



KSBA

KENTUCKY SCHOOL BOARDS
ASSOCIATION

Ronnie Holmes,
President

Kerri Schelling,
Executive Director

SENT VIA EMAIL

August 26, 2020

Todd Allen
General Counsel
Kentucky Department of Education
300 Sower Boulevard, 5th Floor
Frankfort, KY 40601

Re: KSBA comments on filing of **702 KAR 1:190E** (District Employee Emergency Leave)

Dear Mr. Allen:

The following comments are submitted on behalf of the Kentucky School Boards Association (KSBA) during the comment period for the above cited regulation which ends October 31, 2020.

Comment: KSBA supports the emergency administrative regulation as written, and as approved by the Local Superintendents Advisory Council and by the Kentucky Board of Education (KBE).

This comment involves the entire regulation.

We support this regulation as filed, as it provides flexibility to local school boards to address employees possibly needing additional forms of leave for reasons tied to the COVID-19 pandemic. This flexibility was something local boards sought, to allow them to adequately respond to needs of individual employees as well as potentially groups of employees, or all district employees, in a given local community. These needs will likely be varied across communities as a result of differing levels of community spread of the virus. This is something that does not lend itself to any uniform statewide approach, as has been testified to by the medical experts within our Department for Public Health continuously in numerous webcasts hosted by the Department of Education (KDE).

Constitutional and statutory considerations

As you know, state law imposes a cap on the number of days of emergency leave that a local board may grant to employees, and limits who may receive this form of leave. Consistent with the suspension of that statute which the Lt. Governor already issued, this regulation as written will take advantage of the lifting of that cap and allow local boards to grant additional leave as may become necessary given all relevant circumstances in a district over the unpredictable months to come. Of significant legal importance, this regulation as written will satisfy the Kentucky Constitutional mandate that a public employee must perform public services in return for remuneration paid with public funds, by requiring each board to grant a set number of leave days for this form of leave via board action that is tied to

actual needs and unique work circumstances of their employees. KSBA believes this approach avoids legal issues that have driven litigation in the past.

Regulation aligns with the structure of district employment, and recent state policy

This approach is preferable to any uniform statewide approach. First, each local board of education is the employer of district employees, pursuant to numerous constitutional, statutory, and regulatory provisions, including the title of this regulation itself. The local board and the employee are the parties to the employment contract, and the board is by law the source of employee leave, fringe benefits, insurance options, and other benefits available to district employees. State law permits local boards to craft their own employment benefit packages, which are often used to attract employees in a very competitive market. In fact, local boards across the state often increase local taxes in order to give raises to their employees as well as to afford generous benefit packages, which are very often more robust than the benefits and compensation increases provided to state employees, including KDE employees, by state government. KDE leadership has testified to this fact in recent webcasts and KBE meetings when discussing how the department often cannot compete with districts in terms of compensation.

Therefore, we believe this approach is fully aligned with the overall legal structure of district employee pay, leave, and benefits, including the terms of the (now expired) Senate Bill 177 (passed *unanimously* by the General Assembly during the 2020 Regular Session). SB 177, which KSBA also strongly supported, is the most recent policy pronouncement by the legislature on this issue, and it took an almost identical approach to this situation by allowing local boards the discretion to grant more emergency leave than otherwise allowed by state statute, and when that law was in effect we saw local school boards implement it in many ways best tailored to the local situation.

For example, one local board in an area with high community viral spread determined that it needed to cease almost all activities for an extended period and used SB 177 to provide paid leave to all employees during that time. Other boards in other locations did not have that situation and, with low levels of virus spread, used SB 177 flexibility only on an as-needed basis. The ability to tailor this to community needs, given differing community spread levels, is essential.

Regulation addresses needs while preventing possible misuse

This approach also allows for local board discretion on leave policies to allow for needed leave while also preventing misuse of such a policy. We know that last spring some employees, who had no medical orders to quarantine, were not ill, and had not been tested for the virus, erroneously believed that SB 177 had granted all district employees statewide with 30 days of automatic leave, and they immediately submitted leave slips purporting to take 30 days of leave before the bill was even voted upon by the legislature (in fact, such a provision was never a part of the bill considered by the legislature). Local discretion allows for all needs to be met locally where all aspects of the situation are best known, including both employee quarantine needs as well as necessary essential work to continue such as feeding children, and is therefore the only workable approach.

Local boards have already well-implemented the regulation with KSBA assistance

Lastly, please know that we at KSBA have already provided technical assistance to our member school boards to implement this regulation, just as we did immediately after SB 177 took effect last spring. In fact, we were waiting for the regulation to take legal effect to transmit guidance that we had already prepared at the request of our members ahead of the KBE meeting, including sample board resolutions to put this regulation into practice immediately at the local level. Numerous local boards have already implemented this regulation, and some have formulated other innovative ways to address the quarantine needs of their employees both before and after the KBE took this action.

Regulation has resolved this concern, allowing employees to focus on instruction

We wish to thank KDE staff, and the KBE, for moving swiftly on this matter, particularly in light of the impending expiration of the mandated federal emergency family leave and emergency paid sick leave

laws as of December 31, 2020. From the time SB 177 expired to the filing of this regulation, this topic of additional paid leave was the single topic of foremost concern for our educators statewide, raised by them in countless social media posts and in questions submitted to a KET television program devoted to school reopening as well as to district leaders. Since this regulation took effect and local boards responded, this issue appears to have entirely vanished from the conversation among school employees on social media and with district leaders, and among state elected leaders as well.

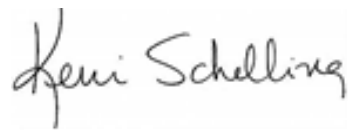
As evidenced by the lack of any discussion whatsoever on this topic since the moment KBE adopted this regulation, KSBA believes this has successfully addressed the uncertainty for all of us, and that is vital now that the school year is underway and all employees, leaders, and parents must shift absolutely all focus to providing quality instruction and ensuring each and every child masters the academic standards set by the KBE and the capacities established by our Constitution and the General Assembly.

In closing

Once again, we thank the KDE staff for collaborating with us on this and so many issues, for discussing these needs during the formulation of the regulation, and for graciously accepting our input to help prevent any unnecessary confusion that none of us can afford as a distraction from the pressing education work at hand.

Thank you and the members of the KBE for your work on this matter.

Sincerely,

A handwritten signature in cursive script that reads "Kerri Schelling". The signature is written in black ink and is positioned above the typed name and title.

Kerri Schelling
Executive Director
Kentucky School Boards Association