

**IOWA DEPARTMENT  
OF EDUCATION  
(Cite as 25 D.o.E. App. Dec. 148)**

***In re Petition for Waiver of Rule***

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Northeast Hamilton Community School District, Petitioner, for a Waiver of Rule 96.5(4)“b”	: : :	ORDER GRANTING WAIVER REQUEST [Adm. Doc. #4690]
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On or about December 10, 2008, the Northeast Hamilton Community School District filed a petition with this agency requesting a waiver from administrative rule 281-Iowa Administrative Code 96.5(4)“b”.

Authority for filing and ruling on petitions for waiver is found in 281—IAC chapter 4. Because the petition herein was not filed within a contested case proceeding and because a hearing is not required by statute, rule, or order, no hearing was held. See 281—IAC 4.9. The agency considered the facts, the criteria for waiver in chapter 4, and the information submitted by Northeast Hamilton in ruling on the petition.

**I.  
FINDINGS OF FACT**

On or about September 9, a “supermajority”<sup>1</sup> of voters of Northeast Hamilton approved the issuance of general obligation bonds to fund roughly 77% of the costs of construction of a new PK – 5 attendance center.<sup>2</sup> The remaining 23% of the costs of the new construction would be financed by the District’s share of the Statewide School Infrastructure Sales, Services and Use Tax (f/k/a Local Option Sales and Services Tax, or LOSST).

Effective July 1, 2008, certain school districts must obtain a certificate of need [“CON”] from the department before expending school infrastructure sales, services and use tax revenues on new construction projects. See, generally, Iowa Code chapter 423E. Specifically, Iowa Code section 423E.4(6) states as follows:

423E.4 Secure an advanced vision for education fund.

...

6. A school district with a certified enrollment of fewer than two hundred fifty pupils in the entire district or certified enrollment of fewer than one hundred

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<sup>1</sup>Per Iowa Code section 296.6, issuance of general obligation bonds by a school district requires approval of 60% of those voting on the referendum.

<sup>2</sup> The present attendance center was built in 1918, and serves grades K – 5.

pupils in high school shall not expend the supplemental school infrastructure amount received for new construction or for payments for bonds issued for new construction against the supplemental school infrastructure amount without prior application to the department of education and receipt of a certificate of need pursuant to this subsection. .... In determining whether a certificate of need shall be issued or denied, the department shall consider all of the following:

- a. Enrollment trends in the grades that will be served at the new construction site.
- b. The infeasibility of remodeling, reconstructing, or repairing existing buildings.
- c. The fire and health safety needs of the school district.
- d. The distance, convenience, cost of transportation, and accessibility of the new construction site to the students to be served at the new construction site.
- e. Availability of alternative, less costly, or more effective means of serving the needs of the students.
- f. The financial condition of the district, including the effect of the decline of the budget guarantee and unspent balance.
- g. Broad and long-term ability of the district to support the facility and the quality of the academic program.
- h. Cooperation with other educational entities including other school districts, area education agencies, postsecondary institutions, and local communities.

Northeast Hamilton has fewer than one hundred pupils in its high school, making it necessary that the District apply for a CON.

The State Board of Education promulgated agency rules to supplement Iowa Code section 423E.4(6). One of those rules, 281—IAC 96.5(4), states as follows:

96.5(4) Ineligibility for approval. If either of the following two descriptions applies to the school district, the school district shall not be eligible for a certificate of need unless a feasibility study conducted within the past three years pursuant to Iowa Code subsection 256.9(34) and the AEA plan pursuant to Iowa Code sections 275.1 to 275.4 determine that sharing or reorganization is not feasible for the school district.

- a. If either the current or any of the five years of projected enrollments for the school district is fewer than 250 students.
- b. If either the current or any of the five years of projected enrollments for the school district for each grade to be served in the building that is the subject of the application is fewer than 25 students.

Pursuant to the above rule, Northeast Hamilton is not eligible to request a CON because the enrollment projections for the current year and next five years show that each grade to be served in a proposed new PK-5 attendance center have fewer than 25 students. Accordingly, the District requests a waiver so that it may request a CON.

## II. CONCLUSIONS OF LAW

When a petition for waiver is filed, the undersigned must conclude that all five criteria listed in rule 4.4 are satisfied before granting a waiver. Those criteria and the undersigned's conclusions are as follows:

1. *Not waiving the rule would result in an undue hardship to the petitioner.*

Northeast Hamilton notes that it has incurred “significant” costs, including professional fees, since approval of issuance of general obligation bonds in early September. The District plans to let bids for the construction project in early 2009. Waiving the rule merely allows the District to have its application for a CON heard and acted upon. Not waiving the rule would have the effect of not allowing Northeast Hamilton to make its case, which would result in an undue hardship to the District

2. *Waiver would not prejudice the substantial legal rights of any person.*

Granting a waiver from the requirement in the rule of a certain number of students in each affected grade level would not prejudice the substantial legal rights of any person. As noted early, the required supermajority of voters approved the issuance of general obligation bonds to help with construction costs, indicating community approval of the project..

3. *The provisions of the rule from which waiver is sought are not mandated by statute or other provision of law.*

The requirement of a certain number of students in each grade of the attendance center to be constructed is not statutory and is not mandated by any provision of law outside of rule 96.5(4)“b”. Therefore, it is a proper subject for waiver request.

4. *Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the rule from which waiver is sought.*

This agency finds that the public health, safety, and welfare are not at stake. Therefore, it is unnecessary to determine whether there is another means by which the same can be met other than by the requirement in rule 96.5(4)“b”.

5. *Waiver would not have a negative impact on the student achievement of any person.*

Granting this waiver would not have a “negative impact on the student achievement of any person.” To the contrary, the addition of a preschool will enhance Northeast Hamilton’s ability to serve its students.

The undersigned is satisfied that the requirement in rule 96.5(4)“b” of a certain number of students in each grade of the attendance center to be constructed is not harmed by granting a waiver herein. The effect of a waiver merely allows the District to have its application for a Certificate of Need heard and ruled on; waiving the subrule does not grant a CON to the District.

It is important to note that last year Northeast Hamilton would not have needed to go through the CON process at all because its high school enrollment was above 100. It is also important to note that the certified enrollment of the District is above the statutory level of 250 pupils. That is, Northeast Hamilton must seek a CON for construction of a

new elementary building not because the entire district enrollment is below 250, but because the enrollment in its high school – grades not affected by the project – fell below 100 pupils this fall.

**III.  
DECISION**

For the foregoing reasons, the petition for waiver is GRANTED.

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Date

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Judy A. Jeffrey, Director