



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

November 19, 2020

Thomas Ziko
Interim General Counsel, State Board of Education
Sent via email only: Thomas.Ziko@dpi.nc.gov

Re: Objection to Rules 16 NCAC 06D .0212, 06G .0314, and .0519; Determination of Substantial Change in 16 NCAC 06G .0508

Dear Mr. Ziko:

The State Board of Education submitted rewritten versions of rules in response to Rules Review Commission objections entered September 17, 2020. The Commission took the following actions on the rewritten rules at its meeting November 19, 2020.

At its meeting on September 17, 2020, the Commission objected to Rule 16 NCAC 06D .0212 for failure to comply with the APA, ambiguity, and lack of necessity. At its meeting this morning, the Commission continued its objection solely on the grounds of failure to comply with the APA and ambiguity in accordance with G.S. 150B-21.9 and 150B-21.12(c).

At its meeting on September 17, 2020, the Commission objected to Rule 16 NCAC 06G .0314 for lack of statutory authority and clarity. This morning, the Commission continued its objection solely on the grounds of statutory authority in accordance with G.S. 150B-21.9 and 150B-21.12(c).

The Commission determined the rewritten version of 16 NCAC 06G .0519 satisfied the Commission's objection entered September 17, 2020. However, the Commission objected to 16 NCAC 06G .0519 for lack of statutory authority for adding a cross-reference to the accountability models underlying the continuing objection for lack of statutory authority in 16 NCAC 06G .0519.

Please note the Rules Review Commission approved rewritten versions of Rules 16 NCAC 06B .0112; 06D .0310; 06E .0107; 06G .0315, .0505, .0506, .0507, .0509, .0514, .0518, .0520, .0521, and .0522. The rewritten version of Rule 16 NCAC 06G .0508 was approved, but the Commission

Julian Mann, III, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

Linda T. Worth
Deputy Director

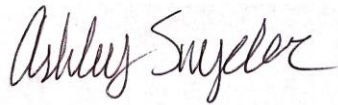
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determined the changes were substantial in accordance with G.S. 150B-21.12, requiring the rule to be re-published and reviewed in accordance with the procedure in G.S. 150B-21.1(a3) and (b).

Please respond to the Commission's objections in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

A handwritten signature in black ink that reads "Ashley Snyder". The signature is written in a cursive, flowing style.

Ashley Snyder
Commission Counsel

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06G .0508

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

On September 17, 2020, RRC objected to 16 NCAC 06G .0508 for failure to comply with the APA and multiple instances of ambiguity. The Commission's objection is detailed in the attachments to this staff opinion. Staff thinks the agency has satisfied all of the Commission's objections and therefore recommends approval of the rule. However, staff recommends the Commission determine the addition of a \$1,000 fee constitutes a substantial change.

G.S. 150B-21.12(c) requires the Commission to determine whether a change satisfies the Commission's objection. If it does, the Commission must approve the rule. The Commission is also required to determine whether the change is substantial within the meaning of G.S. 150B-21.2(g). If a change is substantial, the rule will be required to go through the notice, hearing, and publication process for temporary rules as set forth in G.S. 150B-21.1(a3). Following that process, the rule will come back to the Commission for review.

In September, the Commission objected for failure to comply with the APA and ambiguity for mentioning a fee established outside of the rulemaking process. The agency has now set the fee amount at \$1,000 at line 7. G.S. 115C-218.1 grants the agency authority for the fee. Staff recommends approval of the rule and determination the proposed change is substantial because it addresses an issue not addressed in the proposed rule and produces an effect that could not reasonably have been expected.

Ashley Snyder
Commission Counsel

§ 150B-21.12. Procedure when Commission objects to a permanent rule.

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

§ 150B-21.2. Procedure for adopting a permanent rule.

...

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency shall review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

...

§ 115C-218.1. Eligible applicants; contents of applications; submission of applications for approval.

...

(c) The State Board shall establish reasonable fees of no less than five hundred dollars (\$500.00) and no more than one thousand dollars (\$1,000) for initial and renewal charter applications, in accordance with Article 2A of Chapter 150B of the General Statutes. No application fee shall be refunded in the event the application is rejected or the charter is revoked.

Excerpt from letter to agency dated September 18, 2020 detailing RRC's objection:

The Commission objected to 16 NCAC 06G .0508 for failure to comply with the APA and numerous instances of ambiguity that make the Rule as a whole difficult to understand.

The Commission objected to Subparagraph (a)(1) for referring to a fee established outside the rulemaking process. The definition of a "rule" in 150B-2(8a) specifically includes the establishment of a fee, meaning setting the dollar amount in the Rule. Additionally, 115C-218.1(c) requires the State Board to adopt the application fee "in accordance with Article 2A of Chapter 150B." Since the fee amount is established outside of rule, the Commission objects to Subparagraph (a)(1) for failure to comply with the APA and ambiguity since the amount of the fee is unknown.

The Commission also objected to Paragraph (a) for failure to comply with the APA and ambiguity. Subparagraph (a)(1) states, "Prior to each application round, the State Board of Education shall approve the application process, timeline, and non-refundable fee." Establishing the application and timeline outside of rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this Rule would allow the agency to change the application process and timeline before each application round, changing the substance of this Rule without public notice, comment, or review by the Rules Review Commission. Subparagraphs (a)(2)-(4) refer back to the timeline and "application instructions" established outside the rulemaking process in (a)(1). Since the application process and timeline are established outside of rule, the requirements in Paragraph (a) are unclear and the Commission objected for failure to comply with the APA and ambiguity.

Parts (b)(1)(C) and (D) set application requirements that are ambiguous. It is unclear how applications are evaluated or what factors may be considered to determine whether an application "contains viable governance, business, and education plans." It is also unclear what "other requirements" are required by the agency. Therefore, the Commission objected to Parts (b)(1)(C) and (D) for ambiguity.

Additionally, the Commission objected to Paragraph (c) for ambiguity for use of the following terms or phrases, which are undefined or unclear as written: "capability to provide comprehensive learning experiences" in (c)(2); "promotes innovation" in (c)(3)(B); "large," "diverse" and "locally-based" in (c)(3)(D); "accurately" in (c)(3)(F); and "diverse learning environment" in (c)(3)(I). It is further unclear how Paragraph (c) interacts with G.S. 115C-218.5, which governs the State Board's final approval of applications for charter schools. Therefore, the Commission objected to Paragraph (c) for ambiguity.

16 NCAC 06G .0508 is proposed for adoption with changes as published in 34:13 NCAC 1241 as follows:

16 NCAC 06G .0508 CHARTER SCHOOLS APPLICATION AND REVIEW PROCESS

(a) ~~Deadline for Filing Charter School Applications.~~

~~(1) Prior to each application round, the State Board of Education shall approve the application process, timeline, and non-refundable fee.~~

~~(2) Applications for charters, and the nonrefundable \$1,000 fee, must shall be received by the Office of Charter Schools no later than the last Friday in July date and time specified for the charter application round that year.~~

~~(3) (b) Applications and fees received after the deadline specified by the Office of Charter Schools will not be considered, and any affected applicant groups will be notified in writing.~~

~~(4) Rejection of Incomplete Applications. The Charter School Advisory Board and Office of Charter Schools shall review all timely applications and shall reject all incomplete applications. In order to be deemed complete, all sections of the application must be completed as prescribed in the "Application Instructions" and G.S. 115C 218.2.~~

(b) ~~Charter School Advisory Board Responsibilities~~

~~(1) The Charter School Advisory Board, with the assistance of the Office of Charter Schools, shall review each complete application and determine whether the application meets the requirements of G.S. 115C 218.1~~

~~(A) Meets all the requirements of the Charter School Act, G.S. 115C 218 et seq.;~~

~~(B) Would achieve one or more of the purposes set forth in G.S. 115C 218(a);~~

~~(C) Contains viable governance, business, and education plans; and~~

~~(D) Satisfies any other requirements adopted by the SBE.~~

~~(2) The Charter Schools Advisory Board will present its recommendation on each charter school application to the SBE by the May SBE meeting for discussion.~~

(c) ~~SBE Review of Applications and Award of Charters~~

~~(1) The SBE may request information from applicants, their officers, agents or employees or other persons having information regarding the charter application reviewed by the Charter School Advisory Board when the SBE seeks clarification or greater detail regarding an application~~

~~(2) When awarding charters, the SBE may give priority consideration to applications that demonstrate the capability to provide comprehensive learning experiences to students identified as at risk of academic failure.~~

~~(3) (c) When determining whether to award a charter, the SBE mayshall consider any factors relevant to academic, financial, and governance of the school, including the extent to which the application:~~

~~(A)(1) Reflects reflects the applicant's commitment to the purposes of the charter school law stated in G.S. 115C-218(a);~~

~~(B)(2) Promotes promotes the use of different and innovative teaching methods innovation through charter schools;~~

- 1 ~~(C)~~(3) ~~Reflects~~ reflects the applicant's planning, research, and understanding of educational issues,
- 2 including budgeting, financing, and accounting;
- 3 ~~(D)~~(4) ~~Demonstrates the applicant's commitment to governance by participation of a large, diverse and~~
- 4 ~~locally based board~~describes a board whose size, diversity, and regional affiliations represent the
- 5 community and are likely to promote community support for the school;
- 6 ~~(E)~~(5) ~~Contains~~ contains articles of incorporation and by-laws;
- 7 ~~(F)~~(6) ~~Contains~~ contains a budget that ~~accurately~~ reflects anticipated revenues and ~~costs~~; costs, including
- 8 costs associated with maintenance of the school facilities and projected growth;
- 9 ~~(G)~~ ~~Describes student admission requirements and lottery system that comply with G.S. 115C;~~
- 10 ~~(H)~~(7) ~~Describes~~ contains a plan for acquisition and utilization of a facility consistent with the proposed
- 11 budget and timeline for opening school;
- 12 ~~(I)~~(8) ~~Describes~~ describes a five year marketing plan that promotes a diverse student population learning
- 13 environment; and
- 14 ~~(J)~~(9) ~~Any~~ any other factor that it determines will promote the purposes of the Charter School Act, G.S.
- 15 115C-218 et seq.

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17 *History Note: Authority G.S. 115C-12; 115C-218, 115C-218.1; 115C-218.5;*

18 *~~Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec 27.(b);~~*

19 *~~Emergency Rule Eff. August 20, 2019;~~*

20 *~~Eff. December 1, 2020.~~*

21