

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: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0201

RECOMMENDED ACTION:

- 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:

This Rule concerns the application process for licensure for behavior analysts—paragraph (a)—and assistant behavior analysts—paragraph (b). In both paragraphs, the Rule requires the applicant to submit a “completed application” and fulfill six other requirements. In answer to staff’s request for changes, the Board responded that these six requirements are actually what constitutes a completed application. This redundancy creates ambiguity as to what an applicant must actually provide the Board in order to attain licensure.

Additionally, both Rules .0202 and .0203 contain requirements of a “completed application” that are either not included here or create doubt about the language in this Rule.

In Rule .0202, the Board requires that two letters of reference be included with the application, a requirement that is not included or cross-referenced here. In response to staff’s inquiries as to why this requirement was not included here, the Board indicated that the letters of reference were “elements that are completed by someone other than the applicant.” Thus, it is unclear whether the requirement falls on the letter writer or the applicant.

Brian Liebman
Commission Counsel
November 15, 2022

In Rule .0203, the Board requires the applicant to provide certified copies of any certifications held by the applicant, a requirement that is included here (see (a)(5) and (b)(5)) but which is not cross referenced. Moreover, in Rule .0203, the Rule states that the Board shall accept certifications submitted electronically “on behalf of the applicant,” thus raising similar questions as to what is actually required of an applicant for licensure.

Thus, it is staff’s opinion that the Rule contains unclear and ambiguous language regarding the requirements for licensure, and as such is subject to objection under G.S. 150B-21.9(2).

Brian Liebman
Commission Counsel
November 15, 2022

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 21 NCAC 05 .0201 is adopted with changes as published in 37:03 NCR 231-235 as follows:
2

3 **SECTION .0200 – APPLICATIONS**
4

5 **21 NCAC 05 .0201 APPLICATION FOR LICENSURE OF LICENSED BEHAVIOR ANALYST AND**
6 **LICENSED ASSISTANT BEHAVIOR ANALYST**

7 (a) The Behavior Analyst License applicant shall submit the following to the Board:

- 8 (1) Completed application developed and provided by the Board;
- 9 ~~(2) Official documentation of the education degree required for license;~~
- 10 ~~(3)~~ (2) Documentation of all previous professional human services licenses held by the applicant;
- 11 ~~(4)~~ (3) Attestation that the applicant has read and agrees to adhere to the current version of the Ethics Code
12 for Behavior Analysts published by the certifying entity;
- 13 ~~(5)~~ (4) Documentation of all work experience in the field of behavior analysis, including internships,
14 practicum, and other field experience completed as part of an educational course of study;
- 15 ~~(6)~~ (5) Documentation of all certifications of behavior analysis currently or previously granted by national
16 or other state certification bodies;
- 17 ~~(7)~~ (6) Payment of all required fees; and
- 18 ~~(8)~~ (7) Signed consent form provided by the State Bureau of Investigation or NC Department of Justice
19 authorizing the completion of a certified criminal records check based on the applicant's fingerprints
20 provided to a local law enforcement office.

21 (b) The Assistant Behavior Analyst License applicant shall submit the following to the Board:

- 22 (1) Completed application developed and provided by the Board;
- 23 ~~(2) Official documentation of the education degree required for license;~~
- 24 ~~(3)~~ (2) Documentation of all previous professional human services licenses held by the applicant;
- 25 ~~(4)~~ (3) Attestation that the applicant has read and agrees to adhere to the current version of the Ethics Code
26 for Behavior Analysts published by the certifying entity;
- 27 ~~(5)~~ (4) Documentation of all work experience in the field of behavior analysis, including internships,
28 practicum, and other field experience completed as part of an educational course of study;
- 29 ~~(6)~~ (5) Documentation of all certifications of behavioral analysis currently or previously granted by
30 national or other state certification bodies;
- 31 ~~(7)~~ (6) Payment of all required fees; and
- 32 ~~(8)~~ (7) Signed consent form provided by the State Bureau of Investigation or NC Department of Justice
33 authorizing the completion of a certified criminal records check based on the applicant's fingerprints
34 provided to a local law enforcement office.

35
36 *History Note: Authority G.S. 90-736-738;*
37 *Eff. December 1, 2022.*

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: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0202

RECOMMENDED ACTION:

- 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:

This Rule also concerns the application process for licensure for behavior analysts. Here, the Board requires that "the application [for licensure] shall include two letters of reference, to be submitted to the Board using a portal in the application software." In response to staff's request for changes, in which staff asked why this requirement was not included in Rule .0201's description of a "completed application," the Board replied that this was an element that is "completed by someone other than the applicant." As such, it is unclear who is required to submit the letters of reference. Thus, it is staff's opinion that the Rule contains unclear and ambiguous language regarding the requirements for licensure, and as such is subject to objection under G.S. 150B-21.9(2).

Brian Liebman
Commission Counsel
November 15, 2022

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 21 NCAC 05 .0202 is adopted as published in 37:03 NCR 231-235:
2

3 **21 NCAC 05 .0202 REFERENCES**

4 (a) The application for Behavior Analyst License and Assistant Behavior Analyst shall include two letters of
5 reference, to be submitted to the Board using a portal in the application software. The two letters of references shall
6 include:

7 (1) Name of reference and applicant;

8 (2) Period of time the reference has known the applicant;

9 (3) Nature of professional relationship; and

10 (4) Knowledge of the applicant's training, experience, professional skills, and adherence to legal and
11 ethical standards.

12 (b) Letters of reference shall be submitted electronically to the Board.

13

14 *History Note:* Authority G.S. 90-737.2; 90-737.3;

15 Eff. December 1, 2022.

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: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0203

RECOMMENDED ACTION:

- 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:

This Rule also concerns the application process for licensure for behavior analysts. Here, the Board requires that "the applicant [for licensure] shall submit an official copy of the applicant's Behavior Analyst certification to the Board." However, this clear directive is contradicted in paragraph (b), in which the Rule states that "the Board shall accept the Behavior Analyst certification electronically submitted *on behalf of the applicant.*" This also runs in contradiction to Rule .0201(a)(5) and (b)(5) which states that the *applicant* shall provide copies of his or her certification. Thus, in staff's opinion, it is unclear who is required to actually submit the certification, and this Rule is subject to objection under G.S. 150B-21.9(2).

Brian Liebman
Commission Counsel
November 15, 2022

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 21 NCAC 05 .0203 is adopted as published in 37:03 NCR 231-235:
2

3 **21 NCAC 05 .0203 CERTIFICATION**

4 (a) The applicant for Behavior Analyst License and Assistant Behavior Analyst shall submit an official copy of the
5 applicant's Behavior Analyst certification to the Board.

6 (b) The applicant for Assistant Behavior Analyst shall submit an official copy of the applicant's Behavior Analyst
7 certification to the Board.

8 (c) The Board shall accept the Behavior Analyst certification electronically submitted to the Board on behalf the
9 applicant.

10

11 *History Note: Authority G.S. 90-737.2; 90-737.3;*

12 *Eff. December 1, 2022.*

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: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0401

RECOMMENDED ACTION:

- 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:

In this Rule, the Board lays out its requirements for supervision of assistant behavior analysts by a licensed behavior analyst. Among other things, the Board requires the applicant for licensure as an assistant behavior analyst to “maintain” copies of the supervisory agreement with the behavior analyst as well as “any supervisory evaluations or supervision logs.” The supervising behavior analyst must also maintain these documents, although here the Board limits that requirement to “seven years following the termination of the supervisory relationship.” These documents “shall be made available to the Board upon request.” Thus, the implication is that the *applicant* must maintain documentation related to his supervision *in perpetuity*, while the supervisor can destroy the documents seven years after the termination of the relationship. Moreover, the Rule appears to require the applicant to maintain documentation that would be created by and in the possession of the supervisor, without including a requirement that the supervisor turn these documents over to the applicant. As this Rule creates unclear and ambiguous language as to who is required to maintain what documentation for what period of time, it is staff's opinion that the Rule is subject to objection under G.S. 150B-21.9(2).

Brian Liebman
Commission Counsel
November 15, 2022

Additionally, in paragraph (c) of this Rule, the Board states that the supervisor “may delegate tasks to an assistant behavior analyst in accordance with the supervisory agreement.” First, it is unclear what tasks may be delegated to an assistant behavior analyst. Second, it is unclear whether this means that the supervisor may delegate tasks related to patient care to the assistant behavior analyst that is under supervision, or if this means that the supervisor may delegate supervisory tasks to another assistant behavior analyst. Because this Rule contains unclear and ambiguous language as to the nature of the delegation, it is staff’s opinion that the Rule is subject to objection under G.S. 150B-21.9(2).

Continuing on the topic of delegation, there is significant ambiguity related to the Board’s statutory authority to delegate supervisory tasks from a licensed behavior analyst to an assistant behavior analyst. G.S. 90-738 states that the applicant for licensure as an assistant must have an “ongoing arrangement for supervision by a licensed behavior analyst in a manner consistent with the certifying entity’s [the Behavior Analyst Certification Board, Inc] requirements for supervision of Board Certified Assistant Behavior Analysts.” The language of the statute seems to require that the supervision must be carried out “by a licensed behavior analyst,” unless a delegation to an assistant is consistent with the requirements of the Behavior Analyst Certification Board, Inc’s requirements for supervision. However, these requirements have not been made available to staff, and more importantly, have not been incorporated into this Rule by reference. Thus, it is staff’s opinion that because it is impossible to determine whether the delegation is within the Board’s statutory authority, the Rule is subject to objection under G.S. 150B-21.9(1) for lack of statutory authority.

Finally, in paragraph (d)(4) of the Rule, the Board states that “the frequency and nature of supervision interactions shall be consistent with the supervisory requirements set forth by the certifying entity [the Behavior Analyst Certification Board, Inc.], as defined in G.S. 90-732.” The statutory reference given here is for the definition of “certifying entity.” It does not speak to the supervision requirements set forth by the certifying entity, which, as mentioned above, have not been incorporated by reference in the Rule. Thus, the Rule does not clearly specify to what the “frequency and nature of supervision interactions” should actually conform. It is staff’s opinion that the Rule is subject to objection under G.S. 150B-21.9(2) for lack of clarity or ambiguity.

Brian Liebman
Commission Counsel
November 15, 2022

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

§ 90-732. Definitions.

The following definitions apply in this Article:

- (1) Behavior analysis. - The design, implementation, and evaluation of systematic instructional and environmental modifications to produce significant personal or interpersonal improvements in human behavior.
- (2) Behavior technician. - A paraprofessional who delivers applied behavior analysis services and who practices under the close, ongoing supervision of a licensed behavior analyst, licensed assistant behavior analyst, or other professional licensed under this Chapter or Chapter 90B of the General Statutes, so long as the services of the licensed professional are within the scope of practice of the license possessed by that licensed professional, and the services performed are commensurate with the licensed professional's education, training, and experience. The behavior technician does not design assessment or intervention plans or procedures but delivers services as assigned by a supervisor who is responsible for the behavior technician's work.
- (3) Board. - The North Carolina Behavior Analyst Board.
- (4) Certifying entity. - The nationally accredited Behavior Analyst Certification Board, Inc., or its successor.
- (5) Institution of higher education. - A university, college, professional school, or other institution accredited in the United States, Canada, or other country. For the purposes of this subdivision, accreditation shall be granted by the Commission on Recognition of Postsecondary Accreditation or comparable official organization having accreditation authority.
- (6) Licensed assistant behavior analyst. - An individual who is certified by the certifying entity as a Board Certified Assistant Behavior Analyst and has been issued a license under this Article that (i) is active, (ii) is not suspended or revoked, and (iii) permits the individual to engage in the practice of behavior analysis under the supervision of a licensed behavior analyst.
- (7) Licensed behavior analyst. - An individual who is certified by the certifying entity as a Board Certified Behavior Analyst and has been issued a license under this Article that is active and not suspended or revoked.
- (8) Practice of behavior analysis. - The practice of behavior analysis includes the empirical identification of functional relations between behavior and environmental factors known as functional assessment and analysis. Behavior analysis interventions are based on scientific research and the direct observation and measurement of behavior and the environment. In the practice of behavior analysis, behavior analysts

utilize contextual factors, motivating operations, antecedent stimuli, positive reinforcement, and other consequences to help people develop new behaviors, increase or decrease existing behaviors, and emit behaviors under specific environmental conditions. The practice of behavior analysis expressly excludes psychological testing, cognitive therapy, sex therapy, psychoanalysis, hypnotherapy, and long-term counseling as treatment modalities. (2021-22, s. 1(a).)

§ 90-738. Requirement of licensure as an assistant behavior analyst.

Each applicant shall be issued a license by the Board to engage in the practice of behavior analysis as a licensed assistant behavior analyst if the applicant meets the qualifications set forth by the Board in accordance with G.S. 90-734(a) and provides satisfactory evidence to the Board of all the following criteria:

- (1) The applicant is at least 18 years of age.
- (2) The applicant has passed the certifying entity's Board Certified Assistant Behavior Analyst examination.
- (3) The applicant has an active status with the certifying entity as a Board Certified Assistant Behavior Analyst.
- (4) The applicant has an ongoing arrangement for supervision by a licensed behavior analyst in a manner consistent with the certifying entity's requirements for supervision of Board Certified Assistant Behavior Analysts. (2021-22, s. 1(a).)

1 21 NCAC 05 .0401 is adopted as published in 37:03 NCR 231-235:
2

3 **SECTION .0400 – SUPERVISION AND TELEHEALTH**
4

5 **21 NCAC 05 .0401 SUPERVISION OF ASSISTANT BEHAVIOR ANALYST**

6 (a) Applicants for licensure as an assistant behavior analyst shall provide a supervisory agreement signed by the
7 licensed behavior analyst and the licensed assistant behavior analyst.

8 (b) Applicants for licensure as an assistant behavior analyst shall maintain a copy of the signed supervisory agreement
9 and any supervisory documentation. The supervisor of the licensed assistant behavior analyst shall maintain a copy of
10 the signed supervisor agreement and supervisory documentation for at least seven years following the termination of
11 the supervisory relationship. This documentation shall be made available to the Board upon request.

12 (c) Delegation shall be made if, in the judgment of the licensed behavior analyst, the task or procedures can be
13 properly and safely performed by an appropriately trained assistant behavior analyst or other person, and the delegation
14 does not jeopardize the health or safety of the client.

15 (d) Supervision activities by the licensed behavior analyst include:

16 (1) Direct observation of the supervisee implementing behavior analytic assessment and intervention
17 procedures with clients in natural environments and/or training others to implement them, with
18 feedback from the supervisor. The observation may be done in-person, on-site, or using
19 asynchronous or synchronous formats.

20 (2) One-to-one, live, person-to-person, or synchronous virtual interactions between supervisor and
21 supervisee to review and discuss assessment and treatment plans and procedures, client assessment
22 and progress data and reports, published research, ethical and professional standards and guidelines,
23 professional development needs and opportunities, and relevant laws, regulations, and policies.

24 (3) Live, person-to-person, or synchronous virtual interactions between a supervisor and a group of
25 supervisees to review and discuss assessment and treatment plans and procedures, client assessment
26 and progress data and reports, published research, ethical and professional standards and guidelines,
27 professional development needs and opportunities, and relevant laws, regulations, and policies.

28 (4) Informal interactions between supervisors and supervisees via telephone, electronic mail, and other
29 written communication are encouraged but shall not be considered formal supervision for the
30 purposes of this Chapter.

31 (e) The frequency and nature of supervision interactions shall be consistent with the supervisory requirements set
32 forth by the certifying entity, as defined in G.S. 90-732.

33
34 History Note: Authority G.S. 90-738;

35 Eff. December 1, 2022.

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: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0402

RECOMMENDED ACTION:

- 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:

In this Rule, the Board lays out its requirements for supervision of behavior technicians by a licensed behavior analyst or licensed assistant behavior analyst. Among other things, the Board requires the employer or supervisor to "maintain documentation to demonstrate their adherence to this Rule. Such documentation shall include supervision logs." Staff notes that "shall include" creates an open-ended requirement, indicating that other unspecified documents may satisfy the requirement. As this Rule creates unclear and ambiguous language as to what documentation must be maintained by the supervisor or employer, it is staff's opinion that the Rule is subject to objection under G.S. 150B-21.9(2).

Brian Liebman
Commission Counsel
November 15, 2022

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 21 NCAC 05 .0402 is adopted with changes as published in 37:03 NCR 231-235 as follows:
2

3 **21 NCAC 05 .0402 SUPERVISION OF BEHAVIOR TECHNICIANS**

4 (a) Behavior technicians shall be supervised by a licensed behavior analyst or a licensed assistant behavior analyst.

5 (b) Any licensed behavior analyst or licensed assistant behavior analyst employing or supervising behavior
6 technicians who are implementing applied behavior analysis interventions designed by the licensed behavior analyst
7 or licensed assistant behavior analyst shall maintain professional responsibility for the quality of the interventions
8 rendered and for the effects of the interventions upon the client, patient, or other individuals.

9 (c) The behavior analyst shall have face-to-face contact, including in-person and/or synchronous virtual interactions,
10 during the course of services with all patients, clients, or other recipients of services delivered by behavior technicians
11 as part of the interventions designed by the licensed behavior analyst's or licensed assistant behavior analyst's.

12 (d) Any licensed behavior analyst or licensed assistant behavior analyst employing or supervising behavior
13 technicians who are implementing applied behavior analysis interventions designed by the licensed behavior analyst
14 or licensed assistant behavior analyst shall maintain sufficient documentation to demonstrate their adherence to this
15 Rule. Such documentation may include but is not limited to supervision contracts, supervision logs, supervision notes,
16 meeting notes. The licensed behavior analyst or licensed assistant behavior analyst shall maintain documentation of
17 the employee's or supervisee's training for at least seven years following the termination of applied behavior analysis
18 services by the behavior technician.

19 (e) Behavior technicians shall be utilized to perform only:

20 (1) Non-client-related tasks, including but not limited to clerical and maintenance activities and the
21 preparation of the work area and equipment;

22 (2) Certain routine client-related tasks that, in the opinion of and under the supervision of a licensed
23 behavior analyst or a licensed assistant behavior analyst, have no potential to adversely impact the
24 client or the client's treatment plan and do not constitute the practice of behavior analysis; and

25 (3) The behavior technician shall not design assessment or intervention plans or ~~procedures~~, procedures
26 but may deliver such services as assigned by a supervisor who is responsible for the behavior
27 technician's work.

28 (f) Failure of any licensed behavior analyst or licensed assistant behavior analyst to train and supervise behavior
29 technicians shall subject that licensed behavior analyst or licensed assistant behavior analyst to disciplinary action
30 pursuant to 21 NCAC 05 .0603.

31
32 *History Note: Authority G.S. 90-745;*

33 *Eff. December 1, 2022.*

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: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0403

RECOMMENDED ACTION:

- 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:

This Rule contains the requirements for telehealth and telepractice for licensed Behavior Analysts. The statutes governing the Behavior Analyst Board (G.S. 90-732 et seq.) do not contain authorization to engage in telehealth, and in fact contain no mention of telehealth whatsoever. This is in contrast to other medical professionals licensed under Chapter 90, such as medical doctors (G.S. 90-1.1), dentists (G.S. 90-30.2), psychologists (G.S. 90-270.160, et seq.), occupational therapists (90-270.180, et seq.), audiologists and speech pathologists (G.S. 90-312.1, et seq), dieticians and nutritionists (G.S. 90-365.5), and veterinarians (G.S. 90-186), in which the General Assembly has explicitly authorized telepractice for each of these specialties. Given the disparity, it is staff's opinion that the Board lacks statutory authority to adopt a Rule governing telehealth or telepractice.

Assuming *arguendo* that the Board possesses statutory authority to adopt this Rule, the Rule is impermissibly unclear or ambiguous. In paragraph (b), titled "Jurisdictional Considerations", the Board requires that a person providing behavior analytic services via telehealth from a physical location in North Carolina to a person in another state "shall be licensed by the board *and may be*

Brian Liebman
Commission Counsel
November 15, 2022

subject to licensure requirements in other states where the services are received by the client.” Based upon its response to staff’s request for changes, it appears that the agency intends to merely warn its licensees that they may be subject to licensure in another state, depending on the law of those states. However, it is staff’s opinion that the language here does not reflect that limitation, and instead could be read as a requirement *by the Board* to be licensed in another state other than the State of North Carolina. Consequently, it is staff’s opinion that the language of this Rule is unclear and ambiguous.

Brian Liebman
Commission Counsel
November 15, 2022

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 21 NCAC 05 .0403 is adopted with changes as published in 37:03 NCR 231-235 as follows:
2

3 **21 NCAC 05 .0403 TELEHEALTH AND TELEPRACTICE**

4 (a) Requirements for Licensees Providing Applied Behavior Analytic Services via Telehealth

5 (1) A licensee who provides applied behavior analytic services via telehealth shall:

- 6 (A) Maintain competence with the technologies utilized, including understanding and
7 adequately addressing the actual and potential impact of those technologies on clients,
8 supervisees, or other professionals;
- 9 (B) Maintain compliance with the NC Behavior Analyst Practice Act and the certifying body's
10 ethics code, and all other applicable federal, state, and local laws;
- 11 (C) At the onset of the delivery of care via telehealth, identify appropriate emergency response
12 contacts local to the client so that those contacts shall be readily accessible in the event of
13 an emergency;
- 14 (D) Protect and maintain the confidentiality of data and information in accordance with all
15 applicable federal, state, and local laws; and
- 16 (E) Dispose of data and information only in accordance with federal, state, and local law and
17 in a manner that protects the data and information from unauthorized access.

18 (2) If applied behavior analysis services commence via telehealth, the licensee shall, at the initial
19 meeting with the client:

- 20 (A) Make reasonable attempts to verify the identity of the client;
- 21 (B) Obtain alternative means of contacting the client other than electronically;
- 22 (C) Provide to the client alternative means of contacting the licensee other than electronically;
- 23 (D) Document if the client has the necessary knowledge and skills to benefit from the type of
24 telehealth to be provided by the licensee; and
- 25 (E) Inform the client in writing about and obtain the client's informed written consent
26 regarding:
 - 27 (i) The limitations of using technology in the provision of applied behavior analytic
28 services;
 - 29 (ii) Potential risks to confidentiality of information due to technology in the provision
30 of applied behavior analytic services;
 - 31 (iii) Potential risks of disruption in the use of telehealth technology;
 - 32 (iv) When and how the licensee will respond to routine electronic messages;
 - 33 (v) In what circumstances the licensee will use alternative communications for
34 emergency purposes;
 - 35 (vi) Who else may have access to client communications with the licensee;
 - 36 (vii) How communications can be directed to a specific licensee;
 - 37 (viii) How the licensee stores electronic communications from the client; and

1 (ix) That the licensee or client may elect to discontinue the provision of services
2 through telehealth at any time.

3 (b) Jurisdictional Considerations

4 (1) A person providing applied behavior analytic services via telehealth to a person physically located
5 in North Carolina while services are provided shall be licensed by the board.

6 (2) A person providing applied behavior analytic services via telehealth from a physical location in
7 North Carolina shall be licensed by the board and may be subject to licensure requirements in other
8 states where the services are received by the client.

9 (c) Representation of Services and Code of Conduct - A licensee using telehealth to deliver services shall not:

10 (1) Engage in false, misleading, or deceptive advertising; nor

11 (2) ~~Split fees. Divide or share their fee with another licensee.~~

12

13 *History Note: Authority G.S. 90-738;*

14 *Eff. December 1, 2022.*

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: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0501

RECOMMENDED ACTION:

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

COMMENT:

This Rule states that the Board shall use “those policies, publications, guidelines, and casebooks developed by the certifying entity [the Behavior Analyst Certification Board, Inc.] in determining whether violations of the Ethics Code for Behavior Analysts have occurred.” These same materials “shall also be used in interpreting” the Ethics Code. The Board has not identified or incorporated these “policies, publications, guidelines, and casebooks” by reference. Because the Rule fails to identify the specific materials that it will seek to enforce under this Rule, it is staff’s opinion that the Rule is unclear and ambiguous and as such is subject to objection under G.S. 150B-21.9(2).

Brian Liebman
Commission Counsel
November 15, 2022

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 21 NCAC 05 .0501 is adopted as published in 37:03 NCR 231-235:
2

3 **SECTION .0500 - ETHICS**
4

5 **21 NCAC 05 .0501 ETHICS**

6 The Board shall use those policies, publications, guidelines, and casebooks developed by the certifying entity in
7 determining whether violations of the Ethics Code for Behavior Analysts have occurred. In addition, publications,
8 guidelines, policies, and statements provided by the certifying entity and bodies may be used in interpreting the Ethics
9 Code for Behavior Analysts.

10

11 *History Note: Authority G.S. 90-731; 90-734; 90-743;*

12 *Eff. December 1, 2022.*

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: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0601

RECOMMENDED ACTION:

- 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:

This Rule governs the procedures for filing a complaint against a licensed behavior analyst or licensed assistant behavior analyst. In paragraph (a) of the Rule, the Board states that anyone “with personal knowledge that any person has violated the Code of Conduct [G.S. 90-742], any other rules of this Subchapter, or G.S. 90, Article 43 may file a complaint against the *behavior analyst professional* by submitting a complaint using the Ethics Complaint Form found on the Board’s website” (emphasis added). The term “behavior analyst professional” is undefined, and it is unclear whether this reaches as far as to encompass technicians or other unlicensed employees, or only applies to licensed behavior analysts and assistant behavior analysts.

In paragraph (d), the Rule requires that the Board “*shall* try to reach a settlement through informal procedures pursuant to G.S. 150B-22” (emphasis added) following an investigation of the complaint. This conflicts with Rule .0602, which sets out five outcomes that the ethics committee “*may*” reach following an investigation, only one of which is the offer of informal settlement. Rule .0602 provides that if the ethics committee finds no merit, it may dismiss the complaint, but that if it does find merit, it may offer informal settlement, schedule a meeting with the respondent, notice a

Brian Liebman
Commission Counsel
November 16, 2022

formal hearing before the Board, or enter into a consent agreement wherein the respondent agrees to relinquish his or her license for a period of time. As Rule .0601 directly conflicts with Rule .0601, it is staff's opinion that both rules are unclear and ambiguous and subject to objection under G.S. 150B-21.9(2). Please note the separate opinion for Rule .0602 contains further grounds for objection on that rule.

Brian Liebman
Commission Counsel
November 16, 2022

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 21 NCAC 05 .0601 is adopted as published in 37:03 NCR 231-235:
2

3 **SECTION .0600 – DISCIPLINARY INVESTIGATION**
4

5 **21 NCAC 05 .0601 COMPLAINT PROCEDURES**

6 (a) Initiation. Any individual with personal knowledge that any person has violated the Code of Conduct, any other
7 rules of the Board, or G.S. 90, Article 43 may file a complaint against the behavior analyst professional by submitting
8 a complaint through the Ethics Complaint Form found on the Board's website.

9 (b) Form. The complaint shall be in written or typed format stating the nature of the alleged offense and signed or
10 attested to be true by the complainant. The complaint shall include:

11 (1) the name, address, and telephone number of the complainant;

12 (2) the name and address of the person against whom the complaint is made; and

13 (3) a statement of the facts that describes the allegations against the person.

14 (c) The complaint shall be investigated as set out in Rule .0602 of this Chapter.

15 (d) Following an investigation of the complaint, the ethics committee shall try to reach a settlement through informal
16 procedures pursuant to G.S. 150B-22.

17 (e) Once the ethics committee concludes there is a basis to schedule a disciplinary hearing before the Board, the
18 committee chairperson shall notify the person against whom the complaint is made. The notice to the respondent shall
19 include the following:

20 (1) state the section(s) of the Code of Conduct, other rules of the Board, or G.S. 90, Article 43 which
21 the complaint alleges has been violated;

22 (2) direct that the respondent reply in writing and by certified mail within 15 days of receipt of this
23 notice; and

24 (3) inform the respondent that failure to respond in writing within 15 days may result in revocation of
25 credential.

26 (f) Notice shall be given by regular postage mail, certified mail, or personal service at the last known address of the
27 respondent. If given by certified mail, notice shall be deemed to have been given on the delivery date appearing on
28 the return receipt.

29 (g) The Board may receive official correspondence in an ethics case through e-mail in order to further the investigation
30 or when the subject of an investigation is unable to use or has been unresponsive to certified mail or other methods of
31 delivery. The Board may use local law enforcement or a private investigator licensed by Private Protective Services
32 Board to personally serve a respondent.

33 (h) If notice cannot be given either by personal service or by certified mail, a notice that a complaint has been brought
34 against the respondent shall then be given by publication. A party that cannot with due diligence be served by personal
35 delivery or certified mail may be given notice to respond to a complaint by publication. Service of notice by publication
36 shall consist of publishing a notice by publication once a week for three successive weeks in a newspaper that is
37 qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party
38 to be served is believed by the serving party to be located, or if there is no reliable information concerning the location

1 of the party then in a newspaper circulated in the county of respondent's last address provided to the Board by the
2 respondent. There shall be mailed to the party at or prior to the first publication a copy of the notice to respond by
3 publication to the respondent's last known address. Upon completion of service there shall be filed with the Board by
4 the ethics committee chairperson an affidavit showing the publication and mailing substantially in accordance with
5 the requirement of G.S. 1-75.10(2), the circumstances warranting the use of service by publication, and information,
6 if any, regarding the location of the party served. The notice shall include a statement by the Board that a complaint
7 has been made against the respondent that is scheduled to be heard by the Board within 90 days. The notice shall
8 inform respondent that respondent shall be given 30 days from the date of the last date of publication in which to
9 respond to the service by publication for the purpose of notifying the Board of respondent's whereabouts. Response
10 shall be made in writing to the Board at the address provided by the Board in its notice. If respondent provides the
11 Board with information whereby respondent can be served by the deadline specific in the notice, the Board shall
12 provide notice either personally or by certified mail as provided in Paragraph (g) of this Rule. Failure of respondent
13 notified by publication of a complaint brought by the Board shall be treated as a failure of respondent to reply to the
14 charges.

15 (i) Failure of the respondent to reply to the charges, including each specific allegation, may be considered an
16 admission of the facts contained in the allegation(s).

17
18 *History Note: Authority G.S. 90-731-737;*

19 *Eff. December 1, 2022.*

20

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: North Carolina Behavior Analyst Licensure Board

RULE CITATION: 21 NCAC 05 .0602

RECOMMENDED ACTION:

- 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:

This Rule governs the procedures for investigating a complaint against a licensed behavior analyst or licensed assistant behavior analyst. In paragraph (a) of the Rule, the Board states:

(a) The ~~Ethics Committee~~ ethics committee chairperson, in consultation with the administrative director or their ~~designee~~ designee, and the Board's legal counsel, shall investigate the allegations in the complaint. The chairperson may appoint ~~any person(s)~~ another Board member or name a subcommittee of the Board to serve as the investigating entity to prepare an investigative report.

Several things are unclear about this language. First, the composition of the “investigating entity”—a term used throughout the Rule—is not clearly defined, as it is unclear whether the chair, the administrative director/designee, and the legal counsel are the investigating entity, or whether this term applies only to the subcommittee of the Board that the ethics committee chair may name.

Second, these two sentences are in apparent contradiction. The first sentence says that the complaint “shall” be investigated by the chair, the administrative director/designee, and the legal counsel. The second sentence says that the chair “may” appoint another Board member or name a

Brian Liebman
Commission Counsel
November 16, 2022

subcommittee of the Board to investigate. While the Board's response to staff's request for changes indicates that the second sentence is intended to allow the ethics chair to allow other board members to investigate when the chair has a conflict or determines that the complaint is outside of their investigatory skillset, this intent is not adequately described in the Rule. Because the quoted language is unclear and ambiguous, staff recommends objection pursuant to G.S. 150B-21.9(2).

Finally, with respect to paragraph (c), staff incorporates by reference staff's opinion recommending objection to Rule .0601, specifically the language therein regarding the conflict between Rule .0601(d) and Rule .0602(c), and the recommendation that the Commission object to this rule under G.S. 150B-21.9(2).

Brian Liebman
Commission Counsel
November 16, 2022

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

1 21 NCAC 05 .0602 is adopted as published in 37:03 NCR 231-235:
2

3 **21 NCAC 05 .0602 INVESTIGATION OF COMPLAINT**

4 (a) The Ethics Committee chairperson, in consultation with the administrative director or their designee and legal
5 counsel, shall investigate the allegations in the complaint. The chairperson may appoint any person(s) or name a
6 subcommittee to serve as the investigating entity to prepare an investigative report.

7 (b) The investigating entity may contact the complainant and person against whom the complaint is made.

8 (c) Upon completion of the investigation, the ethics committee chairperson in consultation with the investigating
9 entity may determine that:

10 (1) the complaint is without merit. The chairperson shall notify the complainant that the complaint is
11 dismissed and shall notify the respondent of the dismissal; and

12 (2) upon completion of an investigation wherein the complaint is not dismissed, the Ethics Committee
13 chairperson may:

14 (A) offer an informal resolution pursuant to G.S. 150B-22;

15 (B) schedule a meeting with the respondent;

16 (C) refer the report to the ethics committee or its hearing panel;

17 (D) schedule a hearing before the Board; or

18 (E) the chairperson may take a voluntary dismissal of the case where the respondent
19 relinquishes their credential for an agreed upon period of time.

20 (d) The Ethics Committee members or its subcommittees shall review a report referred by the Ethics Committee
21 chairperson and may take any of the following actions:

22 (1) dismiss the complaint;

23 (2) remand the matter to the investigating entity in order to obtain additional evidence sufficient upon
24 which to base a decision;

25 (3) make a written offer of informal resolution;

26 (4) schedule a meeting with the respondent whereby the dispute may be settled through informal
27 procedures; or

28 (5) schedule a disciplinary hearing, in accordance with G.S. 150B, Article 3A, before the Board.

29
30 *History Note:* Authority G.S. 90-731-737;

31 Eff. December 1, 2022.
32