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Sent: Thursday, November 10, 2022 4:45 PM
To: rrc.comments
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Subject: [External] Comments to the RRC November Agenda - Board of Nutrition and Dietetics
Attachments: Nov 10 2022 RRC Comments Schwalb - Ruberto-Beachler.pdf

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Please accept these comments for review from Cindy Schwalb and Nancy Ruberto Beachler.

Contact information is provided on the comment submission.

Thank you,
Cindy

COMMENTS for the Rules Review Commission Hearing November 17, 2022
Board of Dietetics and Nutrition
Submitted by Cindy Schwalb and Nancy Ruberto-Beachler

Please accept these comments for the Commission to review for merit. We are not administrative lawyers and did not consult with one in writing these comments. However, the work herein is based on research, analysis, evaluation and experience with completing these requirements, practicing in the profession, learning from colleagues and engaging NCBDN staff and members.

QUALIFICATIONS FOR LICENSURE

3. **21 NCAC 17 .0103 QUALIFICATIONS FOR LICENSURE**
4. Each applicant for an initial license as a licensed dietitian/nutritionist shall meet the qualifications as set forth in G.S.
5. ~~90-357. 90-357.5(a)~~ and the rules of this Chapter. Each applicant for an initial license as a licensed nutritionist shall
6. meet the qualifications as set forth in G.S. 90-357.5(c) and the rules of this Chapter. 7
8. *History Note: Authority G.S. 90-356; ~~90-357; 90-357.5.~~*
9. *Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on September 13,*
10. *1992;*
11. *Eff. June 1, 1992;*
12. *Recodified from 21 NCAC 17 .0003 Eff. February 1, 1995;*
13. *Amended Eff. December 1, 2011; July 18, 2002;*
14. *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 4,*
15. ~~2016.~~ 2016:
16. Amended Eff. December 1, 2022.

Suggested change: Strike “and the rules of this Chapter” for each appearance.

COMMENT: Based on the restrictions set forth in **§ 150B-19 a(1)** states that "An agency may adopt only rules that are expressly authorized by federal or State law;" the Board is not authorized to use the rulemaking process to create new requirements for state licensure that are not listed in G.S. 90-357.5 and therefore are not approved by the legislature. With that clarification, "and the rules of this Chapter" cannot be used to create requirements for licensure. Added note: these requirements would only apply to Certified Nutrition Specialists seeking licensure in the licensed nutritionist pathway – which is further discussed in the next rules comment.

21 NCAC 17 .0104 APPLICATIONS - Due to the length of this rule is not being copied in full.

90-356. Power and Responsibility of the Board limits the Board to administering the statute and does not give the Board an authority to interpret law. With 90-356 and Chapter 150B for reference, we would like to emphasize that the Board may only create rules that support the administration of the statute, reduce burden for those who must comply, must prove necessary to create, and that can be carried out in a cost-effective and timely manner. Few of the requirements in .0104 meet these criteria.

Authority to write **.0104** is drawn from: *Authority G.S. 90-356; 90-357.5; 90-357.6; 90-358 (note: 90-358 was repealed)*;

To help the commission work through this lengthy section, here's a clarification of these sections with comments where warranted:

.0104 Sections: (g) This section pertains to applicants in **90-357.5 (a)(2)** who have received a registration from the Commission on Dietetic Registration (CDR) ie., an RD credential. They show their CDR registration and their application is complete. No other rules apply to them, except for Renewal, Ethics and Disciplinary.

.0104 Sections: (h)(i)(j)(k) These lettered sections are for applicants described in **90-357.5 (a)(1)** – These are applicants who do not earn a CDR registration (RD credential) but complete an independent path toward the requirements: taking classes and completing the same internship requirements set forth by the Academy of Nutrition and Dietetics' accrediting arm referred to as ACEND, and then the applicant has to have completed the Academy's CDR exam. To our knowledge, this exam is only offered to students who have completed an ACEND accredited program. If you are not a dietetic intern, you cannot take the exam. So all the pertaining sections of the statute and this administrative code are extraneous, unattainable and unnecessary. In the original practice act of 1992, (current Act passed July 2018), this independent pathway was referred to as the C Pathway. No one was ever able to complete it. It has come to our attention that occupational licensing regulations must actually be attainable or they must be repealed.

.0104 Sections: (l)(m) These lettered sections refer to applicants described in **90-357.5 (c)**. These applicants have a Certified Nutrition Specialist credential received by the Board for Certification of Nutrition Specialists. By earning this credential, applicants prove they have met the education, examination and experience requirements as set forth in the statute. This section should be equivalent to **.0104(g)**, as set forth for the RD applicants seeking an LDN license. The CNS credential meets all the reasonable requirements for a Board Approved supervised experience to be granted licensure in parity with **.0104(g)**. And this was the legislative intent per recorded legislative hearings and legislative summaries written by legislative attorneys and approved by primary bill sponsors for licensing parity.

References in **90-357.5 (c)** that describe an independent pathway of documenting supervised hours in specific areas of nutrition to meet the criteria of CNS credential or DACBN credential are another statutory red herring for the same reasons as discussed in **.0104 Sections: (h)(i)(j)(k)**. No candidate can take the CNS examination or the DACBN examination without completing the credential requirements and earning these credentials. So you can only apply for an LN license as a CNS or DACBN.

Not discussed in the rules is: **90-357.5 (b)**. This statutory section grandfathers all Registered Dietitians from 2018 statutory changes that may disqualify them from licensure. The statute does not provide a "grandfathering" clause for CNS applicants in the LN pathway in the event that it may impede the most experienced CNS from obtaining licensure. There's no grandfather clause because the legislators were not informed that the statute had embedded conflicts for them. They thought they were giving the CNS their own board and combining it with the dietetic board, according to the 2017 H357 primary sponsor. This Board has gone to great lengths to prohibit CNS from obtaining licensure. The requirements in this Application section show further evidence of this.

It's been known and professed by the NCBDN Director and NCAND that RDs, CNSs and DABCNs do not pose risk of public harm.

More specific issues to this rule ...

- **k(3) and m(3) regarding Supervisors:** A section requiring supervisors to submit documents and supervisors to perform certain acts is outside of statutory authority. Supervisors are not applicants. Further, 90-357.5 provides only authority to permit the Board to determine if a supervisor is in fact one of the qualifying practitioners listed in this section. There is no authority here to make any requirements of how supervisors supervise.
- **(l) Most of this section exceeds statutory authority.** The Board cannot limit or restrict supervised experience hours. **90-357.5 does not require** "750 hours of direct supervised experiential learning." An act of administering **90-357.5(c)** would establish confirmation of the statutory requirements "a board approved internship" or "a documented supervised practice of not less than a 1000 hours" with 200 hours in 3 general nutrition categories, in the most time efficient, cost effective and unburdened process possible. An application that simply requires both applicant and supervisor signature on those hours. And the board does not have authority to require an hour by hour log or patient medical records to administer the statute.

Further, the current application for LN applicants requires them to state if they practiced medical nutrition therapy in North Carolina and if the supervisor was licensed in North Carolina, despite a ruling from the RRC in July 2019 informing the Board that they could not require this in their written rule. At the November 2019 NCBDN meeting the executive director and the chair mutually stated that they did not agree with the RRC ruling and were going to find a work around. The Board member application checklist in November 2019 required Board members to evaluate LN applicants based on whether their supervisor was licensed in North Carolina when they worked on medical nutrition therapy cases. Even more problematic for the NCBDN LN application (Category F) is that it has already been rejected by the North Dakota Dietetic and Nutrition Board when the NCBDN director and/or(?) AND's legislative policy director encouraged them to adopt the NCBDN LN application. The general counsel for the North Dakota board said it was illegal. To our knowledge, the NCBDN director has not shared this information with the Board.

SUGGESTED CHANGES:

~~(k)(l)~~ Applicants providing evidence of completing a board-approved supervised practice experience in G.S. 90-357.5(c)(2) shall submit documented proof of holding a current Certified Nutrition Specialist (CNS) or Diplomate of American Clinical Board of Nutrition (DACBN) credential.

[NOTE: Even though this alternative pathway cannot be achieved b/c only CNS applicants can take a CNS examination, etc. these would be conforming changes under the current structure.]

(m) Applicants providing evidence of completing a documented supervised practice experience in G.S. 90-357.5(c)(2) shall submit documentation ~~demonstrating at least 1000 hours of documented, supervised practice experience,~~ meeting the requirements as stated in G.S. 90- 357.5(c)(2). The scope of activities may include alternate supervised experiential learning such as simulation, case studies, and role playing, but must also include at least 750 hours in a professional work setting. The 1000 hours must be concurrent with or following completion of the academic requirements for licensure and need not be a paid experience. Learning experiences must prepare students to work with various populations of diverse cultures, genders, and across the life cycle, which may include infants, children, adolescents, adults, pregnant/lactating females, and older adults and to be able to competently

formulate actionable medical nutrition therapies and interventions, education, counseling, and ongoing care for the prevention, modulation, and management of a range of acute and chronic medical conditions, including:

- (1) underweight, overweight, malnutrition, and obesity;
- (2) cardiometabolic;
- (3) endocrine;
- (4) immune and autoimmune; and
- (5) gastrointestinal disorders.

~~(m)~~ **(n)** The following shall be necessary for proof of completion of a Board-approved internship or a documented, supervised practice experience in nutrition services under Paragraph ~~(h)~~ (m) of this Rule:

21 NCAC 17 .0106 GRANTING LICENSE WITHOUT EXAMINATION

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5. *History Note: Authority G.S. 90-356; 90-360;*

6. *Filed as a Temporary Adoption Eff. March 19, 1992 for a Period of 180 Days to Expire on*

7 *September 13, 1992;*

8 *Eff. June 1, 1992;*

9. *Recodified from 21 NCAC 17 .0006 Eff. February 1, ~~1995~~. 1995.*

10. *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 4,*

11. ~~2016~~. 2016;

12. Repealed Eff. December 1, 2022.

COMMENT:

The Board's original proposed rule, as published in the July 15, 2022 General Register (and follows below), brought 21 NCAC 17 .0106 into statutory compliance by adding “licensed nutritionist” to the list of applicants who can request a license without examination. However, by adding that the requirements be substantially the same as this State, referring to all of North Carolina law, such as the Administrative Code, the Board would be overstepping authority set forth in § 90-360 (*below*), which specifically limits the comparison of requirements to each state’s practice act / Article.

EXHIBITS

21 NCAC 17 .0106 GRANTING LICENSE WITHOUT EXAMINATION 7/15/2022

If an applicant seeks licensure on the basis that the applicant currently holds a valid license as a licensed dietitian/nutritionist or licensed nutritionist issued by another state, political ~~territory~~ territory, or jurisdiction with ~~equivalent~~ substantially the same requirements, requirements as this State, the applicant shall attach to the application evidence that:

1. The applicant currently holds a license in good standing; and
2. The requirements of the state, political ~~territory~~ territory, or jurisdiction are ~~equivalent~~ substantially the same to those of this ~~state~~. State.

Corresponding Statutory Section

§ 90-360. Granting license without examination. The Board may grant, upon application and payment of proper fees, a license as a licensed dietitian/nutritionist or a licensed nutritionist to a person who has met the examination requirements under G.S. 90-359 at the time of application and holds a valid license or certification as a dietitian/nutritionist, dietitian, or nutritionist issued by another state or any political territory or jurisdiction

acceptable to the Board if in the Board's opinion the requirements for that license or certification are substantially the same as the requirements of **this Article**.

The intent of this proposed rule appears to prevent licensed nutritionists and licensed dietitian nutritionists who do not have a CDR (Certificate of Dietetic Registration) from being licensed by reciprocity with another state. As previously explained in comments for **21 NCAC 17 .0103**, when writing H796/H357, NCBDN director, NCAND president and other influencers from the Academy, wrote it so those with a CDR can show their CDR in exchange for a license. Those applicants do not need **90-360** to be licensed in NC when moving from another state.

Now, for applicants with an LDN or LN who are relocating from another state, or seeking to licensure to mentor and supervise CNS candidates, they are not being approved through **§ 90-360** or even permitted to apply for **§ 90-360**. The Board's director (and in-house counsel) has already determined that no state will be substantially the same as North Carolina and has plainly said that to the American Nutrition Association. Though I am not clear if a reason was provided, this circles back to the fact that she and former NCAND president (also former Board member) Kim Illes were key authors of H796/H357. Further, at the 2019 NCBDN public rules hearing, the NCBDN director conveyed that no one knows the statute better than she does when she invited my administrative lawyer to a private meeting so that she, the director, could explain the statute to her.

However, one applicant, licensed in Maryland, who relocated to North Carolina for her husband's job in 2017 and helped pass H796/H357, persisted in her communications to the NCBDN director, that she be given an application to apply via **90-360 / 21 NCAC 17 .0106**. Following that application, the applicant was denied licensure because "in the Board's opinion," Maryland's statute was not substantially similar. This applicant is currently contesting the decision awaiting a hearing before an Administrative judge. [This applicant is one of the commenters, Nancy Ruberto Beachler]

By trying to pass this rule to include all of the states laws, and updating their Administrative Code with very specific requirements that no other state would have, it appears that the Board is seeking to manufacture support for their denial of the aforementioned applicant – and – the NCBDN director's claim that no other state requirements are substantially the same as NC.

After reviewing three public comments on the proposed rule and in consultation with outside legal counsel, the Board chose to repeal **21 NCAC 17 .0106** altogether. *(This was detailed in the Board's response to my Request for Explanation.)*

From this context, the comment we would like to share for the Commission to consider is this: Since 1992, **21 NCAC 17 .0106** provided the clarity for how a licensee from another state moving to North Carolina could be licensed by reciprocity via 90-360. And further above in the Applications section of these proposed rules, there are many, many details about applying via 90-357.5.

Does the omission of how to submit for License Without Examination run contrary to the requirements in § 150B-19.1a(3) by removing what was a clear and unambiguous implementation of

90-360? The Board only needs to add Licensed Nutritionist to **21 NCAC 17 .0106** in order to bring it into statutory compliance. In 2016, this rule was determined by the RRC to be “*necessary, without substantive public interest.*”

What happens when other applicants seek to apply via this pathway if the guidelines to submit for it are removed? Is the Board seeking to block this pathway for Certified Nutrition Specialists and therefore remain in violation of federal antitrust laws? What is the motivation to delete a rule the RRC evaluated as necessary?

Original comments to NCBDN on this rule included a reference to the **legislative intent of 90-360** and how the NCBDN director had previously acknowledged (as recorded in the minutes) that occupational licensing boards should follow the legislative intent when implementing their statute. And we read this elsewhere online in reference to administrative law, but this is not our area of expertise.

In many cases, it may be challenging to identify legislative intent without interpreting the law, which NCBDN is not authorized to do, per the statute. However, we were able to find recordings of a 2015 House Health Committee meeting when the original legislation was being introduced, and a 2017 House Finance Committee meeting that reintroduced the bill for the next biennium. In the 2015 recording, legislators express concern to make sure that nutritionists licensed moving from other states can get licensed and back to work quickly and easily in North Carolina. The legislators ask one of the bill’s author’s, Kim Iles, then NCAND president, if the bill would do this. And she said yes it would, but that for other types of practitioners they set the bar pretty high. Longtime NCBDN attorney, Henry Jones was present and acknowledged by Ms. Iles.

The other recording, introduces that the CNSs want to get licensed and have their own board and their board is going to be combined with the RD board so they **can get licensed**. There was solid legislative intent laid out to license CNS in the licensed nutritionist pathway.

Ms.Iles was an officer of the Board when the Maryland licensed applicant was seeking Licensure Without Examination and was being informed that she could not apply in that pathway. Between Iles, Jones and NCBDN director (who also served as the in-house counsel), it is very confusing why they ignored direct, clear communications of legislative intent.

Now, with the impending hearing (of one of us) and the Board’s response to delete **21 NCAC 17 .0106** entirely, there are concerns. Removing application processes has created ambiguity and confusion for future applicants seeking Licensure Without Examination, especially compared to the plethora of details provided by the Board in **21 NCAC 17 .0104**. Can the board delete a necessary rule? And create further ambiguity for licensees?

Proposed Changes

(New Text is in red)

21 NCAC 17 .0106 GRANTING LICENSE WITHOUT EXAMINATION

To apply for a license without examination as stated in § 90-360, an applicant shall:

1. Provide proof of holding a state license (or from another political territory) that is in good stading; and

2. Submit a copy of the Article of that state or territory for a reasonable comparison of the core licensure requirements: education, examination and experience.

Because **21 NCAC 17 .0106** has been out of statutory compliance since July 1, 2018, when H357 was signed into law, the proposed changes will bring this rule into statutory compliance, will align with legislative intent, and will respect Board limitations to administer, not interpret or expand this State law.

§ **150B-19.1(3)** that states “Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.”

3. **21 NCAC 17 .0302 REQUIREMENTS**

4. A student or trainee under direct supervision is exempt pursuant to G.S. ~~90-360(2)~~ 90-368(2) when enrolled in a course
5. of study or completing a documented supervised practice experience as required under G.S. 90-357.5, not to exceed
6. five years. The Board may approve or disapprove a request for an extension of the period of time based upon
7. circumstances beyond the control of the student or trainee. 8
9. *History Note: Authority G.S. 90-357.5; 90-356(2); 90-368(2);*
10. *Eff. March 1, 1996;*
11. *Amended Eff. July 18, 2002;*
12. *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. October 4,*
13. ~~2016~~ 2016;
14. Amended Eff. December 1, 2022.

Suggested Changes

21 NCAC 17 .0302 REQUIREMENTS

~~A student or trainee under direct supervision is exempt~~ For implementation purposes, student or trainee exemption pursuant to G.S. ~~90-360(2)~~ 90-368(2) may not to exceed five years. The Board may approve or disapprove a request for an extension of the period of time based upon circumstances beyond the control of the student or trainee.

Explanation: Avoids redundancy and clarifies the act of administration by this rule is to define the extension period. = as set forth in §150B-19(4) and §150B-19.1a(3). The phrase “direct supervision” was intentionally struck because the Board is looking to expand authority to require direct supervision and use it to write definitions that would disqualify experienced CNS professionals who completed requirements in previous years. Direct supervision is not a requirement set forth in 90-357.5 by the legislature and takes precedent over a phrase in an exemption from 1992 (~~90-368(2)~~), before the Academy of Nutrition and Dietetics created an independent internship pathway. As well, when adding the CNS and LN pathway to licensure, occupational licensing laws cannot be written that cannot be achieved. The authors of the statute knew since 2015 that the CNS credential was primarily centered on independent work. This is because completing case work and researching and evaluating data to plan a personalized intervention is not something a supervisor watches you do. The supervisor is presented with a plan and hears the assessment from their mentor. Intentional efforts to undermine another profession can be viewed as antitrust, which runs afoul of federal law and suggests an intent to commit fraud against the state of North Carolina and another professional organization when drafting a collaborative bill and lobbying to legislators about your intentions.

Suggested Changes
STRIKE this rule entirely

Explanation

As referenced in **.0104 APPLICATIONS**, the Board does not seem to have statutory authority to specify supervision activities per 90-357.5.

21 NCAC 17 .0516 Disciplinary Costs

Comment: Due to the costs of retaining legal counsel for defendants, this rule would create such an immense burden and fear of financial loss that this would “chill” defendants, innocent and otherwise, from defending themselves in a board investigation. This is perceived as a threat to hinder individuals from objecting to Board decisions..

Submitted by Cindy Schwalb and Nancy Ruberto-Beachler. We can be reached for questions and further information at: cindyschwalb@gmail.com, (703-930-04260); nrubertobeachler@gmail.com, (301-529-5654)

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