SCHOOLS: Telecommunications; Online Curriculum. Iowa Code § 256.7 (2012). Dillon's Rule would not prohibit the use of telecommunications for private companies to deliver educational courses to studnts open-enrolled from other school districts as long as all statutory requirements are met. (Miller and Pottorff to Courtney, State Senator, 3-12-12) #12-3-1

March 12, 2012

The Honorable Thomas G. Courtney
State Senator
State Capitol
L-O-C-A-L

Dear Senator Courtney:

Our office is in receipt of your letter dated February 10, 2012, in which you asked that we issue an opinion on the legality of a program under which two Iowa school districts have contracted with two different private, for-profit, out-of-state companies to provide online classes. You have informed us that students are open enrolled in the school districts for these online programs operated through the Cumberland, Anita, Massena (CAM) community school district and the Clayton Ridge community school district in Guttenberg. Further, you state that the school districts will receive full state funding of $6,000 per pupil rather than $1,800 per pupil through the home school assistance program (HSAP). You question the legality of the existing contracts with these companies and ask that we opine on the authority of the school districts to have moved forward with these programs without first obtaining the express authorization of the General Assembly. We are limiting our response to your question concerning the authority of the school districts to provide an online learning curriculum under existing statutes and we express no opinion on any legislation being proposed by the Department or by legislators.

In assessing the authority of school districts to enter into contracts for these online programs we apply Dillon's Rule. We have observed that "public school districts, as creatures of statute, are not vested with home rule authority." Both our opinions and opinions of the Iowa courts have consistently held that schools are subject to Dillon's Rule, i.e., "the only powers which may be exercised by a school board are those expressly conferred upon them by statute or necessarily implied from those express powers." Op. Atty. Gen. #00-2-4(L). *See Sioux City Comm. Sch. Dist. v. Bd. of Pub. Instruction*, 402 N.W.2d 739, 741 (Iowa 1987); *Barnett v. Durant Comm. Sch. Dist.*, 249 N.W.2d 626, 627 (Iowa 1978); *Silver Lake Consol. Sch. Dist. v. Parker*, 238 Iowa 984, 990, 29 N.W.2d

214, 217-18 (1947). With this principle in mind, we look to specific statutes for that authority.

Statutory Framework

The Iowa General Assembly in 1987 did not directly grant authority to school districts to use telecommunications to instruct students. Rather, it granted very broad authority to the State Board of Education to give this authority to Iowa's school districts. Two sections of the Iowa Code are the source of this authority:

> [T]he state board shall:
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> 7. Adopt rules under chapter 17A for the use of telecommunications as an instructional tool for students enrolled in kindergarten through grade twelve and served by local school districts, accredited or approved nonpublic schools, area education agencies, community colleges, institutions of higher education under the state board of regents, and independent colleges and universities in elementary and secondary school classes and courses. The rules shall include but need not be limited to rules relating to programs, educational policy, instructional practices, staff development, use of pilot projects, curriculum monitoring, and the accessibility of licensed teachers.
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> > a. When curriculum is provided by means of telecommunications, it shall be taught by an appropriately licensed teacher. The teacher shall either be present in the classroom, or be present at the location at which the curriculum delivered by means of telecommunications originates.
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> > b. The rules shall provide that when the curriculum is taught by an appropriately licensed teacher at the location at which the telecommunications originates, the curriculum received at a remote site shall be under the supervision of a licensed teacher. The licensed teacher at the originating site may provide supervision of students at a remote site or the school district in which the remote site is located may provide for

> supervision at the remote site if the school district deems it necessary or if requested to do so by the licensed teacher at the originating site. For the purposes of this subsection, "supervision" means that the curriculum is monitored by a licensed teacher and the teacher is accessible to the students receiving the curriculum by means of telecommunications.
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> c. The state board shall establish an advisory committee to make recommendations for rules required under this subsection on the use of telecommunications as an instructional tool. The committee shall be composed of representatives from community colleges, area education agencies, accredited or approved nonpublic schools, and local school districts from various enrollment categories. The representatives shall include board members, school administrators, teachers, parents, students, and associations interested in education.
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> d. For the purpose of the rules adopted by the state board, telecommunications means narrowcast communications through systems that are directed toward a narrowly defined audience and includes interactive live communications.
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> 8. Rules adopted under this section shall provide that telecommunications shall not be used by school districts as the exclusive means to provide any course which is required by the minimum educational standards for accreditation.

Iowa Code § 256.7(7), (8) (2012). The grant of authority under subsection 7 is very broad. It includes, without limitation, the "use of *telecommunications* as an *instructional tool* for students enrolled in *kindergarten through grade twelve*." Iowa Code § 256.7(7) (emphasis added). The rules shall include rules relating to "programs, educational policy, institutional practices, staff development, use of pilot projects, curriculum monitoring, and the accessibility of licensed teachers." *Id.*

The current rules are found in chapter 15 of the Department's rules. *See* 281 Iowa Admin. Code ch. 15. There are six rules on the use of telecommunications. The rules, like the statutory language, are very broad–

> Telecommunications may be employed as a means to *deliver any course*, including a course required for accreditation by the department, provided it is not the exclusive means of instructional delivery.

281 Iowa Admin. Code 15.4 (emphasis added). They require delivery through a live interactive system that minimally allows one-way video and two-way audio communications. 281 Iowa Admin. Code 15.3. Definitions of "exclusive" and "nonexclusive" instruction turn on whether the instruction is with or without "any other form of instructional delivery." 281 Iowa Admin. Code 15.2. A teacher "appropriately licensed and endorsed for the educational level and content area being taught shall be present and responsible for the instructional program at the receiving site" if the teacher presenting the material through telecommunications is not "appropriately licensed and endorsed for the educational level and content area." Teachers are required to receive training regarding effective use of telecommunications prior to being assigned to deliver instruction through telecommunications. 281 Iowa Admin. Code 15.5. School boards utilizing telecommunications are required to adopt policies addressing the delivery of instruction, course descriptions, and information regarding the teachers involved in the instructional use of telecommunications at both the originating and receiving sites. 281 Iowa Admin. Code 15.6.

It could be argued that internet learning was not envisioned when the legislation was passed in 1987 and that privatization of public elementary and secondary education is such a significant step that new legislation is necessary. While these are significant arguments, in our opinion they are outweighed by the clear and broad language of the authorization in the statute.

Certain restrictions on the use of telecommunications, but not the scope, are imposed by statute: first, the curriculum must be taught by an appropriately licensed teacher; and, second, the curriculum received at the remote site must be under the supervision of a licensed teacher, although the supervision at the remote site may be provided by the licensed teacher at the originating site. The term "supervision" is specifically defined to mean "the curriculum is monitored by a licensed teacher and the teacher is accessible to the students receiving the curriculum by means of telecommunications." Functionally, this definition of "supervision" would require an interactive program that allows direct communication between the teacher and the online students.

In addition to these requirements, subsection 8 prohibits school districts from using telecommunication "as the exclusive means to provide any course which is required by the minimum educational standards for accreditation." To construe "exclusive means" for purposes of this prohibition, we give the term its "usual and ordinary meaning" and "consider the object to be accomplished by the statute as well as the evils to be remedied" in order to arrive at a "reasonable. . . construction which will best effect its purpose rather than one which will defeat it . . . considering all parts of the statute together without giving undue importance to any single or isolated portion." *Naumann v. Iowa Prop. Assessment Appeal Bd.*, 791 N.W.2d 258, 262 (Iowa 2010). When the term is not specifically defined by the Legislature, we may look to the dictionary to define a term. *See IBP, Inc. v. Harker*, 633 N.W.2d 322, 326 (Iowa 2001). The usual and ordinary meaning of the term "exclusive" is "only." Webster's New World Dictionary 489 (2d ed. 1976). Accordingly, school districts are prohibited from using telecommunication as the *only* means of providing any course required for accreditation.

Determining the meaning of the term "exclusive" does not resolve the full meaning of subsection 8. Alternate constructions of subsection 8 are possible. The language could mean that a school district could offer a required course through telecommunications as long as the same course is also provided through a different form of instructional delivery. Under this construction, a school district offering a required course solely through telecommunications would be required to offer a second section of the same course in a more traditional classroom setting. Alternatively, the language could mean that school districts may use telecommunications as an instructional tool in the delivery of a required course as long as other forms of instructional delivery are used when providing that course to students. Under this alternative construction, a school district could satisfy the statute by employing a mixture of delivery methods when offering required courses, such as providing some parts of the course curriculum through telecommunications and other parts in a more traditional classroom setting.

Either construction is plausible from the words used in subsection 8. However, it is unlikely that the General Assembly intended this language to require school districts to offer the same course through wholly different delivery methods. A benefit of telecommunications for school districts is the ability to tap into the expertise of a qualified teacher from a different district, area education agency, or college. The use of telecommunications expands the range of course offerings and allows the pooling of resources, particularly for rural school districts The first construction would severely restrict the use of telecommunication as an instructional tool.

The second construction of subsection 8 also is consistent with the construction given to this language by the Department. The rules state that "[t]elecommunications may be employed as a means to deliver any course, including a course required for accreditation by the department, provided it is not the exclusive means of instructional delivery." 281 Iowa Admin. Code 15.4. The rules define "exclusive instruction" and "nonexclusive instruction." 281 Iowa Admin. Code 15.2. "'Exclusive instruction' means without the use of any other form of instructional delivery"; "'nonexclusive instruction' provides more than one means for interaction between teacher and student." *Id.* These defined terms are not precisely used in the rest of chapter 15. When combined with rule 15.4, the rules could be construed to mean that a course delivered through telecommunications retains its eligibility as a course required for accreditation as long as students have "more than one means" of interacting with teachers. When the rules were adopted, the primary form of telecommunications delivery was likely an ICN room or the equivalent, not the widespread Internet delivery available and more common today.

Written materials discussing "Online Schools" recently distributed by the Department are more specific and explain that subsection 8 "does not mean that there may be one section of physics (e.g.) offered traditionally and one section offered exclusively online. The section offered online must have components of all courses offered taught [sic] 'on the ground.'" According to the Department, this explanation means that components taught in the classroom must be included for the online class. For example, if a physics class includes work in the laboratory facility of a school, the online class must include a component of work in a laboratory as well. Under this interpretation, the online class cannot be the "exclusive means" to provide this course "which is required by the minimum educational standards for accreditation" insofar as additional components would be necessary to make the online class equivalent to the classroom course.

Ordinarily, the Department's interpretation of this language in subsection 8 would be entitled to deference.[1] A court will defer to the agency when it is "firmly convinced" that "the legislature actually intended . . . to delegate to the agency interpretive power with the binding force of law over the elaboration" of the terms. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 14 (Iowa 2010). "This search for legislative intent focuses on the specific statutory provision or language at issue . . . . Indications that an

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[1] The rules were promulgated by the State Board of Education, but the Director of the Department is delegated authority to "interpret the school laws and rules related to the school laws." Iowa Code § 256.9(16).

agency has interpretive authority include *rule-making authority*, decision-making or enforcement authority that requires the agency to interpret the statutory language, and the agency's expertise on the subject or on the term to be interpreted." *The Sherwin-Williams Co. v. Iowa Dep't. of Revenue*, 789 N.W.2d 417, 423 (Iowa 2010) (citation omitted and emphasis added). Given the broad delegation of rule-making authority under Iowa Code section 256.7(7) to address telecommunications as an instructional tool, including programs, educational policy, instructional practices, staff development, use of pilot projects, and curriculum monitoring combined with the Department's interpretive authority, we believe the Department has been vested with interpretive power.

However, the Department's current interpretation of subsection 8 has not been promulgated into rule form. A "rule" is defined to include "each agency statement of general applicability that implements, interprets, or prescribes law or policy. . . ." Iowa Code § 17A.2(11) (2011). Unless this interpretation is promulgated as a rule, courts very well may not defer to Department's interpretation of subsection 8. There are public policy consequences as well to the failure to promulgate an interpretation in rule form. Because the agency has not gone through rulemaking, the public did not have the opportunity to comment, Iowa Code § 17A.4 (1)(b), legislators were not provided the opportunity to file objections or impose delays to implementation of this interpretation, Iowa Code §§ 17A.4 (6), 17A.8(7), (9), and the Governor did not have an opportunity to review proposed rules, to file an objection, or to rescind the rules, Iowa Code §§ 17A.4(6), 17A.4(8). All of this input would be important in the articulation of a policy sufficiently specific to describe how teaching by telecommunications would actually function.

We regard the additional components that are required for online classes to be a substantial factor in delivering an educational curriculum online. The non-exclusive equivalent requirement requires a robust group of learning activities. The equivalent requirement should not be trivialized. It should be noted that for open enrollment students the local school would not be available to assist in activities that would help to meet this requirement. Failure to meet this requirement may require that all funding would be lost. Rules should address these components specifically so that requirements for compliance are fully-vetted in the rule-making process and the obligations of private companies who provide education to Iowa students online are clear.

The current rules were promulgated before technology had developed to its present level. The authorizing statute was enacted in 1987. 1987 Iowa Acts, 72nd G.A., ch. 207, § 1. From the bill explanation that courts often look to in determining legislative intent,

Tallman v. W.R. Grace & Co.-Conn., 558 N.W.2d 208, 210 (Iowa 1997), the original legislation related to the "authority of the state board of education and the department of education over the educational use of telecommunications systems and services" and directed the agency to "study options for the coordination of school calendars and schedules in order to facilitate the use of telecommunications systems and services." Senate File 333, 72nd G.A., 1st Sess. (Iowa 1987). The bill was enacted at a time when computers were far less pervasive in our society. Statutory language addressing supervision of education through telecommunications suggests that the legislation originally envisioned courses taught by telecommunication received in a classroom setting. *See* S.F. 333, § 1 ("[F]or curriculum which is not required by the minimum educational standards, the rules shall not require that a certified teacher must be present in the classroom when the curriculum is being received by means of telecommunications.").

In light of the General Assembly's broad delegation of authority to the Board to authorize telecommunications learning, we cannot conclude that Dillon's Rule would prohibit use of telecommunications to deliver educational courses to students open-enrolled from other school districts in this manner as long as all statutory requirements are met, including providing a mixture of instructional methods when necessary under the curriculum appropriate to grade level and topic. It is evident that the General Assembly did intend to authorize telecommunications as an "instructional tool" subject to clear requirements for the use of licensed teachers, adequate supervision and interactive communications between teachers and students. Although the statutory authorization was very broad, the General Assembly also clearly intended that rules would shape the implementation of the statute and address the serious policy issues that relate to teaching by telecommunications, including "programs, educational policy, instructional practices, staff development, use of pilot projects, curriculum monitoring, and the accessibility of licensed teachers." To develop these rules, the General Assembly authorized a specialized advisory committee to "make recommendations for rules . . . on the use of telecommunications as an instructional tool." The committee was to be comprised of "representatives from community colleges, area education agencies, accredited or approved nonpublic schools, and local school districts from various enrollment categories" to include "board members, school administrators, teachers, parents, students, and associations interested in education." Iowa Code § 256.7(7)(c). In view of the fact that the current rules have not been updated since 1990, comprise slightly more than one page, and do not totally reflect the current interpretation of the Department, it would be wise to reassemble a committee to address teaching through telecommunications in more specific rules that can be vetted by the public, the General Assembly and the Governor through the rule-making process.

Education Delivered through Private Companies

The novelty of school districts relying on contracts with private, for-profit companies to deliver education wholly through telecommunications presents some challenges. A report on online learning has been issued by the U.S. Department of Education. *See* U.S. Department of Education Office of Planning, Evaluation, and Policy Development Policy and Program Studies Service, *Evaluation of Evidence-Based Practices in Online Learning: A Meta-Analysis and Review of Online Learning Studies*, September, 2010.[2] Online curricula in other states have been the subject of public criticism. *See* Stephanie Saul, *Profits and Questions at Online Charter Schools*, N.Y. Times, December 12, 2011. But we have not located any statutory authority in Iowa that prohibits these contractual arrangements with private companies. *See generally* Iowa Code § 256.1(2) ("The department shall stimulate and encourage educational radio and television and other educational communications services as necessary to aid in accomplishing the educational objectives of the state.").

We have in the past addressed limitations on the use of private companies to carry out a governmental function. In 1992 we concluded that the Department of Inspections and Appeals which is charged with statutory responsibility for conducting inspections of food service establishments could contract with private entities to carry out the inspections pursuant to sufficiently narrow standards and guidelines, but could not delegate the agency's authority to utilize administrative warrants. 1992 Op.Atty.Gen.104; 1992 WL 470340. We do not perceive an impermissible delegation of a governmental function where the use of telecommunications as an instructional tool is authorized by statute, the instruction is carried out by licensed teachers, the courses meet the standards for accreditation in the school districts, and the program is subject to audit by the Department. There remain serious policy issues in implementing these programs, including the relationship between the board of directors in these school districts and the teachers employed by the private companies whom the districts do not employ or supervise as well as the redirection of state funds from the public school system to private companies. These policy issues are beyond the scope of our opinion.[3]

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[2] The full text of this report can be accessed online at the Department's website: http://www2.ed.gov/rschstat/eval/tech/evidence-based-practices/finalreport.pdf

[3]By finding that there is statutory authority for the provision of internet learning that is the subject of this opinion, we do not in any way express public policy support for

Although you state in your opinion request that the two school districts that have contracted with private, for profit, companies to provide online instruction will receive "full per pupil state funding for every student enrolled" at the rate of $6,000 per pupil, it is our understanding that the funding rate has not been established. The rate will turn on an audit performed by the Department after the telecommunication program is underway this fall. The Department may conclude that the appropriate rate of funding is the HSAP rate (home schooling rate) which is substantially lower at approximately $1,800 per pupil.[4]

All school districts are subject to periodic audits by the Department. An audit generally consists of a comprehensive site visit at the district. It includes, but is not limited to, confirming compliance with requirements pertaining to professional staff licensure, accreditation, school year length and instructional contact hours, special programs, student records, accessibility and other state and federal law provisions. *See* 281 Iowa Admin. Code ch. 12. The Department anticipates that online programs at the CAM and Clayton Ridge will be audited during the fall of 2012.

Assuming that all other requirements for funding are met by the participating school districts, it is our understanding that the determining factor in setting the appropriate funding level between full funding and HSAP funding may be the role that parents play in the telecommunication program. If an audit by the Department shows that parents play the primary role, assisted by the telecommunication program, the appropriate funding level may very well be determined to be the HSAP level ($1,800). *See generally* Iowa Code §§ 256.1(1), 257.6. This factual assessment can only be made after the program is underway. The possibility that HSAP ultimately will be determined

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this concept. The merits of this type of learning are left to the legislative and executive branches.

[4] In 2003 the Department issued a memorandum addressing implementation of a more limited online program by the Pocahontas Area Community School District. Under this program K12 Inc. provided a distance learning curriculum for elementary students enrolled in a virtual attendance center. The program was designed for parents to educate their children at home. K12Inc. provided "guidance and support," but the parents remained the primary teachers of the children. This program was therefore limited to the HSAP funding level.

to be the appropriate funding level introduces considerable uncertainty into the program under the contracts that have already been executed. This means the ultimate funding level may turn on the conduct of parents over whom neither the school districts nor the private companies have control. Of course, the General Assembly may decide to take action on this matter before the programs are implemented this fall. Any legislative action that impacts the two contracts that have already been executed should take into consideration the effect of legislative action on the contract rights and liabilities of the parties.

In summary, it is our opinion that the broad authorization of telecommunications learning by the General Assembly in 1987 and subsequent rules permit the use of telecommunications by private companies to deliver educational courses to students open-enrolled from other school districts as long as all statutory requirements are met. Rules promulgated by the Board do not address this program in sufficient detail and have not been updated since 1990. We strongly encourage the Board to reconvene the statutory committee to update the rules and allow public comments and political input on the merits of these programs through the rule-making process. The ultimate funding level for students open-enrolled in these programs will be determined only after an audit by the Department when the programs are underway in the fall.

Sincerely,

Thomas J. Miller
Attorney General of Iowa

Julie F. Pottorff
Deputy Attorney General