

## **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 .0601

RECOMMENDATION DATE: April 17, 2023

RECOMMENDED ACTION:

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

COMMENT:

### **I. Grounds for objection**

*This is a temporary rule which the agency has indicated is necessary due to the effective date of a recent act of the General Assembly. The cited act is S.L. 2022-59, which had an effective date of July 8, 2022. The temporary rule was submitted for RRC review on April 10, 2023.*

*G.S. 150B-21.1(a) provides that: "An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following: . . . (2) The effective date of a recent act of the General Assembly or the United States Congress."*

*G.S. 150B-21.1(a2) defines "recent act" as: "A recent act, change, regulation, or order as used in subdivisions (2) through (5) of subsection (a) of this section means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission."*

*When the agency submitted the temporary rule to the Rules Review Commission (4/10/23), 276 days had elapsed since the effective date of the relevant session law (7/8/22). The 210<sup>th</sup> day after the effective date of the cited act was February 3, 2023. Therefore, the agency has not complied with the timelines required by the APA for the adoption of a temporary rule.*

Seth Ascher  
Commission Counsel

## **II. Request for Waiver**

*Agency counsel has indicated in their responses to requests for changes and in email communication that they are requesting a waiver of the timing requirements.*

*G.S. 150B-21.1(a2) provides that: "Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency."*

*The language of this statute indicates that the Commission's decision to grant a waiver is discretionary upon consideration of five factors. Those factors are:*

- 1. the degree of the public benefit,*
- 2. whether the agency had control over the circumstances requiring the waiver,*
- 3. notice to and opposition by the public,*
- 4. the need for the waiver, and*
- 5. previous requests for waivers submitted by the agency.*

*If the Commission decides to grant a waiver pursuant to G.S. 150B-21.1(a2), I recommend that this rule be approved. Otherwise, I recommend that the Commission object to this rule for failure to comply with the APA.*

1 16 NCAC 06G.0601 is adopted under temporary procedures as follows:

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3 **16 NCAC 06G .0601 REMOTE ACADEMIES HARDWARE AND SOFTWARE FEES**

4 (a) Definitions:

5 (1) "Damage fee" means "any mandatory payments that a local school administrative unit charges a  
6 student enrolled in a remote academy for injury to, abuse of, or loss of hardware or software that the  
7 local school administrative unit has provided to the student other than degradation arising from  
8 normal use, wear and tear, provided the payments cannot exceed the actual cost of repair or fair  
9 market value of the hardware or software, whichever is less."

10 (2) "Rental fee" means "any mandatory payments that a local school administrative unit requires  
11 students enrolled in remote academies to make before the local school administrative unit will give  
12 a student access to or possession of any hardware and software needed to participate in the remote  
13 academy."

14 (b) Local administrative units shall not charge students enrolled in remote academies rental fees for use of hardware  
15 or software needed to participate in the remote academy but may charge them damage fees.

16 *History Note: Authority G.S. § 115C-234.10(1)(b)*

17 *Eff. May 1, 2023*

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