

NORTH CAROLINA REGISTER

VOLUME 22 • ISSUE 14 • Pages 1304 - 1359

January 15, 2008

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Contact List for Rulemaking Questions or Concerns

For questions or concerns regarding the Administrative Procedure Act or any of its components, consult with the agencies below. The bolded headings are typical issues which the given agency can address, but are not inclusive.

Rule Notices, Filings, Register, Deadlines, Copies of Proposed Rules, etc.

Office of Administrative Hearings
Rules Division
Capehart-Crocker House
424 North Blount Street
Raleigh, North Carolina 27601-2817
(919) 733-2678
(919) 733-3462 FAX

contact: Molly Masich, Codifier of Rules molly.masich@ncmail.net (919) 733-3367
Dana Vojtko, Publications Coordinator dana.vojtko@ncmail.net (919) 733-2679
Julie Edwards, Editorial Assistant julie.edwards@ncmail.net (919) 733-2696
Felicia Williams, Editorial Assistant felicia.s.williams@ncmail.net (919) 733-3361

Rule Review and Legal Issues

Rules Review Commission
1307 Glenwood Ave., Suite 159
Raleigh, North Carolina 27605
(919) 733-2721
(919) 733-9415 FAX

contact: Joe DeLuca Jr., Commission Counsel joe.deluca@ncmail.net (919) 715-8655
Bobby Bryan, Commission Counsel bobby.bryan@ncmail.net (919) 733-0928
Angela Person, Administrative Assistant angela.person@ncmail.net (919) 733-2721

Fiscal Notes & Economic Analysis

Office of State Budget and Management
116 West Jones Street
Raleigh, North Carolina 27603-8005
(919) 807-4700
(919) 733-0640 FAX

contact: William Crumbley, Economic Analyst william.crumbley@ncmail.net (919)807-4740

Governor's Review

Reuben Young reuben.young@ncmail.net
Legal Counsel to the Governor (919) 733-5811
116 West Jones Street(919)
Raleigh, North Carolina 27603

Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee
545 Legislative Office Building
300 North Salisbury Street
Raleigh, North Carolina 27611
(919) 733-2578
(919) 715-5460 FAX

contact: Karen Cochrane-Brown, Staff Attorney karenc@ncleg.net
Jeff Hudson, Staff Attorney jeffreyh@ncleg.net

County and Municipality Government Questions or Notification

NC Association of County Commissioners
215 North Dawson Street
Raleigh, North Carolina 27603
(919) 715-2893

contact: Jim Blackburn jim.blackburn@ncacc.org
Rebecca Troutman rebecca.troutman@ncacc.org

NC League of Municipalities
215 North Dawson Street
Raleigh, North Carolina 27603
(919) 715-4000

contact: Anita Watkins awatkins@ncmlm.org

NORTH CAROLINA REGISTER
Publication Schedule for January 2008 – December 2008

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule 31st legislative day of the session beginning:	270 th day from publication in the Register
22:13	01/02/08	12/06/07	01/17/08	03/03/08	03/20/08	05/01/08	05/13/08	09/28/08
22:14	01/15/08	12/19/07	01/30/08	03/17/08	03/20/08	05/01/08	05/13/08	10/11/08
22:15	02/01/08	01/10/08	02/16/08	04/01/08	04/21/08	06/01/08	01/2009	10/28/08
22:16	02/15/08	01/25/08	03/01/08	04/15/08	04/21/08	06/01/08	01/2009	11/11/08
22:17	03/03/08	02/11/08	03/18/08	05/02/08	05/20/08	07/01/08	01/2009	11/28/08
22:18	03/17/08	02/25/08	04/01/08	05/16/08	05/20/08	07/01/08	01/2009	12/12/08
22:19	04/01/08	03/10/08	04/16/08	06/02/08	06/20/08	08/01/08	01/2009	12/27/08
22:20	04/15/08	03/25/08	04/30/08	06/16/08	06/20/08	08/01/08	01/2009	01/10/09
22:21	05/01/08	04/10/08	05/16/08	06/30/08	07/21/08	09/01/08	01/2009	01/26/09
22:22	05/15/08	04/24/08	05/30/08	07/14/08	07/21/08	09/01/08	01/2009	02/09/09
22:23	06/02/08	05/09/08	06/17/08	08/01/08	08/20/08	10/01/08	01/2009	02/27/09
22:24	06/16/08	05/23/08	07/01/08	08/15/08	08/20/08	10/01/08	01/2009	03/13/09
23:01	07/01/08	06/10/08	07/16/08	09/02/08	09/22/08	11/01/08	01/2009	03/28/09
23:02	07/15/08	06/23/08	07/30/08	09/15/08	09/22/08	11/01/08	01/2009	04/11/09
23:03	08/01/08	07/11/08	08/16/08	09/30/08	10/20/08	12/01/08	01/2009	04/28/09
23:04	08/15/08	07/25/08	08/30/08	10/14/08	10/20/08	12/01/08	01/2009	05/12/09
23:05	09/02/08	08/11/08	09/17/08	11/03/08	11/20/08	01/01/09	01/2009	05/30/09
23:06	09/15/08	08/22/08	09/30/08	11/14/08	11/20/08	01/01/09	01/2009	06/12/09
23:07	10/01/08	09/10/08	10/16/08	12/01/08	12/22/08	02/01/09	05/2010	06/28/09
23:08	10/15/08	09/24/08	10/30/08	12/15/08	12/22/08	02/01/09	05/2010	07/12/09
23:09	11/03/08	10/13/08	11/18/08	01/02/09	01/20/09	03/01/09	05/2010	07/31/09
23:10	11/17/08	10/24/08	12/02/08	01/16/09	01/20/09	03/01/09	05/2010	08/14/09
23:11	12/01/08	11/05/08	12/16/08	01/30/09	02/20/09	04/01/09	05/2010	08/28/09
23:12	12/15/08	11/20/08	12/30/08	02/13/09	02/20/09	04/01/09	05/2010	09/11/09

EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

- (1) temporary rules;
- (2) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD
An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

Note from the Codifier: This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

North Carolina Department of Labor
Division of Occupational Safety and Health
4 West Edenton Street
Raleigh, NC 27601

(919) 807-2875

NOTICE OF VERBATIM ADOPTION OF FEDERAL STANDARDS

In consideration of G.S. 150-B-21.5(c) the Occupational Safety and Health Division of the Department of Labor hereby gives notice that:

- rule changes have been submitted to update the *North Carolina Administrative Code* at 13 NCAC 07F .0101, 13 NCAC 07F .0201, 13 NCAC 07F .0501, and 13 NCAC 07F .0502 to incorporate by reference the occupational safety and health related provisions of Title 29 of the *Code of Federal Regulations* Parts 1910, 1915, 1917, and 1926 promulgated as of November 15, 2007, except as specifically described, and
- the *North Carolina Administrative Code* at 13 NCAC 07A .0301 automatically includes amendments to certain parts of the *Code of Federal Regulations*, including Title 29, Part 1904—Recording and Reporting Occupational Injuries and Illnesses.

This update encompasses recent verbatim adoptions that are effective February 13, 2008 and must be implemented by industry by or before May 15, 2008 concerning:

- Employer Payment for Personal Protective Equipment
(72 FR 64342 - 64430, November 15, 2007)

The *Federal Register* (FR), as cited above, contains both technical and economic discussions that explain the basis for each change.

For additional information, please contact:

Bureau of Education, Training and Technical Assistance
Occupational Safety and Health Division
North Carolina Department of Labor
1101 Mail Service Center
Raleigh, North Carolina 27699-1101

For additional information regarding North Carolina's process of adopting federal OSHA Standards verbatim, please contact:

A. John Hoomani, General Counsel
North Carolina Department of Labor
Legal Affairs Division
1101 Mail Service Center
Raleigh, NC 27699-1101

Model State Administrative Procedure Act Revision Process -- Invitation to Participate

The National Conference of Commissioners on Uniform State Laws (NCCUSL) is revising its Model State Administrative Procedure Act (MSAPA). NCCUSL invites organizations and individuals interested in state administrative agency processes to participate in this effort.

NCCUSL is a 117 year old national organization of lawyers, judges and law professors who are appointed to represent their states in drafting and seeking enactment of uniform laws to facilitate commerce and certainty in the law among the states. For more information about NCCUSL, visit <http://www.nccusl.org/>.

The goal of the MSAPA drafting committee is to make the administrative process more efficient, accessible and fair. The most recent draft of MSAPA is available at <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=234>. The drafting process will not be completed until the spring of 2009. The MSAPA drafting committee invites interested parties to attend committee meetings as an observer and make comments and suggestions at the meetings or by submitting them in writing. To become an observer, please contact Ms. Leang Sou at NCCUSL at (312) 450-6606 or at leang.sou@nccusl.org. Submit written comments about the MSAPA to Commissioner Francis J. Pavetti, 18 The Strand, Goshen Point, Waterford, CT 06385.

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
The Historic Preservation Foundation of North Carolina, Inc.**

Pursuant to N.C.G.S. 130A-310.34, The Historic Preservation Foundation of North Carolina, Inc. has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Burlington, Alamance County, North Carolina. Among other past activities, the Property is the site of the former Glencoe Mill, and consists of approximately 6.5 acres at 2362 River Road. Environmental contamination exists on the Property in soil, groundwater and stream sediment. The Historic Preservation Foundation of North Carolina, Inc. has committed itself to sell the Property for redevelopment for mixed commercial, office, light industrial, storage/warehouse, institutional and/or residential use. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and The Historic Preservation Foundation of North Carolina, Inc., which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35.

The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the Burlington City Hall, 425 Lexington Ave., Burlington, NC 27215 by contacting Jondeen Terry, City Clerk at (336) 222-5023, or via email at jterry@ci.burlington.nc.us; or at the offices of the N.C. Brownfields Program, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605 (where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents) by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 508-8411.

Written public comments, may be submitted to DENR within 30 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 21 days after the period for written public comments begins. Thus, if The Historic Preservation Foundation of North Carolina, Inc., as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on January 16, 2008. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
M.H.O.C., LLC**

Pursuant to N.C.G.S. 130A-310.34, M.H.O.C., LLC has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Charlotte, Mecklenburg County, North Carolina. The Property, which is the former site of a Dixie Trucking Company facility, comprises approximately 16.25 acres and is located at 3600 North Graham Street. Environmental contamination exists on the Property in groundwater. M.H.O.C., LLC has committed itself to redevelopment of the Property for no uses other than as a trucking terminal or for other industrial purposes. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and M.H.O.C., LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35.

The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at Public Library of Charlotte & Mecklenburg County, 310 N. Tryon St., Charlotte, NC 28202 by contacting Allison Aiken at that address or at (704) 336-2725; or at the offices of the N.C. Brownfields Program, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605 (where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents) by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 508-8411.

Written public comments, may be submitted to DENR within 30 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 21 days after the period for written public comments begins. Thus, if M.H.O.C., LLC, as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on January 16, 2008. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

**SUMMARY OF NOTICE OF
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY
Tower Investments, LLC**

Pursuant to N.C.G.S. 130A-310.34, Tower Investments, LLC has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Greensboro, Guilford County, North Carolina. The Property, the site of a former Guilford Mills plant among other operations, consists of approximately 30.24 acres and is located at 5644 Hornaday Road. Environmental contamination exists on the Property in soil and groundwater. Tower Investments, LLC has committed itself to initially redevelop the Brownfields Property for light industrial uses, such as warehousing or light manufacturing, possibly followed, within three (3) to five (5) years, by mixed retail/office redevelopment (rezoning allowing). The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Tower Investments, LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35.

The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the Greensboro Central Library, 219 North Church Street in Greensboro, North Carolina 27402-3178 by contacting Frank Barefoot in Information Services at (336) 373-2471; or at the offices of the N.C. Brownfields Program, 401 Oberlin Rd., Suite 150, Raleigh, NC 27605 (where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents) by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 508-8411.

Written public comments, may be submitted to DENR within 30 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 21 days after the period for written public comments begins. Thus, if Tower Investments, LLC, as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on January 16, 2008. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson
Brownfields Program Manager
Division of Waste Management
NC Department of Environment and Natural Resources
401 Oberlin Road, Suite 150
Raleigh, North Carolina 27605

Note from the Codifier: The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.

Statutory reference: G.S. 150B-21.2.

**TITLE 02 – DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES**

concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Gasoline and Oil Inspection Board intends to amend the rules cited as 02 NCAC 42 .0102, .0201, .0301, .0401, .0501 and repeal the rules cited as 02 NCAC 42 .0801 - .0806.

Proposed Effective Date: May 1, 2008

Public Hearing:

Date: March 18, 2008

Time: 10:00 a.m.

Location: W. Donald Eaddy Bldg., 4300 Reedy Creek Road, Raleigh, NC 27607

Reason for Proposed Action: *The proposed rule changes would: add specifications for biodiesel, E85, and premium diesel, along with definitions and labeling requirements; update existing specifications for motor fuels; clarify or remove ambiguous language; and delete unnecessary rules pertaining to oxygenated gasoline.*

Procedure by which a person can object to the agency on a proposed rule: *Any person may object to the proposed rules by submitting a written statement of objection(s) to Stephen Benjamin, Secretary, NC Gasoline and Oil Inspection Board, 1050 Mail Service Center, Raleigh, NC 27699-1050.*

Comments may be submitted to: Stephen Benjamin, 1050 Mail Service Center, Raleigh, NC 27699-1050, phone (919) 733-3313, fax (919) 715-0524, email steve.benjamin@ncmail.net

Comment period ends: *The comment period ends at the conclusion of the public hearing on March 18, 2008.*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions

Fiscal Impact:

- ☐ State
☐ Local
☐ Substantive (≥\$3,000,000)
☒ None

**CHAPTER 42 - GASOLINE AND OIL INSPECTION
BOARD**

SECTION .0100 - PURPOSE AND DEFINITIONS

02 NCAC 42 .0102 DEFINITIONS

Except as otherwise defined in Chapter 119, North Carolina General Statutes, the definitions applicable in this Chapter are as follows:

- (1) "ASTM" means ~~the American Society for Testing and Materials~~ ASTM International.
- (2) "Approved lead substitute" means an EPA registered gasoline additive formulated to reduce valve seat recession in engines designed to operate on leaded gasoline.
- (3) "Biodiesel" means a fuel comprised of mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, designated B100, and meeting the requirements of ASTM D 6751.
- (4) "Biodiesel Blend" means a blend of biodiesel meeting ASTM D 6751 with petroleum-based diesel fuel meeting ASTM D 975 or fuel oil meeting ASTM D 396 and designated BXX, where XX represents the volume percentage of biodiesel in the blend.
- (3)(5) "Board" means the Gasoline and Oil Inspection Board.
- (4)(6) "Cetane number" means the relative ignition quality of diesel fuels by the ASTM Cetane Method ~~D 613~~ D 613.
- (5) ~~"Control area" means an area of the state designated by the Environmental Management Commission pursuant to Title 2 of the Clean Air Act Amendments of 1990 in which the oxygen content of gasoline is regulated for the purpose of reducing carbon monoxide levels.~~
- (6) ~~"Control area oxygenate blending facility" means any facility at which the oxygen content of gasoline is altered, excluding retail outlets and wholesale purchaser-consumer facilities.~~

- (7) ~~"Control area terminal" means a terminal which is capable of receiving gasoline in bulk, e.g., by pipeline, marine vessel, tank truck, or barge, or at which gasoline is altered either in quantity or quality, excluding the addition of deposit control additives.~~
- (8) ~~"Control period" means the period during which the oxygen content of gasoline is regulated in any control area.~~
- (9)(7) "Denatured fuel ethanol" means ethanol meeting the provisions of ASTM ~~D 4806, D 4806,~~ "Standard Specification for Denatured Fuel Ethanol to be Blended with Gasolines for Use as an Automotive Spark-Ignition Engine Fuel."
- (10)(8) "Director" means the ~~director~~ Director of the Standards Division of the North Carolina Department of ~~Agriculture, Agriculture and Consumer Services.~~
- (11)(9) "Distributor" means any person who transports or stores or causes the transportation or storage of gasoline at any point between any gasoline refinery or importer's facility and any retail outlet or wholesale purchaser-consumer's facility.
- (10) "E85" means a petroleum product that is a blend of denatured ethanol and gasoline or natural gasoline of which the ethanol portion is nominally 70 to 85 percent ethanol by volume and meeting the requirements of ASTM D 5798.
- (12)(11) "EPA" means the United States Environmental Protection Agency.
- (13)(12) "Leaded" means any gasoline or gasoline-oxygenate blend which contains more than 0.05 gram lead per U.S. gallon (0.013 gram lead per liter) or contains an approved lead substitute which provides a lead equivalency of at least 0.10 gram lead per U.S. gallon (0.026 gram per liter).
- (14)(13) "Liquefied petroleum gas" means any material which is composed predominantly of any of the following hydrocarbons or mixtures of same: propane, propylene, butanes (normal or iso-butane), and butylenes.
- (15)(14) "Motor Octane Number" means the number describing the relative anti-knock characteristic of a motor fuel determined by ASTM Motor Method ~~(D 2700), (D 2700).~~
- (16) ~~"Non oxygenated gasoline" means any gasoline which does not meet the definition of oxygenated gasoline.~~
- (15) "NCWM" means the National Conference on Weights and Measures.
- (16) "NIST" means the National Institute of Standards and Technology.
- (17) "Octane Index" means the number obtained by adding the research octane number and the motor octane number and dividing the sum by two.
- (18) ~~"Oxygen content of gasoline" means the percentage of oxygen by weight contained in a gasoline, based upon its percentage oxygenate by volume, excluding denaturants and other non oxygen containing components with all measurements adjusted to 60 degrees Fahrenheit.~~
- (19)(18) "Oxygenate" means any substance which, when added to gasoline, increases the amount of oxygen in that gasoline, and which has been approved by EPA for use in gasoline.
- (20) ~~"Oxygenated gasoline" means any gasoline containing a substance which adds oxygen to that gasoline.~~
- (19) "Premium Diesel" means a refined middle distillate petroleum product that meets the specifications of ASTM D 975 and NIST Handbook 130, Uniform Engine Fuels, Petroleum Products and Automotive Lubricants Regulation, section 2.2.1.
- (21)(20) "Qualitative word or term" means any word or term used in a brand name which by definition or customary usage indicates a level of quality, classification, grade, or designation.
- (22)(21) "Regular" when used as part of a brand name or as a grade designation for gasoline or gasoline-oxygenate blend shall be construed to mean ~~a leaded an unleaded regular grade commercial automotive gasoline or gasoline-oxygenate blend unless the brand name or grade designation also contains the word "Unleaded" or a word or term of equivalent meaning, blend.~~
- (22) "Renewable Diesel Fuel" means a fuel which is not a mono-alkyl ester; meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under section 7545 of the Clean Air Act; is intended for use in engines that are designed to run on conventional, petroleum derived diesel fuel; is derived from nonpetroleum renewable resources including, but not limited to, vegetable oil, animal wastes, including poultry fats and poultry wastes, and other waste materials, or municipal solid waste and sludges and oils derived from wastewater and the treatment of wastewater; and meets the latest version of ASTM specification D 975.
- (23) "Research Octane Number" means the number describing the relative anti-knock characteristic of a motor fuel determined by ASTM Research Method ~~(D 2699), (D 2699).~~
- (24) ~~"Reseller" means any person who purchases gasoline and resells or transfers it to a retailer or a wholesale purchaser consumer.~~

- ~~(25)(24)~~ "Retail outlet" means any establishment at which gasoline is sold or offered for sale.
- "Retail" means the sale or offering for sale of gasoline to the ultimate consumer for use in a motor vehicle.
- ~~(26)~~ "Retailer" means any person who owns, leases, operates, controls or supervises a retail outlet.
- ~~(27)(25)~~ "Substantially Similar" rule means the U.S. United States Environmental Protection Agency's "Substantially Similar" rule, Section 211 (f) (1) of the Clean Air Act [42 U.S.C. 7545 (f) (1)].
- ~~(28)(26)~~ "Terminal" means a facility at which gasoline is dispensed into trucks for transportation to retail outlets or wholesale purchaser-consumer facilities.
- ~~(29)~~ "Total alcohol" means the aggregate total in volume percent of all alcohol contained in any fuel defined in this Chapter.
- ~~(30)~~ "Total oxygenate" means the aggregate total in volume percent of all oxygenates contained in any fuel defined in this Chapter.
- ~~(31)(27)~~ "Unleaded" means any gasoline or gasoline-oxygenate blend to which no lead or phosphorus compounds have been intentionally added and which contains not more than 0.05 gram lead per U.S. gallon (0.013 gram lead per liter) and not more than 0.005 gram phosphorus per U.S. gallon (0.0013 gram phosphorus per liter).
- ~~(32)~~ "Wholesale purchaser consumer" means any organization that is an ultimate consumer of gasoline and which purchases or obtains gasoline from a supplier for use in motor vehicles and receives delivery of that product into a storage tank of at least 550-gallon capacity substantially under the control of that organization.

ASTM documents referred to in this Rule are hereby adopted by reference, including subsequent amendments and editions, and are available for inspection in the Office of the Director of the Standards Division. Copies of these documents may be obtained from the ASTM, 1916 Race Street, Philadelphia, PA 19103, at a cost determined by ASTM.

Authority G.S. 119-26; 119-26.1.

SECTION .0200 - QUALITY OF LIQUID FUEL PRODUCTS

02 NCAC 42 .0201 STANDARD SPECIFICATIONS

(a) The Board hereby adopts by reference, including subsequent amendments and editions, ASTM ~~D 4814~~, D 4814, "Standard Specification for Automotive Spark-Ignition Engine Fuel" as standard specification for gasoline with the following modifications:

- (1) Applications for temporary exceptions to vapor pressure and vapor/liquid ratio specifications as provided in this

Subparagraph may be made to the ~~director~~, Director. Said applications shall contain evidence ~~satisfactory to the director~~ that outlets marketing gasoline in North Carolina cannot ~~feasibly~~ be supplied from bulk terminals furnishing specified volatility level gasoline or that customary sources of supply have been temporarily interrupted by product shortage and alternate sources furnishing specified volatility level gasoline are not available. Such temporary exceptions granted shall apply only until the next meeting of the ~~board~~, Board at which time the ~~board~~, Board shall establish the duration of the exception;

- (2) The minimum lead content for gasoline registered or labeled as "leaded" ~~or "regular"~~ shall be as defined in ~~Rule .0102 of this Chapter~~, 02 NCAC 42 .0102;
- (3) Vapor pressure and vapor/liquid ratio seasonal specifications as listed in this Subparagraph may be extended for a maximum period of 15 days to allow for the disbursement of old stocks. However, new stocks of a higher volatility classification shall not be offered for retail sale prior to the effective date of the higher volatility classification.

(b) The Board hereby adopts by reference, including subsequent amendments and editions, ASTM ~~D 4814~~, D 4814, "Standard Specification for Automotive Spark-Ignition Engine Fuel" as standard specification for alcohol blends with the following modifications:

- (1) A vapor pressure tolerance not exceeding one pound per square ~~inch~~, inch for ethanol blends of up to 10 percent;
- (2) Vapor pressure and vapor/liquid ratio seasonal specifications as listed in this Subparagraph may be extended for a maximum period of 15 days to allow for the disbursement of old stocks. However, new stocks of a higher volatility classification shall not be offered for retail sale prior to the effective date of the higher volatility classification;
- (3) Applications for temporary exceptions to vapor pressure and vapor/liquid ratio specifications as provided in this Subparagraph may be made to the ~~director~~, Director. Said applications shall contain evidence satisfactory to the ~~director~~, Director that outlets marketing gasoline in North Carolina cannot feasibly be supplied from bulk terminals furnishing specified volatility level gasoline or that customary sources of supply have been temporarily interrupted by product shortage and alternate sources furnishing specified volatility level gasoline are not available. Such temporary exceptions granted shall apply only until the next meeting of the ~~board~~, Board at which time

the ~~board~~ Board shall establish the duration of the exception;

- (4) The minimum temperature at 50 percent evaporated shall be ~~158 degrees F. (70 degrees C.)~~ 150 degrees F (66 degrees C) as determined by ASTM Test Method ~~D 86, D 86~~ for ethanol blends of up to 10 percent;
- (5) The minimum lead content for ~~gasoline/oxygenate~~ gasoline and alcohol blends registered or labeled as "leaded" ~~or "regular"~~ shall be as defined in ~~Rule .0102 of this Chapter, 02 NCAC 42 .0102;~~
- (6) Octane rating shall not be less than the octane index certified on the brand name registration as required by 2 02 NCAC 42 .0500;
- (7) All blends, both leaded and unleaded, shall be blended according to the EPA "Substantially Similar" rule or an EPA waiver for unleaded fuel;
- (8) Water tolerance shall be such that no phase separation occurs when subjected to a temperature equal to the temperatures specified in ~~Table 4, ASTM D 4814, the table for "Maximum Temperature for Phase Separation, °C," ASTM D 4814;~~
- (9) The vapor/liquid ratio specification shall be waived for ethanol blends of up to 10 percent.

(c) The Board hereby adopts by reference, including subsequent amendments and editions, ~~ASTM D 975, D 975~~, "Standard Specification for Diesel Fuel Oils" as standard specification for diesel motor fuels and renewable diesel fuels with the following modification: For diesel motor fuel grade 2-D, the minimum flash point as determined by ASTM Test Method ~~D 56 D 56~~ shall be 115 degrees ~~F. (46 degrees C.)~~ F (46 degrees C).

(d) The Board hereby adopts by reference, including subsequent amendments and editions, ~~ASTM D 396, D 396~~, "Standard Specification for Fuel Oils" as standard specification for fuel ~~oils, oils and blends of biodiesel and fuel oil.~~

(e) The Board hereby adopts by reference, including subsequent amendments and editions, ~~ASTM D 3699, D 3699~~, "Standard Specification for Kerosene" as standard specification for kerosenes with the following modification: For grade 2-K, the presence or absence of coloring matter shall in no way be determinative of whether a substance meets the requirements of this grade of kerosene.

(f) The Board hereby adopts by reference, including subsequent amendments and editions, ASTM D 6751, "Standard Specification for Biodiesel (B100) Blend Stock for Distillate Fuels" as standard specification for biodiesel (B100) and for B99 (a blend of 99 percent biodiesel and one percent petroleum diesel).

(g) The Board hereby adopts by reference, including subsequent amendments and editions, ASTM D 5798, "Standard Specification for Fuel Ethanol (Ed75-Ed85) for Automotive Spark-Ignition Engines" as standard specification for E85 fuel ethanol.

(h) The Board hereby adopts by reference, including subsequent amendments and editions, NIST Handbook 130, "Uniform Engine Fuels, Petroleum Products and Automotive Lubricants

Regulation," section 2.2.1 "Premium Diesel Fuel" as the standard specification of premium diesel fuels in addition to ASTM D 975. Copies of this document may be obtained at no cost from the NIST Web site - <http://ts.nist.gov/WeightsandMeasures/>.

~~(f)(i)~~ In addition to meeting all specification requirements as set forth in this Rule, each fuel must be suitable for the intended use. Motor fuels shall not contain concentrations of methyl tertiary butyl ether (MTBE) in violation of G.S. 119-26.3.

~~(g)(j)~~ ASTM documents adopted by reference herein are available for inspection in the ~~Office~~ office of the Director of the Standards Division and may be obtained from ~~ASTM, 1916 Race Street, Philadelphia, PA 19103, at a cost determined by ASTM.~~ ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA 19428-2959 or their Web site - www.astm.org, at the following cost for each document: D 396, thirty-five dollars (\$35.00); D 975, forty-one dollars (\$41.00); D 3699, thirty dollars (\$30.00); D 4814, forty-seven dollars (\$47.00); D 5798, thirty-five dollars (\$35.00); and D 6571, thirty-five dollars (\$35.00).

Authority G.S. 119-26; 119-26.1; 119-26.3; 150B-14.

SECTION .0300 - SALE OF GASOLINE

02 NCAC 42 .0301 GASOLINE SOLD UNDER LABEL NAME OR BRAND

(a) All gasoline sold at wholesale or retail in North Carolina shall be sold under the label, name, or brand name under which the gasoline was first purchased for resale in North Carolina, except as provided in Paragraph (b) of this Rule.

(b) The owner of any gasoline purchased for ~~sale or~~ resale in North Carolina may sell such gasoline under a label, name, or brand other than that under which the gasoline was purchased provided that a ~~notice of intention to change the label, name, or brand~~ Motor Fuel Brand Name Registration form is filed with the ~~director~~ Director.

Authority G.S. 119-26.

SECTION .0400 - DISPENSING DEVICES AND PUMPS

02 NCAC 42 .0401 LABELING OF DISPENSING DEVICES

(a) For the purpose of product identity, each dispensing device used in the retailing of any motor fuel shall be plainly and conspicuously labeled with the following:

- (1) ~~for gasoline, For gasoline and gasoline-oxygenate blends of up to 10 percent ethanol,~~ the registered brand name;
- (2) ~~for~~ For diesel fuel, the registered brand name plus a descriptive or generic label if the registered brand name does not adequately identify the type ~~and/or~~ grade of product;
- (3) For biodiesel and biodiesel blends, the registered brand name plus a descriptive or generic label if the registered brand name does not adequately identify the type or grade of product;

- (3)(4) ~~for~~ For gasoline-oxygenate blends containing at least one percent by volume of methanol, the registered brand name plus an additional label which states that the blend "contains methanol." The label shall be composed of letters at least one inch in height, minimum one-eighth inch stroke, which contrast distinctly with the label background and shall be affixed to the dispenser front panel in a position clear and conspicuous from the driver's position. Exceptions to this Rule are:
- (A) ~~for~~ For fuels not covered by an EPA waiver, the additional label shall identify the percent by volume of ethanol or methanol in the blend; and
- (B) ~~for~~ For fuels meeting the EPA's "Substantially Similar" rule and which do not contain methanol, no additional label is ~~required~~, required;
- (5) For E85 fuel ethanol, the registered brand name.

(b) Each dispensing device used in the retailing of products other than motor fuel shall be plainly and conspicuously labeled as follows:

- (1) Kerosene shall be labeled as either 1-K Kerosene or 2-K Kerosene. In addition, each dispenser shall contain one of the following legends as appropriate:
- (A) On 1-K kerosene dispensers, the legend "Suitable For Use In Unvented Heaters"; or
- (B) On 2-K kerosene dispensers, the legend "May Not Be Suitable For Use In Unvented Heaters";
- (2) Other products shall be labeled with either the applicable generic name or a brand name which identifies the type of product.

(c) Whenever a motor fuel or other product provided for in this Section is offered for sale, sold, or delivered at retail in barrels, casks, cans, or other containers, each container shall be labeled in accordance with this Section and in accordance with 15 U.S.C. 1451 et. seq., the Fair Packaging and Labeling Act.

(d) If a dispenser is so designed that two or more hose/nozzles which are hoses connected to a common housing dispense more than one type or grade of product, means shall be provided to clearly indicate the identity of the product being dispensed from each hose/nozzle, hose.

Authority G.S. 119-27.

SECTION .0500 - REGISTRATION AND BRANDING

02 NCAC 42 .0501 BRANDING AND REGISTRATION OF MOTOR FUELS

(a) All motor fuels offered for sale, sold, or delivered to a purchaser in this State shall be branded, and each and every brand name shall be registered, together with quality specifications, registered with the ~~director~~ Director on forms

provided by the ~~director~~. In his discretion, the ~~director~~ Director. The Director:

- (1) may require ~~written certification or other satisfactory evidence~~ proof of compliance for any motor fuel which is subject to ~~federal~~ Federal waiver requirements or other applicable laws or regulations; and
- (2) may require any person desiring to register a motor fuel for which there exists no generally recognized classification, basic quality standards, or performance record, to submit, in writing, the following:
- (A) certified test data and performance evaluations; and
- (B) detailed chemical and physical characteristics.

This information shall be from independent sources of recognized qualification or otherwise satisfactory to the ~~director~~ Director, and shall be submitted before an application for registration will be considered.

(b) Any brand name registration under this Section shall in no way supersede ~~federal Trademark Law~~ Federal or state trademark law or state ~~Brandname Law~~ brand name law.

Authority G.S. 119-26.

SECTION .0800 - OXYGENATED GASOLINE

02 NCAC 42 .0801 PURPOSE AND APPLICABILITY

(a) ~~This Section sets forth oxygenated gasoline standards for areas designated by the Environmental Management Commission as carbon monoxide nonattainment areas pursuant to Title II of the 1990 Amendments to the Federal Clean Air Act and regulations promulgated by the United States Environmental Protection Agency. The requirements of this Section apply to all gasoline offered for sale, sold, exchanged, or dispensed as a fuel for use in a spark ignition engine in a control area during a control period, except for gasoline intended for use in aircraft.~~

(b) ~~The requirements of this Section apply to the following control areas:~~

- (1) ~~The Raleigh/Durham Metropolitan Statistical Area consisting of Durham, Franklin, Orange, and Wake Counties;~~
- (2) ~~The Greensboro/Winston Salem/High Point Metropolitan Statistical Area consisting of Davie, Davidson, Forsyth, Guilford, Randolph, Stokes, and Yadkin Counties;~~
- (3) ~~Any other areas designated by the Environmental Management Commission, in accordance with the Administrative Procedure Act.~~

The requirements of this Section do not apply to areas which have been removed from designation as carbon monoxide nonattainment areas by the Environmental Management Commission and the Environmental Protection Agency.

(c) ~~The control period is a four month period beginning November 1 and running through the last day of February of the following year.~~

~~(d) Gasoline in storage within the counties identified in Paragraph (b) of this Rule prior to November 1 at a retail outlet or wholesale purchaser consumer dispensing facility having total gasoline tank capacity of less than 550 gallons or a total weekly dispensing rate of less than 550 gallons is exempt from the requirements of this Section. However, any gasoline supplied to the retail outlet or wholesale purchaser consumer facility during the control period shall comply with the requirements of this Section.~~

~~(e) If the Administrator of the U.S. Environmental Protection Agency delays the effective date of the oxygenated gasoline requirements then the provisions of this Section do not apply during such period.~~

Authority G.S. 119-26; 119-26.1; 143-215.107.

02 NCAC 42 .0802 OXYGEN CONTENT

In addition to the requirements in Section .0200 of this Chapter, the gasoline identified in Rule .0801 of this Section shall have an oxygen content of not less than 2.7 percent by weight.

Authority G.S. 119-26; 119-26.1; 143-215.107.

02 NCAC 42 .0803 RECORD KEEPING AND TRANSFER REQUIREMENTS

~~(a) All parties in the gasoline distribution network, as described in this Rule, shall maintain records containing compliance information enumerated or described in this Rule. These records shall be retained by the regulated parties for at least one year.~~

~~(1) Control area terminal operators. Persons who own, lease, operate or control gasoline terminals which serve control areas shall maintain records containing the following information:~~

- ~~(A) The owner(s) of each batch of gasoline;~~
- ~~(B) For all batches or truckloads of gasoline leaving the terminal, the volume of gasoline, the type of oxygenate(s), and minimum oxygen content of the batch or truckload;~~
- ~~(C) Destination of each tank truck sale or batch of gasoline, that is, whether it was within a control area or not;~~
- ~~(D) The name and address of the party to whom the gasoline was sold or transferred and the date of the sale or transfer.~~

~~(2) Control area oxygenate blenders. Persons who own, lease, operate or control facilities at which the oxygen content of gasoline is altered and which serve control areas shall maintain records containing the following information:~~

- ~~(A) The owner(s) of each batch of gasoline;~~
- ~~(B) For all batches or truckloads of oxygenated gasoline leaving the terminal, the volume of oxygenated gasoline, the type of oxygenate(s),~~

~~and minimum oxygen content of the batch or truckload;~~

~~(C) Destination of each tank truck sale or batch of gasoline, that is, whether it was within a control area or not;~~

~~(D) The name and address of the party to whom the oxygenated gasoline or oxygenate(s) was sold or transferred and the date of the sale or transfer.~~

~~(3) Retailers and wholesale purchaser consumers within a control area must maintain the following records:~~

~~(A) The names and addresses of the parties from whom all shipments of gasoline were purchased or received, and the dates when they were received;~~

~~(B) Data on every shipment of gasoline bought, sold or transported, including:~~

- ~~(i) Volume of each shipment;~~
- ~~(ii) Type of oxygenate(s) and oxygen content;~~
- ~~(iii) Destination of each sale or shipment of gasoline, that is, whether it is intended for use within a control area.~~

~~(b) Each time that physical custody or title of gasoline destined for a control area changes hands other than when gasoline is sold or dispensed for use in motor vehicles at a retail outlet or wholesale purchaser consumer facility, the transferor shall provide to the transferee, in addition to, or as part of, normal bills of lading, invoices, etc., document(s) which clearly and conspicuously contains the following information on that shipment:~~

- ~~(1) The date of the transfer;~~
- ~~(2) The name and address of the transferor;~~
- ~~(3) The name and address of the transferee;~~
- ~~(4) The volume of gasoline which is being transferred;~~
- ~~(5) The proper identification of the gasoline as non-oxygenated or oxygenated;~~
- ~~(6) Type of oxygenate(s) and minimum oxygen content.~~

~~Such document(s) shall accompany every shipment of gasoline to a control area after it has been dispensed by a terminal or control area oxygenate blending facility, or the information shall be included in the normal paperwork which is generated subsequent to the shipment of gasoline from a terminal or control area oxygenate blending facility.~~

Authority G.S. 119-26; 119-26.1; 143-215.107.

02 NCAC 42 .0804 GASOLINE DISPENSER LABELING

~~(a) Each gasoline dispenser stand from which oxygenated gasoline is dispensed at a retail outlet in the control area shall be affixed during the control period with a legible and conspicuous label which contains the following statement:~~

~~"The gasoline dispensed from this pump is oxygenated and will reduce carbon monoxide emissions from motor vehicles."~~

~~(b) The posting of the statement in Paragraph (a) of this Rule shall be in block letters of no less than 20 point bold type; in a color contrasting with the intended background. The label shall be placed in the vertical surface of the dispenser front panel in a position clear and conspicuous from the driver's position.~~

~~(c) The retailer shall be responsible for compliance with the labeling requirements of this Section.~~

~~(d) The label may remain on the dispenser even when oxygenated gasoline is not being sold provided the oxygenated control period is identified.~~

Authority G.S. 119-26.1; 119-27; 143-215.107.

**02 NCAC 42 .0805 SAMPLING, TESTING AND
OXYGEN CONTENT CALCULATIONS**

Oxygenate	Oxygen molecular weight contribution	Specific gravity at 60 degrees F
Methyl Alcohol	0.4993	0.7963
Ethyl Alcohol	0.3473	0.7939
n Propyl Alcohol	0.2662	0.8080
Isopropyl Alcohol	0.2662	0.7899
n Butyl Alcohol	0.2158	0.8137
Isobutyl Alcohol	0.2158	0.8058
sec Butyl Alcohol	0.2158	0.8114
tertiary Butyl Alcohol	0.2158	0.7922^A
Methyl tertiary Butyl Ether	0.1815	0.7460
Ethyl tertiary Butyl Ether	0.1566	0.7452
tertiary Amyl Methyl Ether	0.1566	0.7752
tertiary Hexyl Methyl Ether	0.1377	0.7860

^AExtrapolated, below freezing temperature.

Authority G.S. 119-26; 119-26.1; 143-215.107.

**02 NCAC 42 .0806 COMPLIANCE AND
ENFORCEMENT**

~~(a) During the first 10 days of the control period, gasoline at retail and wholesale purchaser consumer facilities will be deemed in compliance provided documentation on all deliveries during the five days preceding the control period indicates that all gasoline delivered to said facilities complied with Rule .0802 of this Section.~~

~~(b) Gasoline found not to be in compliance with the requirements of this Section will be ordered off sale or removed from use.~~

~~(1) The gasoline may be returned to sale or use once the owner has blended the gasoline with additional oxygenates sufficient to comply with the oxygen content standard of this Section, provided this procedure is supervised by the director and is in accordance with G.S. 119-27.~~

~~(2) The gasoline may be transferred for use outside a control area, provided the record keeping requirements of Rule .0803 of this Section are followed and the transfer~~

~~(a) Sampling methodologies used to determine compliance with this Section shall be those set forth in Appendix D of Title 40, Part 80 of the Code of Federal Regulations, which is adopted by reference, including subsequent amendments and editions. Copies of the Code of Federal Regulations may be obtained from the Government Printing Office, Washington, D.C. at a cost determined by that office.~~

~~(b) Determination of the oxygenate(s) and their volume in gasoline shall be in accordance with test method ASTM D 4815 as set forth in ASTM specification D 4814.~~

~~(c) Oxygen content shall be calculated by multiplying the mass concentration of each oxygenate in gasoline by the oxygen molecular weight contribution of the oxygenate. All volume measurements shall be adjusted to 60 degrees Fahrenheit. For the purpose of calculating oxygen content, the following oxygen molecular weight contributions shall be used.~~

~~procedure is supervised by the director in accordance with G.S. 119-27.~~

Authority G.S. 119-26; 119-26.1; 119-27; 143-215.107.

**TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN
SERVICES**

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Child Care Commission intends to amend the rules cited as 10A NCAC 09 .0705, .1705, .1721, .2318 and repeal the rule cited as 10A NCAC 09 .2511.

Proposed Effective Date: July 1, 2008

Public Hearing:

Date: February 7, 2008

Time: 11:00 a.m. – 12:00 p.m.

Location: NC Division of Child Development, 319 Chapinok Road, Suite 120, Raleigh, NC

Reason for Proposed Action: *The NC Child Care Commission proposes to amend rules regarding the requirements for CPR and First Aid training for staff of child care centers and child care homes. Many of the approved training organizations now offer two year certifications for CPR and First Aid. The proposed rules would now match with the issuing and renewing agencies time frames, but never allow for more than two years for CPR or three years for First Aid in which a certificate would have to be issued or renewed.*

10A NCAC 09 .1721 and .2318 (Records Retention) – *These Rules are being amended to make the retention schedule for family child care homes consistent with the schedule for child care centers. These amendments will simplify the record retention time periods by reducing the number of different retention rules, and will combine all retention schedules into one rule. The amendments will also provide retention schedules for forms that do not currently have them.*

10A NCAC 09 .2511 – *This Rule is scheduled to be repealed due to lack of necessity. Aquatic activities for all children in child care are addressed in Rule .1403, therefore this Rule is no longer needed.*

Procedure by which a person can object to the agency on a proposed rule: *Anyone wishing to comment on these proposed rules or would like to request copies of the rules, should contact Dedra Alston, Rule-making Coordinator, NC Division of Child Development, 2201 Mail Service Center, Raleigh, NC 27699-2201, at (919) 890-7060 or Dedra.Alston@ncmail.net. Written comments will be accepted through March 17, 2008. Oral comments may be made during the public hearing. The Commission Chair may impose time limits for oral remarks.*

Comments may be submitted to: *Dedra Alston, 2201 Mail Service Center, Raleigh, NC 27699-2201, phone (919) 890-7060, fax (919) 662-4568, email Dedra.Alston@ncmail.net*

Comment period ends: *March 17, 2008*

Procedure for Subjecting a Proposed Rule to Legislative Review: *If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.*

Fiscal Impact:

- ☐ State
☐ Local
☐ Substantive (≥\$3,000,000)
☒ None

CHAPTER 09 - CHILD CARE RULES

**SECTION .0700 - HEALTH AND OTHER STANDARDS
FOR CENTER STAFF**

**10A NCAC 09 .0705 SPECIAL TRAINING
REQUIREMENTS**

- (a) At least one staff member shall be knowledgeable of and able to recognize common symptoms of illness.
 (b) Staff who have completed ~~within the last three years~~ a course in basic first aid ~~aid~~, shall be present at all times children are present. First aid training shall be renewed on or before expiration of the certification or every three years, whichever is less. The number of staff required to complete the course shall be based on the number of children present as shown in the following chart:

Number of children present	Number of staff trained in first aid required
1-29	1 staff
30-79	2 staff
80 and above	3 staff

Verification of each required staff person's completion of this course shall be maintained in the person's individual personnel file in the center. The basic first aid course shall address principles for responding to emergencies, ~~rescue breathing~~, and techniques for handling common childhood injuries, accidents and illnesses such as: choking, burns, fractures, bites and stings, wounds, scrapes, bruises, cuts and lacerations, poisoning, seizures, bleeding, allergic reactions, eye and nose injuries and sudden changes in body temperature.

(c) A first aid information sheet shall be posted in a prominent place for quick referral. An acceptable form may be requested free of charge from the North Carolina Child Care Health and Safety Resource Center.

(d) Each child care center shall have at least one person on the premises at all times, and at least one person who accompanies the children whenever they are off the premises, who has current certification in ~~successfully completed within the last 12 months~~ a cardiopulmonary resuscitation (CPR) course provided by either the American Heart Association or the American Red Cross or other organizations approved by the Division. Other organizations shall be approved if the Division determines that the courses offered are substantially equivalent to those offered by the American Red Cross. Successfully completed is defined as demonstrating competency, as evaluated by the instructor, in performing CPR. The course shall provide training in CPR appropriate for the ages of children in care. Documentation of successful completion of the course from the American Heart Association, the American Red Cross, or other organization approved by the Division shall be on file in the center.

(e) Staff shall complete at least four clock hours of training in safety. This training shall address playground safety hazards, playground supervision, maintenance and general upkeep of the outdoor area, and age and developmentally appropriate playground equipment. Staff counted to comply with this Rule

shall have six months from the date of employment, or from the date a vacancy occurs, to complete the required safety training. The number of staff required to complete this training shall be as follows:

- (1) In centers with a licensed capacity of less than 30 children, at least one staff person shall complete this training.
- (2) In centers with a licensed capacity of 30 or more children, at least two staff, including the administrator, shall complete this training.

(f) In centers that are licensed to care for infants ages 12 months and younger:

- (1) the center director and any child care provider scheduled to work in the infant room, including volunteers counted in staff/child ratios, shall complete ITS-SIDS training;
- (2) ITS-SIDS training shall be completed within four months of the individual assuming responsibilities in the infant room or as an administrator, or within four months of these rules becoming effective, whichever is later, and shall be completed again every three years from the completion of previous ITS-SIDS training;
- (3) Completion of ITS-SIDS training may be included once every three years in the number of hours needed to meet annual in-service training requirements in Section .0700 of this Chapter;
- (4) Individuals who have completed initial ITS-SIDS training prior to this Rule becoming effective shall not be required to repeat the training until three years from the completion of initial ITS-SIDS training; and
- (5) Prior to an individual assuming responsibility for the care of an infant, the center's safe sleep policy for infants shall be reviewed with the individual as required by Rule .0707(a) of this Section.

Authority G.S. 110-85; 110-91(1),(8); 143B-168.3.

SECTION .1700 –FAMILY CHILD CARE HOME REQUIREMENTS

10A NCAC 09 .1705 HEALTH AND TRAINING REQUIREMENTS FOR FAMILY CHILD CARE HOME OPERATORS

(a) Prior to receiving a license, each family child care home operator shall:

- (1) Complete and keep on file a health questionnaire which attests to the operator's physical and emotional ability to care for children. The Division may require a written statement or medical examination report signed by a licensed physician or other authorized health professional if there is reason to believe that the operator's health may adversely affect the care of the children.

(2) Obtain written proof that he or she is free of active tuberculosis. The results indicating the individual is free of active tuberculosis shall be obtained within 12 months prior to applying for a license.

(3) Complete within 12 months prior to applying for a license a basic first aid course that at a minimum, shall address principles for responding to emergencies, ~~techniques for rescue breathing,~~ and techniques for handling common childhood injuries, accidents and illnesses such as: choking, burns, fractures, bites and stings, wounds, scrapes, bruises, cuts and lacerations, poisoning, seizures, bleeding, allergic reactions, eye and nose injuries and sudden changes in body temperature.

(4) Successfully complete within 12 months prior to applying for a license a course by the American Heart Association or the American Red Cross or other organizations approved by the Division, in cardiopulmonary resuscitation (CPR) appropriate for the ages of children in care. Other organizations will be approved if the Division determines that the courses offered are substantially equivalent to those offered by the American Red Cross. Successfully completed is defined as demonstrating competency, as evaluated by the instructor, in performing CPR. Documentation of successful completion of the course from the American Heart Association, the American Red Cross, or other organization approved by the Division shall be on file in the home.

(b) After receiving a license, an operator shall:

(1) Update the health questionnaire referenced in Paragraph (a) of this Rule annually. The Division may require the operator to obtain written proof that he or she is free of active tuberculosis.

(2) Complete a first aid course as referenced in Paragraph (a) of this Rule every three years. First aid training shall be renewed on or before expiration of the certification or every three years, whichever is less.

(3) ~~Successfully complete a~~ Have current ~~certification in CPR course annually~~ as referenced in Paragraph (a) of this Rule.

(4) If licensed to care for infants ages 12 months and younger, complete ITS-SIDS training within four months of receiving the license, or within four months of this rule becoming effective, whichever is later, and complete it again every three years from the completion of previous ITS-SIDS training. Completion of ITS-SIDS training may be included once every three years in the number of hours needed to meet the annual in-service training requirement in Paragraph (b) (5) of this Rule.

- Individuals who have completed initial ITS-SIDS training prior to this rule becoming effective shall not be required to repeat the training until three years from the completion of initial ITS-SIDS training.
- (5) Complete 12 clock hours of annual in-service training in the topic areas required by G.S. 110-91(11), except that persons with at least 10 years work experience as a caregiver in a regulated child care arrangement shall complete eight clock hours of annual in-service training.
- (A) Only training which has been approved by the Division as referenced in Rule .0708 of this ~~Subchapter~~ Chapter shall count toward the required hours of annual in-service training.
- (B) The operator shall maintain a record of annual in-service training activities in which he or she has participated. The record shall include the subject matter, the topic area in G.S. 110-91(11) covered, the name of the training provider or organization, the date training was provided and the number of hours of training completed. First aid training may be counted no more than once every three years.
- (E) the names and phone numbers of persons to be contacted in an emergency situation;
- (F) the name and phone number of the child's physician and preferred hospital; and
- (G) authorization for the operator to seek emergency medical care in the parent's absence;
- (4) when medication is administered, authorization for the operator to administer the specific medication according to the parent's or physician's instructions.
- (b) The operator shall complete and maintain other records which shall include:
- (1) documentation for the operator's procedures in emergency situations, on a form which shall be provided by the Division;
- (2) documentation that monthly fire drills are practiced. The documentation shall include the date each drill is held, the time of day, the length of time taken to evacuate the home, and the operator's signature;
- (3) incident reports that are completed each time a child receives medical treatment by a physician, nurse, physician's assistant, nurse practitioner, community clinic, or local health department, as a result of an incident occurring while the child is in the family child care home. Each incident shall be reported on a form provided by the Division, signed by the operator and the parent, and maintained in the child's file. A copy shall be mailed to a representative of the Division within seven calendar days after the incident occurs;
- (4) an incident log which is filled out any time an incident report is completed. This log shall be cumulative and maintained in a separate file and shall be available for review by a representative of the Division. This log shall be completed on a form supplied by the Division;
- (5) documentation that a monthly check for hazards on the outdoor play area is completed. This form shall be supplied by the Division and shall be maintained in the family child care home for review by a representative of the Division; and
- (6) Accurate daily attendance records for all children in care, including the operator's own preschool children. The attendance record shall indicate the date and time of arrival and departure for each child.
- (c) Written records shall be ~~available for review, upon request, by a representative of the Division and shall be maintained as follows:~~
- ~~(1) Records required in Paragraph (b)(2) (b)(6) of this Rule shall be maintained for a minimum of three years, or during the length~~

Authority G.S. 110-85; 110-88; 110-91; 143B-168.3.

10A NCAC 09 .1721 REQUIREMENTS FOR RECORDS

(a) The operator shall maintain the following health records for each child who attends on a regular basis, including his or her own preschool child(ren):

- (1) a copy of the child's health assessment as required by G.S. 110-91(1);
- (2) a copy of the child's immunization record;
- (3) a health and emergency information form provided by the Division that is completed and signed by a child's parent. The completed form shall be on file the first day the child attends. An operator may use another form other than the one provided by the Division, as long as the form includes the following information:
- (A) the child's name, address, and date of birth;
- (B) the names of individuals to whom the child may be released;
- (C) the general status of the child's health;
- (D) any allergies or restrictions on the child's participation in activities with specific instructions from the child's parent or physician;

of time the program has operated, whichever is less.

- (2) ~~Children's records shall be maintained while the child is enrolled, and for a minimum of three years after the child is no longer enrolled.~~
- (3) ~~All other records shall be maintained for as long as the license to which they pertain remains valid.~~
- (1) ~~All children's records as required in this Chapter, except medication permission slips as required in Rule .1720(c)(13) of this Section, must be kept on file one year from the date the child is no longer enrolled.~~
- (2) ~~Additional caregiver records as required in this Chapter shall be maintained on file one year from the employee's last date of employment.~~
- (3) ~~Current program records as required in this Chapter shall be maintained on file for as long as the license remains. Prior versions shall be maintained based on the time frame in the following charts:~~

(A) ~~A minimum of 30 days from the revision or replacement date:~~

<u>Record</u>	<u>Rule</u>
<u>Daily Schedule</u>	<u>.1718(13)</u>
<u>Infant Feeding Schedule</u>	<u>.1718(6)</u>
<u>SIDS Sleep Chart/Visual Check</u>	<u>.1724(8)</u>

(B) ~~A minimum of one year from the revision or replacement date:~~

<u>Record</u>	<u>Rule</u>
<u>Attendance</u>	<u>.1721 (b)(6)</u>
<u>Emergency Numbers</u>	<u>.1720(a)(8)</u>
<u>Emergency Procedures Form</u>	<u>.1721(b)(1)</u>
<u>Field Trip/Transportation Permission</u>	<u>.1723(1)</u>
<u>Fire Drill Log</u>	<u>.1721(b)(2)</u>
<u>Incident Log</u>	<u>.1721(b)(4)</u>
<u>Playground Inspection</u>	<u>.1721(b)(5)</u>
<u>Pet Vaccinations</u>	<u>.1720(d)(10)</u>

- (4) ~~Well-water analysis, pool inspection and inspections for local ordinances as referenced in Rules .1720(d)(1), .1719(7), and .1702(d) of this Section shall remain on file at the family child care home for as long as the license remains valid.~~
- (5) ~~Records may be maintained in a paper format or electronically, except that records that~~

require a signature of a staff person or parent shall be maintained in a paper format.

- (6) All records required in this Chapter shall be available for review by a representative of the Division.

Authority G.S. 110-85; 110-88; 110-91(1),(9).

SECTION .2300 - FORMS

10A NCAC 09 .2318 RETENTION OF FORMS AND REPORTS BY AN OPERATOR

~~Each operator must keep on file in the center, copies of all forms, inspection reports, letters and other correspondence which serve as documentation of compliance or non-compliance for as long as the license to which they pertain remains valid.~~

~~(a) All children's records as required in this Chapter, except the Medication Permission Slip as referenced in Rule .0803(13) of this Chapter, shall be maintained on file for at least one year from the date the child is no longer enrolled in the center.~~

~~(b) All personnel records as required in this Chapter shall be maintained on file at least one year from the date the employee is no longer employed.~~

~~(c) Current program records shall be maintained on file for as long as the license remains valid. Prior versions shall be maintained based on the time frame in the following charts:~~

- (1) ~~A minimum of 30 days from the revision or replacement date:~~

<u>Record</u>	<u>Rule</u>
<u>Activity Plan</u>	<u>.0508 (a)</u>
<u>Allergy Postings</u>	<u>.0901(e)</u>
<u>Feeding Schedule</u>	<u>.0902</u>
<u>Menu</u>	<u>.0901(b)</u>
<u>SIDS Sleep Chart/Visual Check</u>	<u>.0606(a)(7)</u>

- (2) ~~A minimum of one year from the revision or replacement date:~~

<u>Record</u>	<u>Rule</u>
<u>Attendance</u>	<u>G.S. 110-91(9)</u>
<u>Daily Schedule</u>	<u>.0508(a)</u>
<u>Emergency Medical Care Plan</u>	<u>.0802(a)</u>
<u>Fire Drill Log</u>	<u>.0302(d)(4)</u>
<u>Incident Log</u>	<u>.0802(e)</u>
<u>Playground Inspection</u>	<u>.0604(q)</u>
<u>Safe Arrival and Departure Procedures</u>	<u>.1003(b)</u>

~~(d) All building, fire, sanitation and pool inspections as referenced in G.S. 110-91; Rules .0302 and .1403 of this Chapter shall remain on file at the center for as long as the license remains valid.~~

- (e) Records may be maintained in a paper format or electronically, except that records that require a signature of a staff person or parent shall be maintained in a paper format.
- (f) All records required in this Chapter shall be available for review by a representative of the Division.

Authority G.S. 110-85; 110-91(9); 143B-168.3.

SECTION .2500 - CARE FOR SCHOOL-AGE CHILDREN

10A NCAC 09 .2511 OTHER STAFF REQUIREMENTS

- ~~(a) The staff/child ratios required in this Subchapter for school age children shall always be maintained. The required lifeguards shall not be counted in the number of staff required to meet the staff/child ratio.~~
- ~~(b) In addition to the requirements of Rule .2510(k) of this Subchapter, the staff/child ratio shall be one adult to each 12 children in bodies of water other than swimming pools.~~

Authority G.S. 110-91(8),(11); 143B-168.3.

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Medical Care Commission intends to amend the rule cited as 10A NCAC 13D .2210.

Proposed Effective Date: July 1, 2008

Public Hearing:

Date: March 5, 2008

Time: 10:00 a.m.

Location: Room 201 Council Building, NC Division of Health Service Regulation, Dorothea Dix Campus, 701 Barbour Drive, Raleigh, NC 27603

Reason for Proposed Action: *The Health Care Personnel Registry regulations were updated to require providers to report within 24 hours all allegations against health care personnel as defined in G.S. 131E-256(a)(1). The proposed amendment to the Nursing Home rules will reflect similar language to maintain consistency with the law and regulations within the Division. In addition, SB 56 of SL 2007 expanded the types of employees, by provider type, the Health Care Personnel Registry can investigate. This rule amendment assures anyone with a substantiated finding on the NC Health Care Personnel Registry will not be employed in a nursing home.*

Procedure by which a person can object to the agency on a proposed rule: *An individual may object to the agency on the proposed rule by submitting written comments on the proposed rule. They may also object by attending the public hearing and personally voice their objections during that time.*

Comments may be submitted to: Nadine Pfeiffer, 2701 Mail Service Center, Raleigh, NC 27699-2701, phone (919) 855-3758, fax (919) 733-2757, email Nadine.Pfeiffer@ncmail.net

Comment period ends: March 17, 2008

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- ☐ State
- ☐ Local
- ☐ Substantive (≥\$3,000,000)
- ☒ None

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13D – RULES FOR THE LICENSING OF NURSING HOMES

SECTION .2200 - GENERAL STANDARDS OF ADMINISTRATION

10A NCAC 13D .2210 REPORTING AND INVESTIGATING ABUSE, NEGLECT OR MISAPPROPRIATION

- (a) ~~The A~~ facility shall take ~~reasonable~~ measures to prevent patient abuse, patient neglect, or misappropriation of patient property, including but not limited to orientation and instruction of facility staff on patients' rights, and the screening of and requesting of references for all prospective employees.
- (b) The administrator shall ensure that the Health Care Personnel Registry Section of the Division of Health Service Regulation is notified within 24 hours ~~or as soon as practicable~~ of all allegations which appear to a reasonable person to be related to patient abuse, neglect or misappropriation of patient property. of the health care facility becoming aware of all allegations against health care personnel as defined in G.S. 131E-256(a)(1), which includes abuse, neglect, misappropriation of resident property, misappropriation of the property of the facility, diversion of drugs belonging to a health care facility or a resident, fraud against a health care facility or a resident, and injuries of unknown source in accordance with 42 CFR subsection 483.13 which is incorporated by reference.
- (c) The facility shall ~~thoroughly~~ investigate allegations of patient abuse, patient neglect, or misappropriation of patient property in accordance with 42 CFR subsection 483.13 which is incorporated by reference, including subsequent amendments, and shall document all relevant information pertaining to such investigation and shall take whatever steps are necessary to

prevent further incidents of abuse, neglect or misappropriation of patient property while the investigation is in progress. ~~Copies of the The Code of Federal Regulations-Regulations, Title 42, Public Health, Part 430 to the end, revised as of October 1, 2005, Description Item 572-B, may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 371954, PA 15202-7954 979050, St. Louis, MO 63197-9000, for thirty eight dollars (\$38.00) and may be purchased with a credit card by a direct telephone call to the G.P.O. at (202) 512-1800 (866) 512-1800 or online at <http://bookstore.gpo.gov/> or accessed electronically at <http://ecfr.gpoaccess.gov/>.~~

(d) The administrator shall ensure that the report of investigation is printed or typed and postmarked to the Health Care Personnel Registry Section of the Division of Health Service Regulation within five working days of the allegation. The report shall include the date and time of the alleged incident of abuse, neglect or misappropriation of property; the patient's full name and room number; details of the allegation and any injury; names of the accused and any witnesses; names of the facility staff who investigated the allegation; results of the investigation; and any corrective action that may have been taken by the facility.

(e) The facility shall not employ any person with a substantiated finding on the North Carolina Health Care Personnel Registry.

Authority G.S. 131E-104; 131E-131; 131E-255; 131E-256.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for MH/DD/SAS intends to amend the rule cited as 10A NCAC 28C .0201.

Proposed Effective Date: August 1, 2008

Instructions on How to Demand a Public Hearing: *(must be requested in writing within 15 days of notice): A person may demand a public hearing on the proposed rules by submitting a request in writing to W. Denise Baker, 3018 Mail Service Center, Raleigh, NC 27699-3018*

Reason for Proposed Action: *Currently the buildings at all State operated facilities are smoke-free. Although there are limitations on the locations where smoking can take place on campus, tobacco smoking remains prevalent among patients/residents and staff. As such, smoking continues to impose health risks to those who smoke and those who do not. Smoking interferes with patient recovery/ habilitation and factors into aggressive behavior. In order to eliminate these negative factors smoking will no longer have a role in the treatment/ habilitative setting and open the door to improved patient/resident and staff health.*

Procedure by which a person can object to the agency on a proposed rule: *The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to W. Denise Baker, 3018 Mail Service Center, Raleigh, NC 27699-3018.*

Comments may be submitted to: W. Denise Baker, 3018 Mail Service Center, Raleigh, NC 27699-3018, phone (919) 715-2780, fax (919) 733-1221, email denise.w.baker@ncmail.net

Comment period ends: March 17, 2008

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- ☐ State
- ☐ Local
- ☐ Substantive (≥\$3,000,000)
- ☒ None

CHAPTER 28 – MENTAL HEALTH: STATE OPERATED FACILITIES AND SERVICES

SUBCHAPTER 28C - DIGNITY AND RESPECT

SECTION .0200 - ESTHETIC AND HUMANE ENVIRONMENT

10A NCAC 28C .0201 STATE FACILITY ENVIRONMENT

(a) The State Facility Director shall assure the provision of an esthetic and humane environment which enhances the positive self-image of the client and preserves human dignity. This includes:

- (1) providing warm and cheerful furnishings;
- (2) providing flexible and humane schedules; and
- (3) directing state facility employees to address clients in a respectful manner; and manner.
- ~~(4) providing adequate areas accessible to clients who wish to smoke tobacco and areas for non-smokers as requested.~~

(b) The State Facility Director shall also, to the extent possible, make every effort to:

- (1) provide a quiet atmosphere for uninterrupted sleep during scheduled sleeping hours; and
- (2) provide areas accessible to the client for personal privacy, for at least limited periods of time, unless determined inappropriate by the treatment team.

Authority G.S. 122C-51; 131E-67; 143B-147.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Public Health intends to amend the rule cited as 10A NCAC 46 .0301.

Proposed Effective Date: August 1, 2008

Public Hearing:

Date: April 30, 2008

Time: 2:00 p.m.

Location: Cardinal Room, 5605 Six Forks Road, Raleigh, NC 27609

Reason for Proposed Action: The current rule identifies only one accrediting body for baccalaureate schools of nursing, but since that rule was adopted a second nationally recognized accrediting body for baccalaureate schools of nursing has been established. The amendment add the second nationally recognized accrediting body to the rule.

Procedure by which a person can object to the agency on a proposed rule: Objections may be submitted in writing to Chris G. Hoke, JD, the Rule-making Coordinator, during the public comment period. Additionally, objections may be made verbally and in writing at the public hearing for this rule.

Comments may be submitted to: Chris G. Hoke, JD, 1931 MSC, Raleigh, NC 27699-1931, phone (919) 707-5006, email chris.hoke@ncmail.net

Comment period ends: April 30, 2008

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- ☐ State
☐ Local
☐ Substantive (≥\$3,000,000)
☒ None

CHAPTER 46 - LOCAL STANDARDS

SECTION .0300 - LOCAL HEALTH DEPARTMENT STAFF

10A NCAC 46 .0301 MINIMUM STANDARD HEALTH DEPARTMENT: STAFFING

(a) A minimum standard health department shall consist of at least a full-time health director, a full-time public health nurse, a full-time registered sanitarian, and a full-time secretary.

(b) Full-time means that the employee's full time occupation is in public health. The employee is not necessarily employed full time in one department.

(c) All local health department nurses shall either:

- (1) Have a nursing degree from a baccalaureate school accredited by the National League for ~~Nursing~~; Nursing or the Commission on Collegiate Nursing Education; or
- (2) Complete within one year of employment with the health department an introductory course in principles and practices of public health and public health nursing sponsored by the Department. The curriculum for the course will be developed by the Department with input from local health departments and schools of nursing.

Authority G.S. 130A-5(3); 130A-9.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Social Services Commission intends to amend the rule cited as 10A NCAC 67A .0107.

Proposed Effective Date: May 1, 2008

Public Hearing:

Date: March 19, 2008

Time: 10:00 a.m.

Location: Albemarle Building, Conference Room 832 (8th Floor), 325 Salisbury Street, Raleigh, NC

Reason for Proposed Action: North Carolina Identity Theft Protection Act mandates that Social Security Numbers cannot be imbedded in any kind of number issued for recipients to receive benefits.

Procedure by which a person can object to the agency on a proposed rule: By submitting your objection in writing to Lisa Johnson, Division of Social Services, 2401 Mail Service Center, Raleigh, NC 27699-2401 or email lisa.johnson@ncmail.net and by telephone (919) 733-3055.

Comments may be submitted to: Lisa Johnson, APA Rulemaking Coordinator, Division of Social Services, 2401 Mail Service Center, Raleigh, NC 27699-2401, phone (919) 733-3055, fax (919) 733-9386, email lisa.johnson@ncmail.net

Comment period ends: *March 19, 2008*

Procedure for Subjecting a Proposed Rule to Legislative Review:

If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- ☐ State
☐ Local
☐ Substantive (≥\$3,000,000)
☒ None

CHAPTER 67 – SOCIAL SERVICES - PROCEDURES

SUBCHAPTER 67A – GENERAL ADMINISTRATION

SECTION .0100 - ADMINISTRATION

10A NCAC 67A .0107 FORMS

(a) In order to comply with the budgeting, planning and reimbursement requirements of G.S. Chapter 108A and 45 CFR 228.17, each county department of social services shall complete all forms specified by the Department of Health and Human Services.

(b) The forms, initial service client information record, and service client information change notice, shall be completed by the case manager for each client requesting social services. All required fields must be completed and required fields not properly completed shall be considered an error and returned to the worker. Clients may refuse to provide their social security numbers and shall not be denied benefits, but the ~~social security numbers, or alternate unique identifiers as assigned by county departments of social services or the North Carolina Division of Social Services,~~ worker identification numbers of case managers are required in order to allocate costs for federal financial participation.

(c) The form, worker daily report of services to clients, shall be completed by the county services workers and division of services for the blind services workers. This form provides information to meet reporting requirements at the federal, state and local levels and will provide the basis for county reimbursement. All required fields must be completed and required fields not properly completed shall be considered an error and returned to the worker. The ~~social security numbers or alternate unique identifiers as assigned by county departments of social services or the North Carolina Division of Social Services~~

worker identification numbers of service workers are required in order to allocate costs for federal financial participation.

Authority G.S. 75-62; 143B-153; 45 CFR 228.17; 5 USC 552a.

TITLE 13 – DEPARTMENT OF LABOR

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Department of Labor intends to repeal the rule cited as 13 NCAC 07F .0104.

Proposed Effective Date: *May 1, 2008*

Public Hearing:

Date: *February 4, 2008*

Time: *10:00 a.m.*

Location: *4 W. Edenton Street, Raleigh, N.C. – Labor Building-Room 205*

Reason for Proposed Action: *On November 15, 2007, in 72 FR 64342 - 64430, OSHA published a final rule to update its Employer Payment for Personal Protective Equipment. The provisions in OSHA standards that require PPE generally state that the employer is to provide such PPE. However, some of these provisions did not specify that that employer is to provide such PPE at no cost to the employee. The new federal rule stipulates that the employer must pay for required PPE, except in the limited cases specified in the standard. North Carolina is a state plan state and 13 NCAC 07F .0104 is now rendered less effective than the new standard promulgated by OSHA. Due to this, the repeal of 13 NCAC 07F .0104 is necessary in order for North Carolina's Occupational Safety and Health program to remain as effective as the federal program and to maintain North Carolina's state plan status under the federal Occupational Safety and Health Act of 1970. The verbatim adoption of the federal rule implementing OSHA's new standard will be effective February 13, 2008.*

Procedure by which a person can object to the agency on a proposed rule: *Objections to the proposed rule may be submitted, in writing, to Erin T. Gould, Assistant Rulemaking Coordinator, via United States mail at the following address: 1101 Mail Service Center, Raleigh, North Carolina 27699-1101; or via facsimile at (919) 733-4235. Objections may also be submitted during the public hearing conducted on this rule, which is noticed above. Objections shall include the specific rule citation(s) for the objectionable rule(s), the nature of the objection(s), and the complete name(s) and contact information for the individual(s) submitting the objection. Objections must be received by 5:00 p.m. on March 17, 2008.*

Comments may be submitted to: *Erin T. Gould, 1101 Mail Service Center, Raleigh, NC 27699-1101, phone (919) 733-7885, fax (919) 733-4235, email erin.gould@nclabor.com*

Comment period ends: *March 17, 2008*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- ☐ State
☐ Local
☐ Substantive (≥\$3,000,000)
☒ None

**CHAPTER 07 - OFFICE OF OCCUPATIONAL SAFETY
AND HEALTH**

**13 NCAC 07F.0104 PERSONAL PROTECTIVE
EQUIPMENT**

~~Subpart I — Personal Protective Equipment — 29 CFR 1910.132, General requirements, is amended at 29 CFR 1910.132(b) to read:~~

~~"(b) Equipment. (1) Employer provided equipment. It is the responsibility of the employer to provide, at no cost to the employee, all personal protective equipment which the employee does not wear off the jobsite for use off the job.
(2) Employee-owned equipment. Where employees provide their own protective equipment, the employer shall be responsible to assure its adequacy, including proper maintenance, and sanitation of such equipment."~~

Authority G.S. 95-131; 95-133; 150B-21.6.

**TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND
COMMISSIONS**

CHAPTER 16 – DENTAL EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of Dental Examiners intends to amend the rules cited as 21 NCAC 16G .0101, .0103; 16H .0203; 16I .0104; 16R .0106.

Proposed Effective Date: *June 1, 2008*

Public Hearing:

Date: *February 7, 2008*

Time: *7:00 p.m.*

Location: *Dental Board Office, 507 Airport Boulevard, Suite 105, Morrisville, NC 27560*

Reason for Proposed Action:

21 NCAC 16G .0101 – *is proposed for amendment to provide that dental hygienists may, upon proper delegation by a dentist, take impressions for night guards and for the repair of dentures.*

21 NCAC 16G .0103 – *to clarify that hygienists may make impressions as permitted by 21 NCAC 16G .0101.*

21 NCAC 16H .0203 – *is provided for amendment to provide that Dental Assistant II may, upon proper delegation and supervision by a dentist, take impressions for night guards and the repair of dentures.*

21 NCAC 16I .0104 – *is proposed for amendment to provide that a hygienist who works at least 20 hours per week in certain educational or governmental institutions may receive 2 hours of continuing education credit annually for such work.*

21 NCAC 16R .0106 – *is proposed for amendment to provide that a dentist who works at least 20 hours per week in certain educational or governmental institutions may receive 5 hours continuing education credit per year for such work.*

Procedure by which a person can object to the agency on a proposed rule: *Comments to Bobby D. White, Chief Operations Officer, NC Dental Board, 507 Airport Boulevard, Suite 105, Morrisville, NC 27560, phone (919) 678-8223.*

Comments may be submitted to: *Carolyn Bakewell, 507 Airport Boulevard, Suite 105, Morrisville, NC 27560*

Comment period ends: *April 7, 2008*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- ☐ State
☐ Local
☐ Substantive (≥\$3,000,000)
☒ None

SUBCHAPTER 16G – DENTAL HYGIENISTS

SECTION .0100 – DENTAL HYGIENISTS

21 NCAC 16G .0101 FUNCTIONS WHICH MAY BE DELEGATED

A dental hygienist may be delegated appropriate functions to be performed under the direct control and supervision of a dentist who shall be personally and professionally responsible and liable for any and all consequences or results arising from performance of such acts and functions. In addition to the functions set out in G.S. 90-221(a) and 21 NCAC 16H .0201, functions which may be delegated to a dental hygienist include:

- (1) Take impressions for study models and opposing casts which will not be used for construction of permanent dental appliances, but which may be used for the fabrication of adjustable orthodontic ~~appliances; appliances,~~ nightguards and the repair of dentures or partials;
- (2) Apply sealants to teeth that do not require mechanical alteration prior to the application of such sealants, provided that a dentist has examined the patient and prescribed the procedure;
- (3) Insert matrix bands and wedges;
- (4) Place cavity bases and liners;
- (5) Place and/or remove rubber dams;
- (6) Cement temporary restorations using temporary cement;
- (7) Apply acid etch materials/rinses;
- (8) Apply bonding agents;
- (9) Remove periodontal dressings;
- (10) Remove sutures;
- (11) Place gingival retraction cord;
- (12) Remove excess cement;
- (13) Flush, dry and temporarily close root canals;
- (14) Place and remove temporary restorations;
- (15) Place and tie in or untie and remove orthodontic arch wires;
- (16) Insert interdental spacers;
- (17) Fit (size) orthodontic bands or brackets;
- (18) Apply dentin desensitizing solutions;
- (19) Perform periodontal screening;
- (20) Perform periodontal probing;
- (21) Perform subgingival exploration for or removal of hard or soft deposits;
- (22) Perform sulcular irrigation;
- (23) Apply sulcular antimicrobial or antibiotic agents which are resorbable;
- (24) Perform extra-oral adjustments which affect function, fit, or occlusion of any temporary restoration or appliance; and
- (25) Initially form and size orthodontic arch wires and place arch wires after final adjustment and approval by the dentist.

Authority G.S. 90-221; 90-223(b).

21 NCAC 16G .0103 PROCEDURES PROHIBITED

Those procedures which require the professional education and skill of a dentist and may not be delegated to a dental hygienist shall include, but shall not be limited to:

- (1) Comprehensive examination, diagnosis and treatment planning;
- (2) Surgical or cutting procedures on hard or soft tissues, including laser, air abrasion or micro-abrasion procedures;
- (3) Placement or removal of sulcular nonresorbable agents;
- (4) The issuance of prescription drugs, medications or work authorizations;
- (5) Taking of impressions for final fixed or removable restorations or ~~protheses;protheses,~~ except as provided for in Rule .0101(1) of this Chapter;
- (6) Final placement or intraoral adjustment of a fixed or removable appliance;
- (7) Intraoral occlusal adjustments which affect function, fit, or occlusion of any temporary or permanent restoration or appliance;
- (8) Extra-oral occlusal adjustments which affect function, fit, or occlusion of any permanent restoration or appliance;
- (9) Performance of direct pulp capping or pulpotomy;
- (10) Placement of sutures;
- (11) Final placement or cementation of orthodontic bands or brackets;
- (12) Placement or cementation of final restorations;
- (13) Administration of any anesthetic by any route except the administration of topically-applied agents intended to anesthetize only cutaneous tissue; and
- (14) Intraoral use of a high speed handpiece.

Authority G.S. 90-221(a); 90-223(b).

SUBCHAPTER 16H - DENTAL ASSISTANTS

SECTION .0100 - CLASSIFICATION AND TRAINING

21 NCAC 16H .0203 PERMITTED FUNCTIONS OF DENTAL ASSISTANT II

A Dental Assistant II may perform any and all acts or procedures which may be performed by a Dental Assistant I. In addition, a Dental Assistant II may be delegated the following functions to be performed under the direct control and supervision of a dentist who shall be personally and professionally responsible and liable for any and all consequences or results arising from the performance of such acts and functions:

- (1) Take impressions for study models and opposing casts which will not be used for construction of dental appliances, but which may be used for the fabrication of adjustable orthodontic ~~appliances; —appliances,~~ nightguards and the repair of dentures or partials;
- (2) Apply sealants to teeth that do not require mechanical alteration prior to the application of such sealants, provided a dentist has

- examined the patient and prescribed the procedure;
- (3) Insert matrix bands and wedges;
 - (4) Place cavity bases and liners;
 - (5) Place and/or remove rubber dams;
 - (6) Cement temporary restorations using temporary cement;
 - (7) Apply acid etch materials/rinses;
 - (8) Apply bonding agents;
 - (9) Remove periodontal dressings;
 - (10) Remove sutures;
 - (11) Place gingival retraction cord;
 - (12) Remove excess cement;
 - (13) Flush, dry and temporarily close root canals;
 - (14) Place and remove temporary restorations;
 - (15) Place and tie in or untie and remove orthodontic arch wires;
 - (16) Insert interdental spacers;
 - (17) Fit (size) orthodontic bands or brackets;
 - (18) Apply dentin desensitizing solutions;
 - (19) Perform extra-oral adjustments which affect function, fit or occlusion of any temporary restoration or appliance;
 - (20) Initially form and size orthodontic arch wires and place arch wires after final adjustment and approval by the dentist;
 - (21) Polish the clinical crown using only;
 - (a) a hand-held brush and appropriate polishing agents; or
 - (b) a combination of a slow speed handpiece (not to exceed 10,000 rpm) with attached rubber cup or bristle brush, and appropriate polishing agents.

Before a Dental Assistant II can utilize a slow speed handpiece with rubber cup or bristle brush attachment, a formal educational course in coronal polishing consisting of at least 7 hours shall be completed. A polishing procedure shall in no way be represented to the patient as a prophylaxis and no specific charge shall be made for such unless the dentist has performed an evaluation for calculus, deposits, or accretions and a dentist or dental hygienist has removed any substances detected.

Authority G.S. 90-29(c)(9); 90-48.

SUBCHAPTER 16I - ANNUAL RENEWAL OF DENTAL HYGIENIST LICENSE

SECTION .0100 – ANNUAL RENEWAL

21 NCAC 16I .0104 REPORTING CONTINUING EDUCATION

(a) The number of hours completed to satisfy the continuing education requirement shall be indicated on the renewal application form submitted to the Board and certified by the hygienist. Upon request by the Board or its authorized agent, the hygienist shall provide official documentation of attendance at courses indicated. Such documentation shall be provided by the

organization offering or sponsoring the course. Documentation must include:

- (1) the title;
- (2) the number of hours of instruction;
- (3) the date of the course attended;
- (4) the name(s) of the course instructor(s); and
- (5) the name of the organization offering or sponsoring the course.

(b) All records, reports and certificates relative to continuing education hours must be maintained by the licensee for at least two years and shall be produced upon request of the Board or its authorized agent.

(c) Dental hygienists shall receive four hours credit per year for continuing education when engaged in the following:

- (1) service on a full-time basis on the faculty of an educational institution with direct involvement in education, training, or research in dental or dental auxiliary programs; or
- (2) affiliation with a federal, state or county government agency whose operation is directly related to dentistry or dental auxiliaries.

Verification of credit hours shall be maintained in the manner specified in this Rule.

(d) Evidence of service or affiliation with an agency as specified in Paragraph (c) of this Rule shall be in the form of verification of affiliation or employment which is documented by a director or an official acting in a supervisory capacity.

(e) Hygienists who work at least 20 hours per week in an institution or entity described in Subparagraph (c)(1) or (2) of this Rule shall receive two hours credit per year for continuing education.

Authority G.S. 90-225.1.

SUBCHAPTER 16R - CONTINUING EDUCATION REQUIREMENTS: DENTISTS

SECTION .0100 – CONTINUING EDUCATION

21 NCAC 16R .0106 EXEMPTION FROM AND CREDIT FOR CONTINUING EDUCATION

(a) Dentists may request exemption from continuing education requirements by submitting evidence in writing to the Board of retirement or semi-retirement from the practice of dentistry. A retired dentist is a dentist who never practices dentistry. A semi-retired dentist is a dentist who practices on an occasional basis not to exceed 100 clock hours in a calendar year. A dentist who can demonstrate a disabling condition may request a variance in continuing education hours during a particular period. Written documentation of a disabling condition that interferes with the dentist's ability to complete the required hours shall be provided to the Board. The Board may grant or deny requests for variance in continuing education hours based on a disabling condition on a case by case basis, taking into consideration the particular disabling condition involved and its affect on the dentist's ability to complete the required hours. In considering the request, the Board may require additional documentation substantiating any specified disability.

(b) In those instances where continuing education is waived and the exempt individual wishes to resume practice, the Board shall require continuing education courses in accordance with Rule .0103 of this Section when reclassifying the licensee. The Board may require those licensees who have not practiced dentistry for a year or more to undergo a bench test prior to allowing the licensee to resume practice when there is indication of inability to practice dentistry.

(c) Dentists shall receive 10 hours credit per year for continuing education when engaged in any of the following:

- (1) service on a full-time basis on the faculty of an educational institution with direct involvement in education, training, or research in dental or dental auxiliary programs; or
- (2) affiliation with a federal, state or county government agency whose operation is directly related to dentistry or dental auxiliaries. Verification of credit hours shall be maintained in the manner specified in Rule .0105 of this Section.

(d) Dentists who work at least 20 hours per week in an institution or entity described in Subparagraph (c)(1) or (2) of this Rule shall receive five hours credit per year for continuing education.

Authority G.S. 90-31.1; 90-38.

TITLE 25 – STATE PERSONNEL

Notice is hereby given in accordance with G.S. 150B-21.2 that the State Personnel Commission intends to adopt the rules cited as 25 NCAC 01C .0414; 01I .2006 and amend the rules cited as 25 NCAC 01C .0215; 01H .0701, .1102-.1104, 01I .2002, .2301.

Proposed Effective Date: June 1, 2008

Public Hearing:

Date: February 20, 2008

Time: 10:00 a.m.

Location: Office of State Personnel Conference Room, Administration Building, 116 West Jones Street 3rd Floor, Raleigh, NC.

Reason for Proposed Action:

25 NCAC 01C .0215 – *To amend the rule on Employment Contracts to allow an agency to require repayment of a portion of the cost for optional training if the employee does not remain employed with the agency for a predetermined length of time. The employee would be informed of this requirement in writing along with details about the amount of time required to work and the expected amount of the repayment.*

25 NCAC 01C .0414 – *To adopt a rule to define a type of appointment that will allow a contractual arrangement with individuals in professional/technical/highly specialized or difficult to recruit areas. The employees are not deemed to be independent contractors under the applicable IRS regulations and, therefore, must be paid on a payroll.*

25 NCAC 01H .0701, .1102-.1104 – *These amendments are made to conform to legislative changes (HB 1412) to G.S. 128-15 and G.S. 126-82 which were approved by the 2007 General Assembly.*

25 NCAC 01I .2002, .2006, .2301 – *Rule adoption and amendment to implement changes (Senate Bill 1023) made to the State Personnel Act by the 2007 Legislature.*

Procedure by which a person can object to the agency on a proposed rule: *A person may object to these proposed rules by one of the following methods: (1) A written letter to Peggy Oliver, HR Policy Administrator, Office of State Personnel, 1331 Mail Service Center, Raleigh, NC 27699-1331; (2) an email to peggy.oliver@ncmail.net; (3) or a telephone call to Peggy Oliver at (919)807-4832.*

Comments may be submitted to: *Peggy Oliver, 1331 Mail Service Center, Raleigh, NC 27699-1331, phone (919)807-4832, fax (919)715-9750, email peggy.oliver@ncmail.net.*

Comment period ends: March 17, 2008

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- ☐ State
- ☐ Local
- ☐ Substantive (≥\$3,000,000)
- ☒ None

CHAPTER 1 - OFFICE OF STATE PERSONNEL

SUBCHAPTER 1C - PERSONNEL ADMINISTRATION

SECTION .0200 - GENERAL EMPLOYMENT POLICIES

25 NCAC 01C .0215 EMPLOYMENT CONTRACTS

(a) Except as to apprenticeship agreements executed according to the provisions of N.C.G.S. Chapter 94 and except as to provisions of Paragraph (b) below, the following provisions apply to employment contracts:

- (1) No ~~person-employee~~ shall be required, as a condition of employment subject to N.C.G.S. Chapter 126 to enter into a contractual arrangement with any state agency as defined

~~in 25 NCAC 01A .0103 or university for employment with that agency or university. However, this shall not prohibit apprenticeship agreements for training purposes when executed according to the provisions of N. C. G. S. Chapter 94.~~

- (2) No state agency ~~or university~~ may require, as a condition of employment, that ~~a person~~ an employee agree, in writing or otherwise, to a minimum specified length of employment, ~~except for the minimum training period specified in an apprenticeship agreement duly executed under G.S. Chapter 94.~~
- (3) No state agency may prohibit, as a condition of initial or continued employment, any ~~person~~ employee from transferring to another state agency or university.
- (4) No state agency ~~or university~~ may require, as a condition of employment, that ~~a person~~ an employee agree, in writing or otherwise, that a payment be made to the employing agency if a minimum specified period of employment is not met.
- (5) No agency may require the repayment of the cost of job training required by the employing agency as a condition of continued employment.

(b) An agency that provides all or part of the cost of professional development seminars or other educational opportunities to employees that are not a requirement for the job and that are in excess of \$5000 may condition the provision of agency funds upon agreement of the employee to repay the funds subject to the following conditions:

- (1) The employee is informed about the repayment provisions in advance.
- (2) The amount of time that the agency expects the employee to remain employed is clearly specified and does not exceed one year.
- (3) The prorated amount that the employee will have to repay for each month the employee leaves prior to the end of the term is clearly specified in the agreement, and
- (4) The terms of the agreement are reduced to writing and the employee and the human resources director both sign the agreement.

Authority G.S. 94; 126-4.

SECTION .0400 - APPOINTMENT

25 NCAC 01C .0414 CONTRACTUAL WORKER

(a) Notwithstanding 25 NCAC 1C .0215, an agency may employ individuals pursuant to a contract if the individuals are engaged to perform on-going professional or technical services in the areas of medicine or health care, engineering, information technology, or other highly specialized or difficult to recruit areas. Agency contracts with independent contractors under the applicable IRS regulations are not subject to this rule.

(b) Contracts for persons hired under this appointment type may be for any period of time up to three years. Such contracts shall include, as a minimum, the duration of the contract, the amount of compensation to be received under the contract, and other matters necessary for the parties to have an accurate understanding of the respective obligations of the contract. The contract shall include a provision that the individual is subject, at a minimum, to Articles 6 and 7 of Chapter 126 of the General Statutes. If the agency is providing any benefits to the individual, e.g., health insurance, retirement, the contract must so state; otherwise, the contract must contain a provision whereby both parties agree and acknowledge that no benefits are being provided or received under the contract. The contract may also contain a renewal provision but such a provision must be contingent upon the written agreement of both parties.

(c) An individual working pursuant to a contract is subject to the terms of the contract and is not entitled to any benefits except as expressly stated in the contract. The provisions of Chapter 126 of the North Carolina General Statutes, the State Personnel Manual, and Title 25 of the Administrative Code are only deemed to be terms of the contract insofar as they are specifically incorporated by reference in the contract.

Authority: G.S. 126-4.

SUBCHAPTER 1H - RECRUITMENT AND SELECTION

SECTION .0700 - PRIORITY CONSIDERATION: GENERAL PROVISIONS

25 NCAC 01H .0701 GENERAL PROVISIONS

(a) It is recognized that certain applicants for positions of State employment may receive a priority over other applicants for the position. Priority consideration in certain situations may be accorded to the following applicants:

- (1) Career State employees applying for a position that is a higher salary grade (or salary grade equivalency) as provided in 25 NCAC 01H .0800;
- (2) Career State employees who have received written notification of imminent separation due to a reduction in force;
- (3) Eligible employees in positions which are designated as exempt policymaking and who have less than 10 years of cumulative State service in subject positions as provided in 25 NCAC 01H .1000;
- (4) Eligible employees in positions which are designated as exempt managerial and who have less than 10 years of cumulative State service in subject positions and who have been removed from the exempt position for reasons other than cause but not because the employee's selection violated G.S. 126-14.2, as provided in 25 NCAC 01H .1000;
- (5) Eligible employees in positions which are designated as exempt managerial and who have less than 10 years of cumulative State service and who have been removed from the

exempt managerial position because the employee's selection violated G.S. 126-14.2, as provided in 25 NCAC 01H .1000; and

- (6) Eligible veterans applying for initial employment or subsequent employment ~~an initial position~~ in State government, as provided in 25 NCAC 01H .1100.

(b) The priority consideration listed in Subparagraph (a)(6) of this Rule may only be asserted against substantially equal or less qualified non-veteran outside applicants or other State employees who do not fall into any of the categories listed in Subparagraphs (a)(1) – (a)(5) of this Rule.

(c) The priority consideration listed in Subparagraphs (a)(3), (a)(4) and (a)(5) of this Rule may be defeated by an employee with the priority listed in Subparagraph (a)(2) of this Rule or by a current State employee who has greater cumulative State service in positions subject to the State Personnel Act. The selected applicant must meet the minimum qualifications, including training, experience, competencies and knowledge, skills and abilities.

Authority G.S. 126-4.

SECTION .1100 – VETERANS' PREFERENCE

25 NCAC 01H .1102 CLAIMING VETERANS' PREFERENCE

In order to claim veterans' preference, all eligible persons shall submit a DD Form 214, Certificate of Release or Discharge from Active Duty, along with a State Application for Employment (PD-107 or its equivalent) to the appointing authority. Appointing authorities are responsible for verifying eligibility and may request additional documentation as is necessary to ascertain eligibility. Eligible veterans shall meet the minimum qualifications, as defined in 25 NCAC 01H .0635, for the position.

Authority G.S. 126-4(4); 126-4(10); 128-15.

25 NCAC 01H .1103 ALLEGATION OF DENIAL OF VETERANS' PREFERENCE

Any claim or allegation that veterans' preference has not been accorded to an eligible veteran shall be filed with the State Personnel Commission through the established contested case procedures of the Office of Administrative Hearings. Such claims shall be filed in a manner consistent with the requirements of G.S. 150B-23 and G.S. 126-38. Such claims shall be heard as contested cases pursuant to G.S. 150B, Article 3. The State Personnel Commission may, upon a finding that veterans' preference was denied in violation of these Rules, order the ~~hiring or reinstatement~~ employment, subsequent employment, promotion, reassignment or horizontal transfer of any affected person, as well as any other remedy necessary to correct the violation.

Authority G.S. 126-4(10); 126-4(11); 126-34.1(b)(4); 126-37; 126-38; 150B-2(2); 150B, Article 3.

25 NCAC 01H .1104 APPLICATION OF THE VETERANS' PREFERENCE

(a) ~~The Veterans' preference to shall be accorded eligible veterans, as defined in 25 NCAC 01H .1105, shall apply in initial selection and reduction in force situations only, by giving additional credit as follows:~~

~~(b)(1)~~ In initial selection, employment, subsequent employment, promotion, reassignment, and horizontal transfer procedures, where numerically scored examinations are used in determining the relative ranking of candidates, 10 points shall be awarded to eligible veterans.

~~(c)(2)~~ In initial selection, employment, subsequent employment, promotion, reassignment, and horizontal transfer procedures where structured interview, assessment center, in-basket, or any other procedure, not numerically scored, is used to qualitatively assess the relative ranking of candidates, the veteran who has met the minimum qualification requirements for the vacancy, and who has less than four years of related military experience beyond that necessary to minimally qualify, shall also receive additional experience credit for up to four years of unrelated military service. The spouse or dependent shall not receive additional experience credit for the veteran's unrelated military service. To determine the amount of additional experience credit to be granted for unrelated military service, first determine the amount of related military service possessed by the eligible veteran beyond that required to meet the minimum qualifications, then apply the following:
~~(d) The amount of additional experience credit to be granted for unrelated military service in individual cases shall be determined as follows. First, determine the amount of related military service possessed by the eligible veteran beyond that required to meet the minimum qualifications.~~

(A) If the total of such experience equals or exceeds four years, the additional credit for unrelated military service does not apply.

(B) If the total of such experience is less than four years, the veteran shall receive direct experience credit for unrelated military service in an amount not to exceed the difference between the eligible veteran's related military service and the four-year maximum credit that may be granted.

(3) In reduction-in-force situations, when calculating length of service, the eligible veteran shall be accorded one year of State service for each year or fraction thereof of military service, up to a maximum of five

years credit. This additional credit does not count as total state service.

~~(e)(b)~~ After applying the ~~preference~~, preference to candidates from outside the State government structure, upon initial employment or subsequent employment as outlined in Paragraph (a)(1) or (2) above, the ~~qualified-eligible~~ veteran shall be hired when the veteran's overall qualifications are substantially equal to the non-veterans in the applicant pool as provided in 25 NCAC 01H .0701(b). Substantially equal qualifications occur when the employing agency cannot make a reasonable determination that the qualifications held by one or more applicants are significantly better suited for the position than the qualifications held by another applicant.

~~(f) In reduction in force situations, when calculating length of service, the eligible veteran shall be accorded one year of State service for each year or fraction thereof of military service, up to a maximum of five years credit.~~
(g)(c) Spouses of disabled veterans, the surviving spouse or dependent of a veteran who died on active duty during periods of war either directly or indirectly as a result of such service, the spouses of veterans who suffer disabling injuries through service related reasons during peacetime, and the surviving spouse or dependent of a veteran who died through service related reasons during peacetime shall be eligible for preference in state employment if the spouse meets the minimum qualifications. The spouse or dependent shall not receive additional experience credit for the veteran's unrelated military service. The preference to be given is that the qualified spouse or dependent shall be hired when the spouse or dependent's overall qualifications are substantially equal to the non-veterans in the applicant pool. The spouse, surviving spouse or surviving dependent of that veteran may claim such employment veterans' preference without regard to whether such preference has been claimed previously by the veteran.

(d) For promotion, reassignment and horizontal transfer, after applying the preference to veterans who are current State employees as explained under "Determining Military Service Credit," the eligible veteran competes with all other applicants who have substantially equal qualifications.

Authority G.S. 126-4(4); 126-4(10); 128-15.

SUBCHAPTER 1I - SERVICE TO LOCAL GOVERNMENT

SECTION .2000 - APPOINTMENT AND SEPARATION

25 NCAC 01I .2002 TYPES OF APPOINTMENTS AND DURATION

(a) Probationary Appointment:

- (1) Individuals receiving original appointments to permanent positions must serve a probationary period. ~~Persons being hired after leaving employment in a subject position, and employees voluntarily accepting promotions, transfers or demotions in another county, social services department, mental health program, district health program or emergency management program may be required to serve a probationary period by their new employer.~~

This period is an essential extension of the selection process, and provides the time for effective adjustment of the new employee or elimination of those whose performance will not meet acceptable standards. Persons being rehired after leaving employment in a position subject to G. S. 126 who have achieved career status and have not experienced a break in service, and employees voluntarily accepting promotions, transfers or demotions in another county, in a department of social services, mental health program, county or district public health program or emergency management program who have achieved career status and have not experienced a break in service shall not be required to serve a new probationary period, except for the purpose of determining eligibility for benefits or compensation under local government policy.

- (2) The length of the probationary period shall not be less than three nor more than nine months of either full-time or part-time employment. The length is dependant upon the complexity of the position and the rapidity of progress made by the particular individual in the position. When the employee's performance meets the required standard of work, after at least three months and not more than nine months in the position, the employee shall be given permanent status unless in a trainee appointment. If the desired level of performance is not achieved within nine months after initial appointment, the employee shall be separated from service unless in trainee status; an employee with a trainee appointment is expected to make a satisfactory progress, but is not permanent until he has completed the training period.

~~(3) At any time during a probationary period an employee may be separated from service for causes related to performance of duties or for personal conduct detrimental to the agency without right of appeal or hearing. The employee must be given notice of dismissal, including reasons.~~

- ~~(4)~~(3) Employment in a temporary appointment may be toward the probationary period at the discretion of the appointing authority. Employment in an intermittent or emergency appointment shall not be credited toward the probationary period.

(b) Trainee Appointment:

- (1) A trainee appointment may be made to a position in any class for which the specification includes special provisions for a trainee progression leading to a regular appointment. An individual may not be appointed as a trainee if he/she possesses the

acceptable training and experience for the class.

- (2) The specification for each class in which a trainee appointment is authorized will define the minimum qualifications for the trainee appointment and the minimum qualifications for a regular probationary appointment. It is, of course, expected that the individual will progress through supervised experience to a minimum level of satisfactory performance in the position during a period of time indicated by the difference between the amounts of experience required for the two types of appointments. This limit does not include time spent on educational leave or additional time required to participate in a work-study program designed to meet educational requirements for the class. An employee may not remain on a trainee appointment beyond the time he meets the educational and experience requirements for the class. After the employee has successfully completed all educational and experience requirements he shall be given probationary or permanent status in the position or shall be separated. If the period of the trainee appointment equals or exceeds nine months, the employee must be given permanent status or be separated at the completion of the trainee period.

- (3) If an employee with permanent status in another class accepts a trainee appointment, the permanent status will be waived for the duration of the trainee appointment. The employee can regain permanent status either through successful completion of the trainee appointment, by reinstatement to the class in which he previously held status, or by transfer to a position in a class for which he/she would have been eligible based on previous permanent status.

- (4) A former employee who does not meet the minimum requirements of the class to which he is being appointed shall be given a trainee appointment. All requirements for the trainee appointment must be satisfied prior to attaining permanent status.

(c) **Permanent Appointment.** A permanent appointment is an appointment to a permanently established position when the incumbent is expected to be retained on a permanent basis. Permanent appointments follow the satisfactory completion of a probationary and/or trainee appointment, or may be made upon reinstatement of a qualified employee.

(d) **Time-Limited Appointment.** A time-limited appointment may be made to:

- (1) a permanent position that is vacant due to the incumbent's leave of absence and when the replacement employee's services will be needed for a period of one year or less; or

- (2) to a permanent position that has an established duration of no more than two years. Such appointment shall not be made for less than six months. If at the end of the two year time-limited appointment, the work is expected to continue and the position becomes permanent, the employee should be given a permanent appointment. A time-limited appointment is distinguished from a temporary appointment by the greater length of time, and from the regular permanent appointment by its limited duration.

(e) **Temporary Appointment.** A temporary appointment may be made to a permanent or temporary position. The appointment shall be limited to a maximum duration of 12 months.

(f) **Pre-Vocational Student Appointment.** This appointment is to be used to enable students to gain practical knowledge of their particular occupational area of interest. A suitable plan for training under close supervision must be developed for the individual. In the case of a co-operative, work study, internship, or similar appointment, the time schedule for work must be determined. The basis of eligibility and selection for such an appointment shall be outlined in a formal plan developed by the participating agencies for each type and level of student involvement. Upon successful completion of their training, individuals may be considered for any vacant position for which qualified.

(g) **Emergency Appointment:**

- (1) An emergency appointment may be made when an emergency situation exists requiring the services of an employee before it is possible to identify a qualified applicant through the regular selection process. When it is determined that an emergency appointment is necessary, all other requirements for appointments will be waived.

- (2) An emergency appointment may be made for a period of up to 60 work days (consecutive or non-consecutive), or a total of 480 hours "in pay status". Any one individual may not receive successive emergency appointments with the same department or agency. At least three calendar months must elapse before that department or agency can give the same individual another emergency appointment.

(h) **Appointment of Incumbents in Newly-Covered Programs:**

- (1) Upon extension of State Personnel Act requirements to a program, position, or group of positions, the incumbent(s) may be appointed with permanent status in his classifications under any of the following circumstances:

- (A) The employee is qualified for reinstatement on the basis of previous permanent status in a comparable position; or
(B) The employee has at least three months of satisfactory service in the program or agency, as certified by the

appointing authority, and the appointing authority recommends that the employee be granted permanent status.

- (2) If the agency fails to grant permanent status within nine months from the initial coverage then the incumbent must be terminated. Employees given trainee appointments will be given permanent status consistent with other trainee appointments.
- (3) Incumbents who have less than three months of service with the agency shall be continued with no status until they are granted permanent status or terminated as required in this Rule. Employees with more than three months but less than nine months services in the agency may be continued without status until nine months have elapsed. At the end of nine months, however, the incumbent must be granted permanent status or terminated.

(i) **Work Against Appointment.** When qualified applicants are unavailable and there is no trainee provision for the classification of the vacancy, the appointing authority may appoint an employee below the level of the regular classification in a work-against situation. A work-against appointment is for the purpose of allowing the employee to gain the qualifications needed for the full class through on-the-job experience. The appointee must meet the minimum training and experience standard of the class to which initially appointed. A work-against appointment may not be made when applicants are available who meet the training and experience requirements for the full class, and for the position in question.

Authority G.S. 126-4.

25 NCAC 01I .2006 BREAK IN SERVICE

(a) A break in service occurs when an employee is in non-pay status for more than 31 calendar days. (An employee is in pay status when working, when on paid leave or when on workers' compensation leave. An employee is not in pay status after the last day of work when separated because of resignation, dismissal, death, retirement or reduction in force.) Periods of leave without pay do not constitute a break in service.

(b) A break in service does not occur when an employee moves from one local government agency subject to G. S. 126 to another local government agency subject to G. S. 126 without being in non-pay status for more than 31 calendar days.

(c) A break in service does not occur when an employee moves from a local government agency subject to G. S. 126 to a state agency or university without being in non-pay status for more than 31 calendar days.

(d) A break in service does not occur when an employee moves from a state agency or university from a position subject to G. S.

126 to a local government agency subject to G. S. 126 without being in non-pay status for more than 31 calendar days.

Authority G.S. 126-4.

**SECTION .2300 - DISCIPLINARY ACTION:
SUSPENSION, DISMISSAL AND APPEALS**

25 NCAC 01I .2301 JUST CAUSE FOR DISCIPLINARY ACTION

(a) Any employee, regardless of occupation, position, or profession may be warned, demoted, suspended or dismissed by the appointing authority. Such actions may be taken against employees with ~~permanent status, as defined in 25 NCAC 1I .2002(a)(2),~~ career status as defined in G. S. 126-1.1 only for just cause. The degree and type of action taken shall be based upon the sound and considered judgment of the appointing authority in accordance with the provisions of this Rule. When just cause exists the only disciplinary actions provided for under this Section are:

- (1) Written warning;
- (2) Disciplinary suspension without pay;
- (3) Demotion; and
- (4) Dismissal.

(b) At any time during the period prior to achieving career status, including during the probationary period, an employee may be separated from service for causes related to performance of duties or for personal conduct detrimental to the agency without right of appeal or hearing. The employee must be given notice of dismissal, including reasons. Such notice may be, but is not required to be, in writing.

~~(b)(c)~~ There are two bases for the discipline or dismissal of employees under the statutory standard of "just cause" as set out in G.S. 126-35. These two bases are:

- (1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance.
- (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct.

~~(e)(d)~~ Either unsatisfactory or grossly inefficient job performance or unacceptable personal conduct, as defined in 25 NCAC 1I .2302(a); .2303(a); and .2304(b), constitutes just cause for discipline or dismissal. The categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case. No disciplinary action shall be invalid solely because the disciplinary action is labeled incorrectly.

~~(d)(e)~~ The imposition of any disciplinary action shall comply with the procedural requirements of this Section.

Authority G.S. 126-35.

Note from the Codifier: The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270th day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270th day.

This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Rule-making Agency: NC DHHS, Division of Health Service Regulation

Rule Citation: 10A NCAC 14C .0203

Effective Date: January 1, 2008

Date Approved by the Rules Review Commission: December 13, 2007

Reason for Action: House Bill 1473 removed the Agency's authority for collecting and establishing fees for Certificate of Need submission applications. The General Statutes 131E-177(9) and 131E-182(c) were amended to establish the fee structure for CON applications. The Agency no longer will be making rules to establish fees. The agency is amending the rule to repeal the application fees rule language to allow for rule consistency with the amended General Statutes. Change to existing Certificate of Need rules are required to adhere to a new fee structure established by the General Assembly with the passage of House Bill 1473 that became effective July 1, 2007. The fees will be structured in the General Statutes, G.S. 131E-177(9) and 131E-182(c), rather than in rule, effective October 1, 2007. The Agency is amending the rule to repeal the application fees rule language to allow for rule consistency with the amended General Statutes and to alleviate any potential confusion for CON applications due to discrepancies between the current rule and the amended Statutes regarding the fee structure.

CHAPTER 14 – DIRECTOR, DIVISION OF HEALTH SERVICE REGULATION

SUBCHAPTER 14C – CERTIFICATE OF NEED REGULATIONS

SECTION .0200 – APPLICATION AND REVIEW PROCESS

10A NCAC 14C .0203 FILING APPLICATIONS

- (a) An application shall not be reviewed by the agency until it is filed in accordance with this Rule.
- (b) An original and a copy of the application shall be file-stamped as received by the agency no later than 5:30 p.m. on the 15th day of the month preceding the scheduled review period. In instances when the 15th of the month falls on a weekend or holiday, the filing deadline is 5:30 p.m. on the next business day. An application shall not be included in a scheduled review if it is

not received by the agency by this deadline. Each applicant shall transmit, with the application, a fee to be determined according to the ~~following formula:~~ formula as stated in G.S. 131E-182(c).

- ~~(1) With each application proposing the addition of a sixth bed to an existing or approved five bed intermediate care facility for the mentally retarded, the proponent shall transmit a fee in the amount of two thousand dollars (\$2,000).~~
- ~~(2) With each application, other than those referenced in Subparagraph (b)(1) of this Rule, proposing no capital expenditure or a capital expenditure of up to, but not including, one million dollars (\$1,000,000), the proponent shall transmit a fee in the amount of three thousand five hundred dollars (\$3,500).~~
- ~~(3) With each application, other than those referenced in Subparagraph (b)(1) of this Rule, proposing a capital expenditure greater than of one million dollars (\$1,000,000) or greater, the proponent shall transmit a fee in the amount of three thousand five hundred dollars (\$3,500), plus an additional fee equal to .003 of the amount of the proposed capital expenditure in excess of one million dollars (\$1,000,000). The additional fee shall be rounded to the nearest whole dollar. In no case shall the total fee exceed seventeen thousand five hundred dollars (\$17,500).~~

(c) After an application is filed, the agency shall determine whether it is complete for review. An application shall not be considered complete if:

- (1) the requisite fee has not been received by the agency; or
- (2) a signed original and copy of the application have not been submitted to the agency on the appropriate application form.

(d) If the agency determines the application is not complete for review, it shall mail notice of such determination to the applicant within five business days after the application is filed and shall specify what is necessary to complete the application. If the agency determines the application is complete, it shall mail notice of such determination to the applicant prior to the beginning of the applicable review period.

(e) Information requested by the agency to complete the application must be received by the agency no later than 5:30 p.m. on the last working day before the first day of the scheduled review period. The review of an application shall commence in the next applicable review period that commences after the application has been determined to be complete.

History Note: Authority G.S. 131E-177; 131E-182;
Eff. October 1, 1981;
Temporary Amendment Eff. July 15, 1983, for
a Period of 118 Days, to Expire on November
10, 1983;
Amended Eff. November 1, 1990: January 1,
1990;
Temporary Amendment Eff. August 11, 1993,
for a period of 180 days or until the permanent
rule becomes effective, whichever is sooner;
Amended Eff. December 1, 1994; January 4,
1994;

Temporary Amendment Eff. August 12, 1994,
for a period of 180 days or until the permanent
rule becomes effective, whichever is sooner;
Temporary Amendment Eff. January 1, 2000;
Amended Eff. April 1, 2001;
Temporary Amendment Eff. February 16,
2004;
Amended Eff. August 1, 2004;
Temporary Amendment Eff. February 1, 2006;
Amended Eff. November 1, 2006;
Temporary Amendment Eff. January 1, 2008.

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. Also, the Contested Case Decisions are available on the Internet at <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge
JULIAN MANN, III

Senior Administrative Law Judge
FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

Beecher R. Gray
Selina Brooks
Melissa Owens Lassiter
Don Overby

A. B. Elkins II
Joe Webster
Shannon Joseph

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
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STATE OF NORTH CAROLINA
COUNTY OF DURHAM

Filed

2007 OCT 29 AM 10: 51

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
07 EDC 0319

Office of
Administrative Hearings

CORPORATION FOR EFFECTIVE SCHOOLING)
d/b/a KESTREL HEIGHTS SCHOOL,)
Petitioner,)
v.)
THE STATE BOARD OF EDUCATION and)
THE NORTH CAROLINA DEPARTMENT OF)
PUBLIC INSTRUCTION,)
Respondent.)

DECISION

THIS CAUSE came on for hearing before the undersigned Administrative Law Judge, Augustus B. Elkins II, on June 28-29 and July 9, 2007, at the Office of Administrative Hearings (OAH) in Raleigh, North Carolina. The record was left open for submission of materials by the parties after receipt of a copy of the transcript of the proceeding. After filing by Respondent and Petitioner, the record was closed on August 29, 2007.

APPEARANCES

For the Petitioner: Philip S. Adkins
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Durham, NC 27717

For the Respondent: Laura E. Crumpler
Assistant Attorney General
NC Department of Justice
PO Box 629
Raleigh, NC 27602

ISSUES

1. Whether the State Board of Education's decision to deny Petitioner's request for a grade expansion from grades 6-12 to K-12 was arbitrary and capricious.

2. Whether the Department of Public Instruction erroneously withheld Special Education funding from Petitioner during the 2006-07 school year.
3. Whether the decision of the Department of Public Instruction to fund Petitioner at an enrollment of 426 students for the 2007-08 school year was arbitrary and capricious or otherwise erroneous.

STATUTES AND/OR RULES AT ISSUE

N.C.G.S. ' 115C-238.29D(d). Final Approval of Applications for Charter Schools.

....

A material revision of the provisions of a charter application shall be made only upon the approval of the State Board of Education.

It shall not be considered a material revision of a charter application and shall not require the prior approval of the State Board for a charter school to increase its enrollment during the charter school's second year of operation and annually thereafter (i) by up to ten percent (10%) of the school's previous year's enrollment or (ii) in accordance with planned growth as authorized in the charter. Other enrollment growth shall be considered a material revision of the charter application, and the State Board may approve such additional enrollment growth of greater than ten percent (10%) only if the State Board finds that:

- (1) The actual enrollment of the charter school is within ten percent (10%) of its maximum authorized enrollment;
- (2) The charter school has commitments for ninety percent (90%) of the requested maximum growth;
- (3) The board of education of the local school administrative unit in which the charter school is located has had an opportunity to be heard by the State Board of Education on any adverse impact the proposed growth would have on the unit's ability to provide a sound basic education to its students;
- (4) The charter school is not currently identified as low-performing;
- (5) The charter school meets generally accepted standards of fiscal management; and
- (6) It is otherwise appropriate to approve the enrollment growth.

EXHIBITS

Note: The Official Transcript failed to include Exhibits (for either Petitioner or Respondent) identified/offered/received

For Petitioner: Petitioner's exhibits A-T, 1-17

For Respondent: Respondent's exhibits 1-3, 4A, 4B, 5A, 5B, 6-31, A, A1, and B.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of witnesses and all other evidence, the Undersigned makes the following:

FINDINGS OF FACT

1. Petitioner, Corporation for Effective Schooling, Inc., is a North Carolina non-profit corporation doing business as Kestrel Heights School (Kestrel) in Durham County, North Carolina. (Petitioner's Exhibit A).
2. The Respondent, The North Carolina State Board of Education (SBE) is the state agency that governs the public elementary and secondary school systems in the State of North Carolina. The State Board of Education meets once a month. The Department sends out the agenda and all relevant materials to Board members in advance of the monthly meeting.
3. The Respondent, The North Carolina Department of Public Instruction (DPI) is the state agency that manages the elementary and secondary school systems in the State of North Carolina. The Department of Public Instruction consists of divisions and departments authorized by the State Board of Education and necessary for supervision and administration of the public school system. N.C.G.S. 115C-21(a)(1). The Superintendent of Public Instruction, through the Department of Public Instruction, "manages on a day-to-day basis the administration of the free public school system, subject to the direction, control, and approval of the State Board." N.C.G.S. 115C-19.
4. The Office of Charter Schools (OCS) is a division of DPI tasked with overseeing and managing public charter schools in the State of North Carolina. OCS reports directly to the Financial and Business Services area of DPI. The Office of Charter Schools is headed by Jack

Moyer and has five consultants who work directly with the charter schools throughout the State. The Office of Charter Schools maintains contact with charter schools through E-mail, direct mailings, telephone contact, conferences and workshops. The Office of Charter Schools reports to Philip Price, Associate Superintendent for Financial and Business Services. The Office of Charter Schools makes reports and recommendations to the State Board of Education. Decision-making authority rests with the State Board of Education.

5. Pursuant to N.C.G.S. 115C-238-29I(d), the State Board is authorized to establish, and did establish, a Charter School Advisory Committee (CSAC) to make recommendations concerning charter schools to the SBE and to provide any other assistance needed by the SBE. The Office of Charter Schools provided staff and clerical support for the Charter School Advisory Committee. The CSAC was appointed by the Chairman of the SBE and was responsible to make recommendations regarding charter school's requests for enrollment enlargement and grade expansions. The Committee was disbanded in April of 2007 by the State Board of Education.

6. The General Assembly enacted the Charter School Act in 1996, establishing "a system of charter schools" with the goal of improving student learning, increasing learning opportunities, encouraging the use of different and innovative teaching methods, providing expanded choices for parents, and providing less regulation for charter schools. N.C.G.S. 115C-238-29A. A charter school is a "public school" even though it is operated by a private nonprofit board of directors. N.C.G.S. 115C-238-29E. Charter schools are part of the "general and uniform system of free public schools" guaranteed by the State Constitution, Article IX, sec.2, which system is to be supervised and administered by the State Board of Education. Article IX, sec.5. Charter schools are funded with State and local tax revenues based upon a per pupil allocation. N.C.G.S. 115C-238-29H.

7. Persons wishing to create a charter school must submit an application for review and scrutiny by State officials, to be approved or disapproved by the State Board of Education. The number of charters that can be awarded is limited to 100. N.C.G.S. 115C-238-29D.

8. When the Charter School law was first enacted, there was no provision that dealt with enrollment increases. 1995 N.C. Sess. Law c. 731 s.2 (Reg. Sess.1996) Subsequently, the legislature amended N.C.G.S. 115C-238-29D(d) to dictate a specific process for allowing or disallowing enrollment increases by charter schools.

9. The Petitioner, Kestrel, applied for a charter in the summer of 1997 to operate a school, grades 6-12 using a Paedia teaching philosophy. In the application, Kestrel planned to begin with 160 students in its first year of operation. The application indicated the Board of Directors expected the enrollment to reach 480 students by the 2002-2003 school year. (Petitioner's Exhibit A).

10. The SBE granted Kestrel a Charter dated June 5, 1998 to operate a charter school in Durham County pursuant to its business and educational plans outlined in its application and the Charter School Act, N.C.G.S. §115C-238.29A et. seq. (Petitioner's Exhibit B). Petitioner was granted a Charter with an effective date of July 1, 1998. The Charter was issued by the State Board of Education and was effective for 5 years from its effective date.

11. In its original application for the Charter, Petitioner was required to indicate its enrollment projections, by grade level, for each of the five years of its initial operation, in this case from 1998 through the spring of the final year of its five-year charter, or 2003. (Resp. Ex. 2) Petitioner projected the following enrollments for each of those years:

Grade Level	1998-1999 LEA1--LEA2-- LEA3	1999-2000 LEA1--LEA2-- LEA3	2000-2001 LEA1--LEA2-- LEA3	2001-2002 LEA1--LEA2-- LEA3	2002-2003 LEA1--LEA2-- LEA3
Sixth	40	60	63 1 1	68 1 1	68 1 1
Seventh	40	40	65	68 1 1	68 1 1
Eighth	40	40	60	65	68 1 1
Ninth	40	60	70	68 1 1	68 1 1
Tenth		40	60	70	68 1 1
Eleventh			40	60	70
Twelfth				40	60
Subtotals	160 0 0	240 0 0	358 1 1	439 3 3	470 5 5
Total	160	240	360	445	480

12. As indicated in its original application, Petitioner intended to grow from four grades (6-9) with a total of 160 students in its first year of operation (1998-1999) to five grades (6-10) with a total projected enrollment of 480 students in its fifth year of operation (2002-03). Although Petitioner was approved to operate a 6-12 school, its projections for its first five years did not include adding grades 11 and 12. (Resp. Ex. 2)

13. Kestrel opened its doors in late August, 1998 leasing space in the local YMCA and a renovated tuxedo shop a quarter of a mile away. Kestrel enrolled 160 students in its first year and eventually grew to 185 students in its second year. Kestrel was unable to grow beyond roughly 185 students despite high parent demand because it was not able to secure larger facilities. Twice Kestrel worked with the owner of the nearby Lakewood Shopping Center who was initially willing to build a school on the shopping center property and then offered to renovate an existing structure on the property. Both deals fell through.

14. The OCS has had three directors since its inception in 1996. Mr. Grova Bridgers served from 1996 through May 2001. Mr. Otho Tucker served from July 2001 through January 2004 when the current director Mr. Jack Moyer was hired. During Mr. Bridgers' and Mr. Tucker's tenures, the OCS and SBE allowed charter school to grow up to the maximum enrollment authorized in their initial charter no matter how long that growth took. That was the established interpretation of N.C.G.S. §115C-238.29D(d) until the associate Superintendent of Financial and Business Services, Philip Price, announced a change of interpretation in January 2006.

15. Mr. Jack Moyer was hired as the Director of OCS in July, 2004. When Moyer assumed the position as Director of the Office of Charter Schools, the office was understaffed. For the year 2004-05, the office allowed all the schools to remain at their then-current enrollment maximum projections. In early 2005, the OCS decided to give all charter schools in North Carolina two years to grow to their maximum enrollment contained in their original charter application. By letter dated March 9, 2005, Jack Moyer notified Kestrel Heights that its maximum enrollment for the 2005-06 school year would be 480, based upon its original projections and the Department's decision to permit each charter school to have a two-year

period in which to meet a projected enrollment. All charter schools were informed of the decision to extend enrollment projections for two years beginning with the 2005-06 school year. Accordingly, a charter school could remain at its then-current maximum for the years 2005-06, and 2006-07.

16. Petitioner applied for a renewal of its Charter during the fall of 2001, its fourth year of operation. (Resp. Ex. 31) The State Board of Education granted/renewed Petitioner a second charter, effective July 1, 2003. (Resp. Ex. B) The charter renewal application and approval dated February 11, 2002 did not include any projections of student enrollment. (Respondent's Exhibit S). In February of 2002, the SBE renewed Kestrel's charter without any revisions for an additional five (5) year term beginning in 2003. (Petitioner's Exhibit C).

17. In 2004, Kestrel partnered with a private educational management organization, Imagine Schools, which possessed the capital funding for a facility to help Kestrel realize its goal of growing to 480 students. For the school year 2004-2005, Kestrel had an enrollment of 166 students (Respondent's Exhibit 12).

18. In December 2004, Petitioner submitted a request to the SBE for an increase in its grade offering and to increase its maximum enrollment for 2005-2006 to 484. Petitioner requested that it be permitted to expand to operate grades K-5. (Res. Ex. 4A) In its request, Petitioner proposed to drop its grades 9-12 until FY 2010. (Resp. Ex. 4A)

19. The SBE denied Petitioner's request for a grade expansion for the 2005-06 school year. (Resp. Ex. 5A) According to Jack Moyer, Director of the Office of Charter Schools, there were concerns about Petitioner's intention to drop the higher grades after holding itself out for so many years as offering those grades.

20. At the January 5, 2005 SBE meeting, OCS and the CSAC did not recommend that the SBE approve Kestrel's request to expand from 167 students in the 2004-2005 school year to 484 students in the 2005-2006 school year. (Petitioner's Exhibit R).

21. For the school year 2005-2006, Kestrel had an enrollment of 189 students (Respondent's Exhibit 12). On March 9, 2005, Mr. Moyer sent a letter to Kestrel indicating its maximum enrollment was 480 students for the 2005-2006 school year, "based on the Charter for Kestrel Heights School." (Respondent's Exhibit 4B).

22. At the January 26, 2006 CSAC meeting, Mr. Price stated that the local LEA's were upset because charter school funding comes from the local LEA allotment. As a charter school grows, the local LEA has to readjust. Mr. Price contended that if a charter school had not met its projected growth in its first two years of operation, the charter school funding would be "reset" and the charter school could then only grow by 10% or must obtain SBE approval for greater growth. Mr. Price indicated that if a charter school enrolled students in excess of its maximum authorized enrollment, those extra students would not be funded. (Petitioner's Exhibit G). Except for the recitation of Mr. Price's remarks, the policy he espoused is not written or incorporated into any rule or the SBE policies for charter schools.

23. At the February 1 and 2, 2006 SBE meeting, Mr. Moyer requested that the SBE approve Torchlight Academy's request because the SBE approval was required. Torchlight Academy's previous years enrollment was not within 10% of its additional maximum. (Petitioner's Exhibit 17).
24. On February 14, 2006, Mr. Moyer sent a letter to Kestrel indicating that Kestrel's maximum enrollment for the 2006-2007 school year was 480 students, "based on the figures submitted in your charter." The only numbers "submitted in" Kestrel's charter was in the original charter application which was incorporated into the first charter granted to Kestrel dated June 12, 1998. (Petitioner's Exhibit A and Petitioner's Exhibit B). Mr. Moyer testified that the language in the letter was in error and he sent the wrong form letter on that occasion.
25. In the fall of 2006, the charter schools were asked to submit any requests for grade expansions or enrollment increases by November 3, 2006. Kestrel Heights submitted a timely request to expand its grade offerings from 6-12 (which had been authorized in its original charter) (Petitioner's Exhibit J) to K-12 and to correspondingly increase its enrollment from 403 (its calculation for the 2006-07 school year) to 980. These requests were for the 2007-2008 school year. (Resp. Ex. 7) Attached to the request was the justification for the expansion which specifically stated that the school wanted to "add 500 students in grades K-5 in a new building to be constructed. . . ." (Resp. Ex. 7) The request was not seeking to expand its middle and high school. The budget presented was based upon a total enrollment of 980 students. (Resp. Ex. 7) The request indicated that it sought "enrollment growth beyond 10%." (Resp. Ex. 7)
26. The OCS did not process Kestrel's request because it believed Kestrel was not within 10% of its authorized maximum enrollment of 480 students for the 2006-2007 school year.
27. In a memorandum sent from the Office of Charter Schools, the office informed the schools that any increase of greater than 10% required State Board action in order to be approved, and also any grade configuration changes had to be approved by the State Board. (Resp. Ex. 6). The letter quoted from the statute including the following, "prior approval of the State Board for a charter school to increase its enrollment during the charter school's second year of operation and annually thereafter (i) by up to ten percent (10%) of the school's previous year's enrollment or (ii) in accordance with planned growth as authorized in the charter." N.C.G.S. ' 115C-238.29D(d)
28. After quoting from the statute and setting forth the statutory criteria for the Board to base its decision on, the memorandum goes on to state:
Clarification:
All six of these criteria must be met before a school is eligible for an enrollment increase. Not meeting any one of the criteria will be sufficient to keep the enrollment increase from being recommended to the State Board of Education. Therefore, if you know your school does not meet all the criteria, you need not apply for an Enrollment Increase beyond 10%; however, your school must still complete the Statement of Intent declaring your request.
You can still apply for a change of grade structure, but your enrollment cap will not increase more than 10% of your previous year's enrollment.

29. Upon receiving the request from Kestrel Heights, Joel Medley, a consultant with the Office of Charter Schools, e-mailed the school to inform it that the request was for more than 10%, that the school was not currently within 10% of its maximum authorized enrollment of 480, and that the growth to 980 students would not be allowed. (Resp. Ex. 8)

30. Kestrel Heights arranged to be heard by the Charter School Advisory Committee at its December 14, 2006, regularly scheduled meeting. (Pet. Ex. L). The Charter School Advisory Committee agreed that Kestrel Heights did not meet the minimum criteria to ask for an enrollment increase beyond the automatic 10%. However, at the December 14, 2006 meeting of the CSAC, the CSAC modified Kestrel's request and voted to recommend to the SBE that it approve Kestrel's request to add grades K-5 within its maximum enrollment of 480 students. (Petitioner's Exhibit M). Kestrel Heights representatives accepted the offer of the CSAC to recommend the grade increase and indicated that the school would "come back next year to ask for additional enrollment growth." (Resp. Ex. 9)

31. Eighteen charter schools were presented to the State Board at its January 2007 meeting, requesting either enrollment increases, grade expansions, or both. (Resp. Ex. 11) The State Board had requested that the Office of Charter Schools present certain information regarding each school, including its performance composite for three years and whether or not the school had made AYP for each of those three years. In addition, the SBE had asked for the recommendation of staff in the Office of Charter Schools as well as the recommendation of the Charter School Advisory Committee.

32. At the January 3-4, 2007 meeting, OCS opposed Kestrel's request and the CSAC's recommendations for a grade expansion, arguing for the first time that Kestrel's authorized maximum for the 2007-2008 school year was only 426, not 480 students. (Petitioner's Exhibit M; Petitioner's Exhibit O). The OCS opposed the CSAC recommendation that Kestrel's request be approved to add grades K-5 within its 480 maximum authorized enrollment, listing Kestrel's three years of declining composite test scores, lack of an impact statement and maximum enrollment of only 426, not 480 for the next school year.

33. Mr. Medley testified at trial the reason that there was no discussion at the CSAC meeting in December concerning Kestrel Heights' maximum for the 2007-08 school year was because information was not yet available regarding the enrollment figures for the fall. By the time the State Board of Education met in January, the OCS had obtained enrollment data for the schools and had been able to determine what 10% growth would amount to. According to the enrollment figures, the best one of the first two months' enrollment for Kestrel Heights for the fall of 2006 was 387.

34. At its January 2007 meeting, the SBE discussed the approval of 18 charter school requests for grade expansion and enrollment enlargement in closed session. During the meeting, OCS recommended five schools for approval whose three year trends were downward; Bethany Community, Lincoln Charter, Union Academy, Phoenix Academy and Lake Norman Charter. All five had downward trends that were more significant than Kestrel's. (Petitioner's Exhibit N). OCS also recommended Community Charter School for a grade expansion, even though its

composite test scores dropped precipitously, 27.6 percentage points between the 2004-2005 and 2005-2006 school years and whose last scores were 16.5 percentage points lower than Kestrel's.

35. Though Kestrel's test scores declined, it had made Average Yearly Progress (AYP), the federal benchmark for measuring school performance its last two years. One of the schools the OCS favorably recommended for grade expansion, Queens Grant, failed to make AYP in its last year. (Petitioner's Exhibit N)

36. OCS, not Kestrel, was responsible for sending Kestrel's request to the local LEA for an impact statement.

37. In the executive summary, the OCS prepared for the SBE, the OCS recommended that the SBE approve Phoenix Academy's request to maintain its maximum student enrollment of 781 approved in 2005 even though it only had 417 students and was not within 10% of its maximum enrollment. (At the January 5, 2005 SBE meeting, OCS recommended, and the SBE approved, Phoenix Academy's request to go from 324 students in the 2004-2005 school year to 781 students and add the 8th grade in the 2005-2006 school year.) (Petitioner's Exhibit R and Petitioner's Exhibit N).

38. Mr. Moyer recommended that the SBE approve Phoenix Academy's request to enlarge its enrollment for the 2007-2008 school year despite the OCS's requirement it be within 10% of its maximum enrollment because Phoenix had contacted him and explained they had had problems acquiring land for facilities.

39. At the January 2007 SBE meeting, OCS recommended that the SBE approve Queens Grant's request that it be allowed to add 10th grade and remain at its "previously approved" maximum of 840 students. (Petitioner's Exhibit N). (At the February 2006 meeting of the SBE, OCS recommended the SBE approve Queens Grant's enrollment increase from 722 students for the 2005-2006 school year to 840 students for the 2006-2007 school year and to add grade 9 which was subsequently approved.) (Petitioner's Exhibit S).

40. Following the presentation to the State Board of Education, Mr. Medley was confronted by Mr. Norman George, a consultant who works with Kestrel Heights. Mr. George questioned the calculation of the 426 enrollment number and Mr. Medley attempted to explain it.

41. The State Board of Education met again on January 31-February 1, 2007, to conduct its regular business for the month of February. At this meeting the Board voted to adopt the recommendations of the Office of Charter Schools with respect to requests for grade expansions and enrollment increase. Included in the State Board's decisions for the February meeting was its vote to deny the request of Kestrel Heights, as forwarded by the CSAC for a grade expansion to K-12 within its maximum authorized enrollment of 480 students. There was no request before the State Board to increase the enrollment of Kestrel Heights. The sole request was to increase the grade span from 6-12 to K-12.

42. Kestrel and Imagine planned to build a new school facility in southern Durham County and designed a school building that could accommodate the 420 students of the 480 students that

the SBE had approved in the original charter application. In the fall of 2005, Kestrel informed the OCS that it intended to grow from its then enrollment of 185 students to its authorized maximum of 480 students.

43. The construction began in late May and was delayed due to weather and difficulties with local inspection approval. The school facilities were not completed until mid-September and Kestrel had to operate at its old facilities for the first three weeks of the school year.

44. Charter schools do not receive any capital funding from the state or the local government and thus are dependent upon private capital funding. The maximum student enrollment authorized by Respondents is critical to planning the development of school facilities and attracting private capital.

45. The time frame for locating a suitable property, designing a school, obtaining local government approval and permitting, and constructing school facilities can take anywhere from 10 months to one year and 9 months. It took Imagine Schools, the developer of the Kestrel school facilities fourteen months to locate a suitable piece of property, obtain the local permits, and build the school facilities Kestrel currently occupies.

46. In August of 2006, Kestrel had applications for 550 students. To accommodate the growth in student enrollment, Kestrel operated on a double shift schedule, teaching the 6th-8th grades in the morning and the 9th-11th grades in the afternoon. As a result, planned enrollment at Kestrel dropped dramatically. That number grew to approximately 400 students 40 days into the first semester.

47. Charter schools receive their state-allotted funding in three installments: at the beginning of the school year; in late October or early November; and the final installment prior to the end of March. (Petitioner's Exhibit 10). The SBE releases one-third of Kestrel's budget sometime in late July or early August depending upon when the North Carolina legislature approves the state budget.

48. Traditional public schools have their school year's state allotment available at the beginning of each school year. Currently, the charter school allotment comes out of the traditional school's annual allotment. (Petitioner's Exhibit 9).

49. If the charter school has projected to enroll more students than it actually enrolls, DPI reallocates a pro-rata amount for each child the charter school over projected to the local traditional school by November or December.

50. If a traditional school enrolls more students than DPI projected in a school year, DPI funds those additional students from a Five Million Dollar contingency fund.

51. Charter school enrollments are calculated one year at a time. The enrollment numbers are good for one year and have to be recalculated each year. The DPI builds into the budget each fiscal year an automatic increase. The allotment process and the budgeting process are

constructed to facilitate planning on the part of the State, the LEAs (local school administrative units) and the charter schools.

52. The decision to set Kestrel Heights' maximum enrollment for 2007-08 was a decision made internally by the Department of Public Instruction.

53. At the hearing, both Mr. Moyer and Mr. Price testified that they interpreted N.C.G.S. §115C-238.29D(d) to mean that whenever the SBE authorized a new maximum enrollment, a charter school had only two years to reach that new maximum or its enrollment maximum would automatically reset to 10% of the school's second year enrollment. Both men cited the phrase, "...during the charter school's second year of operation and every year thereafter..." in that section as the statutory language justifying the stated policy. Mr. Moyer also testified that DPI had authorized Kestrel a maximum of 480 students enrollment for the 2005-2006 and 2006-2007 school years. Thus, Kestrel had to enroll 480 students for the 2006-2007 school year which it failed to do. Consequently, Mr. Moyer testified that according to his interpretation given to him by Mr. Price of N.C.G.S. §115C-238.29D(d) Kestrel's maximum enrollment for the 2007-2008 school year automatically reset to 10% of Kestrel's actual enrollment for the 2006-2007 school year. OCS calculated that Kestrel could only grow to 426 students in the upcoming school year.

54. The funding of charter and traditional public schools is determined by the legislature by enactment of legislation, including the appropriations bill. Traditional public schools are given "allotments" which are assigned depending upon the number of students in the public schools of that school system. The "allotments" that would otherwise be assigned to the traditional LEA, are converted to dollars and then reassigned to charter schools depending on the number of students enrolled in the charter schools.

55. The funding of special needs children is controlled by N.C.G.S. §115C-238.29H. With respect to funding for exceptional children, Mr. Price testified that such categorical funding is above and beyond the regular average daily membership funding. The General Assembly determined that children with special needs require an additional pot of money to supplement educational delivery. The General Assembly established a categorical allotment. The General Assembly's appropriation for special needs children includes a cap of 12.5 per cent. (2005 N.C. Sess. Law c.276 c.7.12) Due to the cap, it is possible that LEAs as well as charter schools may have special education students for whom there is no funding.

56. Pursuant to N.C.G.S. 115C-238.29F(d)(4), a charter school "shall comply with policies adopted by the State Board of Education for charter schools relating to the education of children with special needs." In addition, charter schools "shall comply with the reporting requirements established by the State Board of Education in the Uniform Education Reporting System." N.C.G.S. 115C-238.29F(f)(2)

57. The Charter of a charter school specifically provides that the charter school must comply with State and federal laws and with State Board Policy in reporting the number of exceptional children served by the school. (Resp. Ex. B) The Charter also provides that the school must submit all reports as required by the State Board. (Resp. Ex. B)

58. Both State and federal regulations require official headcounts, submitted by a specified deadline, in order to qualify the LEA or charter school for special education funding. The headcount deadlines for State funding is April 1 of each year in order to qualify for funding in the subsequent academic year. The headcount for federal funding is due by December 1 of each year for the following year. (Resp. Ex. A) All LEAs and charter schools are made aware of these deadlines.

59. Once the school year has begun, the LEAs and charter schools are bound by the numbers they submitted the preceding fiscal year, both for federal and for state funds. There is one exception, for state funds only, provided by the allotment policy manual. The allotment policy, applicable to both LEAs and charter schools, allows adjustments to be made for special needs children who transfer between the traditional public schools and the charter school, but only during the first 60 days of the school year and only if the schools file the proper notice by the 10th of the month following the month the child transferred.

60. In the 2006-2007 school year, Kestrel enrolled 81 special needs students on the first day of the school year and provided services to them. Kestrel received funding for less than half of special needs students despite several verbal requests from Kestrel to the Respondents.

61. Kestrel Heights submitted an April 1, 2006 headcount of 38 special education students. Kestrel Heights did not file any notification with the State during the 60-day window provided at the beginning of the school year indicating incoming transfers of special education students, i.e., Kestrel did not submit a transfer form as required by the State Allotment Manual, Charter Schools, Program Report Code 036 Special Provision 1. (Petitioner's Exhibit 11). Therefore, Kestrel received no additional funding because they didn't file the forms appropriate to obtain the funding. As a result, Respondents could not fund all of the 81 special education students that attended Kestrel in the 2006-2007 school year. (Petitioner's Exhibit U).

62. Philip S. Adkins is the Chairman of the Board of Directors of Kestrel. He is a licensed attorney practicing in Durham, NC. He has represented a number of charter schools in North Carolina since the first schools were chartered in 1997. Mr. Adkins has represented Washington Montessori Charter School in Washington, North Carolina and Two Rivers Charter School in Boone, North Carolina concerning disputes with OCS. During his representation of those two schools, Mr. Adkins has written Mr. Moyer challenging his interpretation of the Charter School Act, and has copied the SBE Chairman and various senior DPI employees. (Petitioner's Exhibits D and E). On three occasions, Mr. Moyer visited Kestrel and advised Kestrel's director of his concerns regarding Kestrel partnering with Imagine Schools. Mr. Moyer shared information about issues Imagine was having in Florida and felt Kestrel maybe getting itself in some trouble. Kestrel nonetheless continued their relationship with Imagine.

63. On November 15, 2006, Mr. Moyer placed Kestrel on governance cautionary status for failing to timely submit a self-study on time. Before this time, Kestrel had never failed to timely file reports in the past eight years of its history. (Petitioner's Exhibit F).

64. Mr. Adkins wrote a lengthy letter to Mr. Moyer complaining about derogatory comments he had made at a November 2006 meeting of the Advisory Committee. (Petitioner's Exhibit K).

During the hearing of this case, in response to a question regarding building a facility for charter schools, Mr. Moyer directed comments to Mr. Adkins that he was "tired of all the whining about how tough it is to build a building." Mr. Moyer stated to Mr. Adkins that he (Moyer) had "walked in those shoes," and that he (Moyer) knew "exactly what it's all about." Mr. Moyer concluded his comments to Mr. Adkins by stating that "if the kitchen's too hot, don't get in the kitchen." (Transcript Volume II, page 426)

65. Mr. Moyer testified that the State Board makes its own decisions on all matters coming before it. The State Board in the past has, from time to time, rejected recommendations from the CSAC, from the Office of Charter Schools, and from Mr. Moyer. There was no evidence presented at the hearing tending to indicate that the Office of Charter Schools exerted undue influence on the State Board of Education.

66. Respondent DPI prepared a chart showing an analysis of the actual versus the projected enrollment of Kestrel Heights School. In the chart, which appears below, the projected growth as set forth in the charter application is shown in the third column for the first 5 years of the charter school's operation. The fourth column for the second 5 years of the charter school's operation, following renewal, show the planned enrollment to be 480 for years 2003 through 2007. The fourth column sets out the actual enrollment for that school year, calculated by taking the highest enrollment of the first two months of the school year.

APPROVED GRADE SPANS	FISCAL YEAR	PLANNED	BEST 1 OF 2 ACTUAL ADM	% OF PLANNED GROWTH
6-9	1998-99	160	154	96%
6-10	1999-2000	240	165	69%
6-11 10	2000-2001	360	168	47%
6-12 10	2001-2002	445	183	41%
6-12 10	2002-2003	480	167	35%
6-12 11	2003-2004	480	163	34%
6-12 11	2004-2005	480	166	35%
6-12 11	2005-2006	480	189	39%
6-12 11	2006-2007	480	387	81%
6-12	2007-2008	426		

(Resp. Ex. 12)

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction of this contested case pursuant to applicable State and Federal laws. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in the matter. Petitioner bears the burden of proving the claims alleged in

the Petition by a preponderance of evidence. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

2. The State Board of Education has the constitutional power to “supervise and administer the free public school system and the educational funds provided for its support; and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.” N.C. Const. Art. IX, sec. 5. In addition to the powers bestowed upon the State Board of Education by the State Constitution, the General Assembly has vested the Board with financial powers including those found in N.C.G.S. 115C-408, N.C.G.S. 115C-12(1a), N.C.G.S. 115C-12(5), and N.C.G.S. 115C-18

3. The State Board is vested with the power to oversee, monitor, approve, and revoke charter schools. N.C.G.S. 115C-238.29A *et seq.* Among the powers conferred upon the SBE is that of approving or disapproving requests by charter schools for grade increases and for enrollment increases. N.C.G.S. 115C-238.29D(d)

4. The first named Respondent is the North Carolina State Board of Education. The first and only issue directed to that Respondent is whether the State Board of Education exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or acted unlawfully, when it issued its decision to deny Petitioner’s request for a grade expansion from grades 6-12 to K-12. Petitioner has the burden of proof by a preponderance of the evidence as to its claims against Respondent.

5. The responsible party for the burden of proof must carry that burden by a greater weight or preponderance of the evidence. Black’s Law Dictionary cites that “preponderance means something more than weight; it denotes a superiority of weight, or outweighing.” The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

6. In accord with Painter v. Wake County Bd of Ed., 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it is presumed that “public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.” The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence.

7. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Rusher v. Tomlinson, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), aff’d, 343 N.C. 119, 468 S.E. 2d 57 (1996); Comm’r of Insurance v. Fire Insurance Rating Bureau, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). “It is more than a scintilla or a permissible inference.” Lackey v. Dept. of Human Resources, 306 N.C. 231, 238, 293 S.E.2d 171, 177 (1982). In weighing evidence which detracts from the agency decision, “[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand” Little v. Bd. of Dental Examiners, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted).

8. The Petitioner has failed to overcome the presumption set forth by law that the SBE's decision denying Petitioner's request for a grade expansion from grades 6-12 to K-12 was lawful and correct. As such, the presumption granted by law remains, that, the SBE did not exceed its authority or jurisdiction, did not act erroneously, did not act arbitrarily or capriciously, and acted as required by law or rule.

9. The second named Respondent is the North Carolina Department of Public Instruction. The first issue directed to that Respondent is whether the DPI exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or acted unlawfully, when it issued its decision to withhold Special Education funding from Petitioner during the 2006-07 school year. Petitioner has the burden of proof by a preponderance of the evidence as to its claims against Respondent.

10. The Petitioner has failed to overcome the presumption set forth by law that the DPI's decision withholding Special Education funding from Petitioner during the 2006-07 school year was lawful and correct. As such, the presumption granted by law remains, that, the DPI did not exceed its authority or jurisdiction, did not act erroneously, did not act arbitrarily or capriciously, and acted as required by law or rule.

11. The last issue before the Undersigned is whether the decision of the Department of Public Instruction to fund Petitioner at an enrollment of 426 students for the 2007-08 school year was arbitrary and capricious or otherwise erroneous.

12. Kestrel's charter was renewed in February of 2002 without any revisions. Paragraph 1 of the "renewed" charter dated June 12, 2003, states that the Application is incorporated in this Charter and all representations and conditions contained in the Application are binding on the school. The only "Application" Petitioner submitted to the SBE was the original application. The renewed charter included Kestrel's original maximum enrollment of 480 students.

13. The statute at issue is N.C. Gen. Stat. §115C-238.29D(d), which reads:

"It shall not be considered a material revision of a charter application and shall not require the prior approval of the State Board for a charter school to increase its enrollment during the charter school's second year of operation and annually thereafter (i) by up to ten percent (10%) of the school's previous year's enrollment or (ii) in accordance with planned growth as authorized in the charter."

14. The initial statute allowed "renewal" of the charter, but did not provide a definition of the term "material revision." N.C. Legis. 731 1996. Later, the statute was amended to clarify that a "material revision" did not include growth by ten percent or less of the previous year's enrollment or "as otherwise provided in the charter" at the second year of the charter school's existence and "annually thereafter." N.C. Legis. 1997-430. Additionally, the duration of the initial charter and each renewal was extended from five years to ten years, with the additional requirement that the State Board of Education "review the operations" of each school at least once every five years. N.C. Legis. 2004-203.

15. At issue in this case is whether the interpretation of the statute by the Office of Charter Schools (OCS) is currently valid. The interpretation changed significantly shortly after OCS fell under new management. The interpretation was espoused by Jack Moyer, Director of OCS and by his supervisor, Philip Price.

16. The OCS has had three directors since its inception in 1996. Mr. Grova Bridgers served from 1996 through May 2001. Mr. Otho Tucker served from July 2001 through January 2004 when the current director Mr. Jack Moyer was hired. During Mr. Bridgers' and Mr. Tucker's tenures, the OCS and SBE allowed charter school to grow up to the maximum enrollment authorized in their initial charter no matter how long that growth took. That was the established interpretation of N.C.G.S. §115C-238.29D(d) until the associate Superintendent of Financial and Business Services, Philip Price, announced a change of policy in January 2006.

17. At the January 26, 2006 CSAC meeting, Mr. Price contended that if a charter school had not met its projected growth in its first two years of operation, the charter school funding would be "reset" and the charter school could then only grow by 10% or obtain SBE approval for greater growth. Mr. Price indicated that if a charter school enrolled students in excess of its maximum authorized enrollment, those extra students would not be funded. Except for the recitation of Mr. Price's remarks, the policy he espoused is not written or incorporated in the Administrative Code or in any other rules or into the SBE policies for charter schools.

18. In accordance with N.C. Gen. Stat. §150B-33(b) an administrative law judge may, "Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly."

19. An agency's interpretation of a statute is relevant and is given "due consideration" by the court. See, e.g., Simonel v. N.C. School of the Arts, 119 N.C.App. 772, 775, 460 S.E.2d 194, 196 (1995); MacPherson v. City of Asheville, 283 N.C. 299, 307, 196 S.E.2d 200, 206 (1973) (also stating that the agency's interpretation may even be considered to be "prima facie correct" (quoting In re Vanderbilt University, 252 N.C. 743, 114 S.E.2d 655 (1960))). Notwithstanding this consideration, "it is ultimately the duty of the courts to construe administrative statutes." State ex rel. Utilities Com'n v. The Public Staff-North Carolina Utilities Com'n, 309 N.C. 195, 211, 306 S.E.2d 435, 444 (1983). Additionally, the court reviewing an agency's interpretation of a statute is not bound by that agency's interpretation. Christenbury Surgical Center v. North Carolina Dept. of Health and Human Services, 138 N.C. App. 309, 312, 531 S.E.2d 219, 221 (2000).

20. In interpreting a statute, the court should defer to an agency's interpretation of it, as long as the agency has interpreted the statute reasonably. County of Durham v. N.C. Dept. of Env't and Natural Resources, 131 N.C.App. 395, 396-97, 507 S.E.2d 310, 311 (1998). A court must first look to the language and plain meaning of a statute, and if the language is clear and unambiguous, the court must give the statute that meaning. Carrington v. Brown, 136 N.C. App. 554, 558, 525 S.E.2d 230, 234 (2000). Where there is ambiguity in a statute, the court must try to give meaning to all provisions of the statute and additionally to consider the intent of the

legislature when creating the statute. Wilkins v. North Carolina State University, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006). A court should not construe a statute in such a way that renders part of it meaningless. *Id.* at 380-81, 631 S.E.2d 224. Policy reasons for passing the statute as well as the history of the legislation are also helpful when interpreting. Electric Supply Co. of Durham, Inc. v. Swain Electric Co., Inc., 328 N.C. 651, 656, 403 S.E.2d 291, 294-95 (1991).

21. Though there is little State law on what should happen if an agency changes its interpretation of a statute, federal case law states that an agency's initial interpretation is not necessarily "carved in stone" and an agency may continue to evolve its interpretation and policies due to changes in circumstances. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 863-64 (1984) (allowing EPA to vary its interpretation of the word "source," as used in the Clean Air Act due in part to the fact that one of its definitions of the term was actually suggested by the Court of Appeals). *See also* Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 157-58 (2000).

22. In this case, the change in OCS's interpretation of the provision of the Charter School Act in question coincided only with the change in management of the agency, not with direction from Congress, the North Carolina General Assembly, a court, or evolving knowledge. The plain language of the act does not require or even suggest that anything like a two-year window is all that is allowed in which a school may achieve its maximum number of students or else lose it. In giving meaning to all of the provisions of the statute, it would appear that the language used (particularly the use of the word "or") was meant to keep charter schools from growing to out-of-control proportions in a very short amount of time by restricting them to the maximum number of students originally authorized **or** to within 10 percent of their maximum (or a slightly higher number, depending on whether the school has grown past its maximum for more than one year).

23. The legislative history is not particularly helpful, except for the fact that the duration of the charter was doubled, which suggests that requiring a renewal every five years was considered to be too much oversight, and further suggests and enforces the interpretation that it is not considered a material revision of a charter application and shall not require the prior approval of the State Board for a charter school to increase its enrollment during the charter school's second year of operation and annually thereafter in accordance with planned growth as authorized in the charter.

24. As a policy matter, it is illogical and certainly "is not clear and unambiguous to persons it is intended to direct, guide, or assist," to require charter school to submit a hypothetical maximum number of students in a five (ten) year charter and renewals if they will in fact not be allowed to achieve that maximum after only two years have passed. Additionally, as the evidence revealed, it can be difficult to get a charter school up and running fully in only two years. Giving a charter school the two year deadline may actually cause charter schools to be less careful when expanding due to their haste to do so and result in "bad policy" for quality charter schools.

25. NCGS Section 115C-238.29D (d) provides for three methods by which a charter school may increase its enrollment. First the statute allows a charter school to grow by up to 10% of its

previous year's student enrollment without a revision of its charter. (NCGS Section 115C-238.29D (d) (i)). Second, the statute allows a charter school to grow in accordance with planned growth as authorized in the charter without a revision of its charter. (NCGS Section 115C-238.29D (d) (ii)). And third, the statute requires a charter school to obtain SBE approval to revise its charter if it intends to grow by greater than 10% of its previous year's enrollment and that growth is not in accordance with planned growth authorized in its charter. (NCGS 115C-238.29D (d)). Any different interpretation would have the effect of rendering part of the statute meaningless.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. . Based on those conclusions and the facts in this case, Respondent, North Carolina State Board of Education has not exceeded its authority, acted erroneously, failed to use proper procedure, or failed to act lawfully when it denied Petitioner's request for a grade expansion from grades 6-12 to K-12. Based on those conclusions and the facts in this case, Respondent, North Carolina Department of Public Instruction has not exceeded its authority, acted erroneously, failed to use proper procedure, or failed to act lawfully when it withheld Special Education funding from Petitioner during the 2006-07 school year. Based on the Conclusions of Law and Findings of Fact in this case, Respondent, North Carolina Department of Public Instruction's decision to limit Petitioner's growth and deny funding beyond an enrollment of 426 students for the 2007-08 school year instead of the 480 students granted by Petitioner's Charter was erroneous.

NOTICE

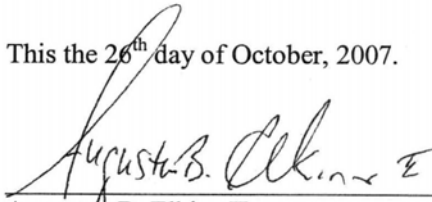
In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact.

The agency shall adopt the Decision of the Administrative Law Judge unless the agency demonstrates that the Decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record.

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision issued by the Undersigned, and to present written arguments to those in the agency who will make the final decision. N. C. Gen. Stat. § 150B-36(a). The agency that will make the final decision in this case is the North Carolina State Board of Education.

IT IS SO ORDERED.

This the 26th day of October, 2007.

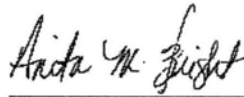

Augustus B. Elkins II
Administrative Law Judge

A copy of the foregoing was mailed to:

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This the 29th day of October, 2007.



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