signal to alert students to the need for quiet aboard the bus when approaching railroad tracks. Turn off all noise making equipment (fans, heater, radio, etc.)
- 17.13 After quietness aboard the stopped bus has been achieved, bus operators shall open the service door and operator window. The bus operator shall listen and look in both directions along the track(s) for any approaching train(s) and for signals indicating the approach of a train.
- 17.13(a) If the tracks are clear, the bus operator shall close the service door and may then proceed in a gear low enough to permit crossing the tracks without having to manually shift gears. The bus operator shall cancel the four-way hazard lamps after the bus has cleared the tracks.
  - 17.13(b) When two or more tracks are to be crossed, the bus operator shall not stop a second time unless the bus is completely clear of the first

## **Addendum B**

crossing and has at least 15 feet clearance in front and at least 15 feet clearance to the rear.

- 17.13(c) Before crossing the tracks, the bus operator shall verify that there is enough space after the tracks for the bus plus 15 feet if it is necessary to stop after crossing the tracks.
- 17.14 School transportation vehicle operators of School Buses, Multifunction Buses and Motor Coach Buses are not required to stop at crossings only controlled by a red, amber, green traffic control signal when it is in the green position or when the crossing is controlled by a police officer or human flag person, or when the crossing is marked with an official “exempt” sign placed on the railroad crossing light post or cross bucks post.