

RRC STAFF OPINION

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

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06B .0114

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection for lack of statutory authority. The rewritten rule exceeds the agency's statutory authority to regulate a "school transportation system" by requiring individuals inspecting school buses to obtain a "North Carolina School Bus Inspection Certification." The governing standards set in the statutes listed in the rule's history note relate to school bus safety as it pertains to equipment and mechanical maintenance of school buses, not to the individuals conducting the inspections. G.S. 115C-240(c) discusses the following: "construction, equipment, color, and maintenance of school buses"; fuel requirements; and "adequate heating facilities, a standard signaling device..., an alternating flashing stoplight..., and such other warning devices, fire protective equipment and first aid supplies as may be prescribed...." The rewritten rule governs the inspectors and does not address the specific safety criteria that will be used in the inspection.

Staff thinks authority over the inspectors themselves may rest at the local level instead of with the State Board. G.S. 115C-248(a) states "the superintendent of each local school administrative unit, shall cause each school bus owned or operated by such local school administrative unit to be inspected at least once each 30 days during the school year..." In other words, the statute gives control of the act of conducting the inspection to the local superintendent.

In the History Note, staff fails to see grant of authority to State Board of Education to govern individual inspectors. Assuming arguendo authority exists over the individual inspectors as part of the authority to "promulgate rules and regulations for the operation of a public school transportation system," to what extent can the agency regulate their training and qualifications? The statutes

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listed provide no guidance. The proposed rule establishes a new Certificate created and issued by the agency. To obtain a Certificate, the Rule requires individuals to take a course and pass a test, both administered by the agency. The Rule further provides how DPI can revoke this Certificate. Staff is not aware of any other similar certificate created by an agency in rule instead of through statute absent express statutory authority.

Statutory Authority in History Note:

§ 115C-12. Powers and duties of the Board generally.

The general supervision and administration of the free public school system shall be vested in the State Board of Education. The State Board of Education shall establish all needed rules and regulations for the system of free public schools, subject to laws enacted by the General Assembly. In accordance with Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction, as an elected officer and Council of State member, shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction. The powers and duties of the State Board of Education are defined as follows:

- (17) Power to Provide for School Transportation Programs. - The State Board of Education is authorized and empowered to promulgate such policies, rules, and regulations as it may deem necessary and desirable for the operation of a public school transportation system by each local administrative unit in the State. Such policies, rules, and regulations shall include, but are not limited to, fund allocations and fiscal support to assure the effective and efficient use of funds appropriated by the General Assembly in support of the school transportation system. Nothing herein shall be construed to affect in any way or to lessen in any way the full and complete authority of local boards of education to assign pupils to schools in accordance with G.S. 115C-366.

§ 115C-240. Authority and duties of State Board of Education.

(a) The State Board of Education shall promulgate rules and regulations for the operation of a public school transportation system.

(b) The State Board of Education shall be under no duty to supply transportation to any pupil or employee enrolled or employed in any school. Neither the State nor the State Board of Education shall in any manner be liable for the failure or refusal of any local board of education to furnish transportation, by school bus or otherwise, to any pupil or employee of any school, or for any neglect or action of any county or city board of education, or any employee of any such board, in the operation or maintenance of any school bus.

(c) The State Board of Education shall from time to time adopt such rules and regulations with reference to the construction, equipment, color, and maintenance of school buses, the number of pupils who may be permitted to ride at the same time upon any bus, and the age and qualifications of drivers of school buses as it shall deem to be desirable for the purpose of promoting safety in the operation of school buses. Every school bus that is capable of operating on diesel fuel shall be capable of operating on diesel fuel with a minimum biodiesel concentration of B-20, as defined in G.S. 143-58.4. No school bus shall be operated for the transportation of pupils unless such bus is constructed and maintained as prescribed in such regulations and is equipped with adequate heating facilities, a standard signaling device for giving due notice that the bus is about to make a turn, an alternating flashing stoplight on the front of the bus, an alternating flashing stoplight on the rear of the bus, and such other warning devices, fire protective equipment and first aid supplies as may be prescribed for installation upon such buses by the regulation of the State Board of Education.

(d) The State Board of Education shall assist local boards of education by establishing guidelines and a framework through which local boards may establish, review and amend school bus routes prepared pursuant to G.S. 115C-246. The State Board shall also require local boards to implement the Transportation Information Management System or an equivalent system approved by the State Board of Education, no later

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than September 1, 1992. The State Board of Education shall also assist local boards of education with reference to the acquisition and maintenance of school buses or any other question which may arise in connection with the organization and operation of school bus transportation systems of local boards.

(e) The State Board of Education shall allocate to the respective local boards of education funds appropriated from time to time by the General Assembly for the purpose of providing transportation to the pupils enrolled in the public schools within this State. Such funds shall be allocated by the State Board of Education in accordance with the number of pupils to be transported, the length of bus routes, road conditions and all other circumstances affecting the cost of the transportation of pupils by school bus to the end that the funds so appropriated may be allocated on a fair and equitable basis, according to the needs of the respective local school administrative units and so as to provide the most efficient use of such funds. Such allocation shall be made by the State Board of Education at the beginning of each fiscal year, except that the State Board may reserve for future allocation from time to time within such fiscal year as the need therefor shall be found to exist, a reasonable amount not to exceed ten percent (10%) of the total funds available for transportation in such fiscal year from such appropriation. If there is evidence of inequitable or inefficient use of funds, the State Board of Education shall be empowered to review school bus routes established by local boards pursuant to G.S. 115C-246 as well as other factors affecting the cost of the transportation of pupils by school bus.

(f) The respective local boards shall use such funds for the purposes of replacing, maintaining, insuring, and operating public school buses and service vehicles in accordance with the provisions of G.S. 115C-239 to 115C-246, 115C-248 to 115C-254 and 115C-256 to 115C-259 and for no other purpose, but in the making of expenditures for such purposes shall be subject to rules and regulations promulgated by the State Board of Education.

§ 115C-248. Inspection of school buses and activity buses; report of defects by drivers; discontinuing use until defects remedied.

(a) The superintendent of each local school administrative unit, shall cause each school bus owned or operated by such local school administrative unit to be inspected at least once each 30 days during the school year for mechanical defects, or other defects which may affect the safe operation of such bus. A report of such inspection, together with the recommendations of the person making the inspection, shall be filed promptly in the office of the superintendent of such local school administrative unit, and a copy thereof shall be forwarded to the principal of the school to which such bus is assigned.

(b) It shall be the duty of the driver of each school bus to report promptly to the principal of the school, to which such bus is assigned, any mechanical defect or other defect which may affect the safe operation of the bus when such defect comes to the attention of the driver, and the principal shall thereupon report such defect to the superintendent of the local school administrative unit. It shall be the duty of the superintendent of the local school administrative unit to cause any and all such defects to be corrected promptly.

(c) If any school bus is found by the principal of the school, to which it is assigned, or by the superintendent of the local school administrative unit, to be so defective that the bus may not be operated with reasonable safety, it shall be the duty of such principal or superintendent to cause the use of such bus to be discontinued until such defect is remedied, in which event the principal of the school, to which such bus is assigned, may permit the use of a different bus assigned to such school in the transportation of the pupils and employees assigned to the bus found to be defective.

(d) The superintendent of each local school administrative unit, shall cause each activity bus which is used for the transportation of students by such local school administrative unit or any public school system therein to be inspected for mechanical defects, or other defects which may affect the safe operation of such activity bus, at the same time and in the same way and manner as the regular public school buses for the normal transportation of public school pupils are inspected. A report of such inspection, together with the recommendations of the person making the inspection, shall be filed with the principal of the school which uses and operates such activity bus and a copy shall be forwarded to the superintendent of the local school administrative unit involved. It shall be the duty of the driver of each activity bus to make the same reports to

the principal of the school using and operating such activity bus as is required by this section. If any public school activity bus is found to be so defective that the activity bus may not be operated with reasonable safety, it shall be the duty of such principal to cause the use of such activity bus to be discontinued until such defect is remedied to the satisfaction of the person making the inspection and a report to this effect has been filed in the manner herein prescribed. Nothing in this subsection shall authorize the use of State funds for the purchase, operation or repair of any activity bus.

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COMMENT:

On September 17, 2020, RRC objected to 16 NCAC 06B for lack of clarity and necessity. Staff thinks the agency has satisfied RRC's objections, but recommends the Commission enter a new objection for lack of statutory authority and clarity.

A letter to the agency dated September 18, 2020 detailed the reason for the RRC's objection as follows:

Additionally, the Commission objected to 16 NCAC 06B .0114 for lack of clarity and necessity. If the "vehicle inspection training and certification requirements" are "mandated by the Department of Public Instruction" and not the State Board of Education, it is unclear why this Rule is necessary. Further, it is unclear what the "vehicle inspection training and certification requirements" are or where those requirements can be found. It seems the standards are set by DPI, but it is further unclear whether that authority has been delegated by the State Board. The agency did not respond to follow-up technical change requests for this Rule to provide clarity in advance of the Commission meeting.

Staff thinks the rewritten rule shows the requirements are set by the State Board of Education and the rewritten version details the "vehicle training and certification requirements."

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However, by doing so, the rule establishes a “North Carolina School Bus Inspection Certification.” The Certificate is issued by the Department of Public Instruction (DPI). To obtain this Certificate, an individual is required to attend a class and pass an examination provided by DPI. Staff acknowledges the State Board of Education has authority over the public school transportation system, including the maintenance and inspection of buses. As written, staff fails to see how the agency has authority over the school bus inspectors. Staff further does not see authority to create and regulate this new type of license.

Responses from the agency indicate these licenses apply to “school employees,” but it is unclear to staff whether only school employees obtain these licenses. As submitted, the rule does not indicate it only applies to LEA employees nor does it provide authority to regulate LEA employees. Therefore, staff recommends objection for lack of statutory authority and clarity.

Statutory Authority in History Note:

§ 115C-12. Powers and duties of the Board generally.

The general supervision and administration of the free public school system shall be vested in the State Board of Education. The State Board of Education shall establish all needed rules and regulations for the system of free public schools, subject to laws enacted by the General Assembly. In accordance with Sections 7 and 8 of Article III of the North Carolina Constitution, the Superintendent of Public Instruction, as an elected officer and Council of State member, shall administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction. The powers and duties of the State Board of Education are defined as follows:

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§ 115C-240. Authority and duties of State Board of Education.

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(c) The State Board of Education shall from time to time adopt such rules and regulations with reference to the construction, equipment, color, and maintenance of school buses, the number of pupils who may be permitted to ride at the same time upon any bus, and the age and qualifications of drivers of school buses as it shall deem to be desirable for the purpose of promoting safety in the operation of school buses. Every school bus that is capable of operating on diesel fuel shall be capable of operating on diesel fuel with a minimum biodiesel concentration of B-20, as defined in G.S. 143-58.4. No school bus shall be operated for the transportation of pupils unless such bus is constructed and maintained as prescribed in such regulations and is equipped with adequate heating facilities, a standard signaling device for giving due notice that the bus

is about to make a turn, an alternating flashing stoplight on the front of the bus, an alternating flashing stoplight on the rear of the bus, and such other warning devices, fire protective equipment and first aid supplies as may be prescribed for installation upon such buses by the regulation of the State Board of Education.

(d) The State Board of Education shall assist local boards of education by establishing guidelines and a framework through which local boards may establish, review and amend school bus routes prepared pursuant to G.S. 115C-246. The State Board shall also require local boards to implement the Transportation Information Management System or an equivalent system approved by the State Board of Education, no later than September 1, 1992. The State Board of Education shall also assist local boards of education with reference to the acquisition and maintenance of school buses or any other question which may arise in connection with the organization and operation of school bus transportation systems of local boards.

(e) The State Board of Education shall allocate to the respective local boards of education funds appropriated from time to time by the General Assembly for the purpose of providing transportation to the pupils enrolled in the public schools within this State. Such funds shall be allocated by the State Board of Education in accordance with the number of pupils to be transported, the length of bus routes, road conditions and all other circumstances affecting the cost of the transportation of pupils by school bus to the end that the funds so appropriated may be allocated on a fair and equitable basis, according to the needs of the respective local school administrative units and so as to provide the most efficient use of such funds. Such allocation shall be made by the State Board of Education at the beginning of each fiscal year, except that the State Board may reserve for future allocation from time to time within such fiscal year as the need therefor shall be found to exist, a reasonable amount not to exceed ten percent (10%) of the total funds available for transportation in such fiscal year from such appropriation. If there is evidence of inequitable or inefficient use of funds, the State Board of Education shall be empowered to review school bus routes established by local boards pursuant to G.S. 115C-246 as well as other factors affecting the cost of the transportation of pupils by school bus.

(f) The respective local boards shall use such funds for the purposes of replacing, maintaining, insuring, and operating public school buses and service vehicles in accordance with the provisions of G.S. 115C-239 to 115C-246, 115C-248 to 115C-254 and 115C-256 to 115C-259 and for no other purpose, but in the making of expenditures for such purposes shall be subject to rules and regulations promulgated by the State Board of Education.

§ 115C-248. Inspection of school buses and activity buses; report of defects by drivers; discontinuing use until defects remedied.

Note: Only G.S. 115C-248(d) is provided in the history note. The agency references (a) in its responses.

(a) The superintendent of each local school administrative unit, shall cause each school bus owned or operated by such local school administrative unit to be inspected at least once each 30 days during the school year for mechanical defects, or other defects which may affect the safe operation of such bus. A report of such inspection, together with the recommendations of the person making the inspection, shall be filed promptly in the office of the superintendent of such local school administrative unit, and a copy thereof shall be forwarded to the principal of the school to which such bus is assigned.

(b) It shall be the duty of the driver of each school bus to report promptly to the principal of the school, to which such bus is assigned, any mechanical defect or other defect which may affect the safe operation of the bus when such defect comes to the attention of the driver, and the principal shall thereupon report such defect to the superintendent of the local school administrative unit. It shall be the duty of the superintendent of the local school administrative unit to cause any and all such defects to be corrected promptly.

(c) If any school bus is found by the principal of the school, to which it is assigned, or by the superintendent of the local school administrative unit, to be so defective that the bus may not be operated with reasonable safety, it shall be the duty of such principal or superintendent to cause the use of such bus to be

discontinued until such defect is remedied, in which event the principal of the school, to which such bus is assigned, may permit the use of a different bus assigned to such school in the transportation of the pupils and employees assigned to the bus found to be defective.

(d) The superintendent of each local school administrative unit, shall cause each activity bus which is used for the transportation of students by such local school administrative unit or any public school system therein to be inspected for mechanical defects, or other defects which may affect the safe operation of such activity bus, at the same time and in the same way and manner as the regular public school buses for the normal transportation of public school pupils are inspected. A report of such inspection, together with the recommendations of the person making the inspection, shall be filed with the principal of the school which uses and operates such activity bus and a copy shall be forwarded to the superintendent of the local school administrative unit involved. It shall be the duty of the driver of each activity bus to make the same reports to the principal of the school using and operating such activity bus as is required by this section. If any public school activity bus is found to be so defective that the activity bus may not be operated with reasonable safety, it shall be the duty of such principal to cause the use of such activity bus to be discontinued until such defect is remedied to the satisfaction of the person making the inspection and a report to this effect has been filed in the manner herein prescribed. Nothing in this subsection shall authorize the use of State funds for the purchase, operation or repair of any activity bus. (1955, c. 1372, art. 21, s. 8; 1961, c. 474; 1975, c. 150, s. 2; 1981, c. 423, s. 1.)

Exchange with agency:

November 3, response from agency to question about authority:

G.S. § 115C-240(a) gives the SBE authority to promulgate rules “for the operation of a public school transportation system.” G.S. § 115C-240(c) authorizes the SBE to adopt rules governing “maintenance of school buses . . . as it may deem to be desirable for the purpose of promoting safety in the operation of school buses.” The SBE believes that those statutes give it authority to adopt rules regarding certification of school bus inspectors.

G.S. § 115C-248 requires local superintendents to “cause” school buses to be inspected and requires the superintendent to record the “recommendations of the person making the inspection.” On its face, this statute has literally no quality controls. The SBE believes that it has the authority under G.S. § 115C- 240 to require local superintendents to employ qualified people to inspect school buses.

While we recognize that the General Assembly typically expressly authorizes licensing boards to issue licenses, we do not believe those statutes are analogous to or control the SBE’s authority in this case. **A school bus inspector certification is not a license in the sense that a person needs the certificate to ply a public trade. As you note, other licenses like a mechanic’s license regulate work in that field. School bus inspectors are not offering their services to the public at large. School bus inspectors are school employees.** A school bus inspector certificate is actually limitation on whom a superintendent can “cause” to conduct inspection required under G.S. 115C-248(a). Another way to look at it is that by requiring the statutory inspection to be done by a certified inspector, the SBE is defining what an “inspection” is. In either case, the SBE is simply exercising its authority to regulate the operation of the school transportation system under G.S. 115C-240(a) and its authority to regulate bus “maintenance” under G.S. 115C-240(c).

November 5, from staff:

I have a question about .0114. **Do school bus inspectors need to be certified to apply or qualify for employment as a school bus inspector or are employees trained and certified on the job?**

November 12, from agency:

I'm reviewing emails to be sure I have responded to all of them. Regarding 06B .0114 SCHOOL BUS AND ACTIVITY BUS INSPECTIONS AND INSPECTOR CERTIFICATION, you asked if school bus inspectors need to be certified to apply or qualify for employment as a school bus inspector or are employees trained and certified on the job?

School bus certification is not a job requirement for any school employment. Current school employees, like mechanics, apply for school bus certification. Having said that, the certification is portable. So, a school may prefer to recruit employees who already have the school bus certification rather than send a mechanic to get certified.

16 NCAC 06B .0114 is proposed for adoption with changes as published in 34:13 NCAC 1212 as follows:

16 NCAC 06B .0114 SCHOOL BUS AND ACTIVITY BUS INSPECTIONS AND INSPECTOR CERTIFICATION

(a) Local education agencies (LEAs) shall require each 30-day inspection required under G.S. 115C-248 to be conducted by an individual who ~~has completed the vehicle inspection training and certification requirements administered by the Department of Public Instruction.~~ holds a North Carolina School Bus Inspection Certification (Certificate).

(b) DPI shall issue an applicant who satisfies the requirements of paragraph (f) or paragraph (j) a Certificate which shall expire at midnight on June 30th of the fifth calendar year after the year in which the applicant passed either the School Bus Inspector Examination or Recertification Examination.

(c) An LEA shall display the Certificates of all employed certified school bus where they are visible in the LEA school bus maintenance facility.

(d) An LEA shall notify DPI within 30 days of employing a certified school bus inspector.

(e) “Pass” for purposes of this rule means “correctly answer at least 80 percent of the questions on a School Bus Inspector Examination or Recertification Examination.”

(f) A first time applicant for a Certificate must:

(1) complete the North Carolina Department of Public Instruction (DPI) school bus inspection class; and

(2) pass the DPI School Bus Inspector Examination (Examination).

(g) If, on the first attempt, the applicant does not pass the Examination, the applicant cannot retake the Examination until the employing LEA certifies in writing to DPI that:

(1) the applicant completed at least four hours of bus inspection training as directed by the employing LEA; and

(2) the training has been recorded in the applicant’s personnel file.

(h) If, on the second or any subsequent attempt, the applicant does not pass the Examination, he or she must complete the DPI school bus inspection class before retaking the Examination.

(i) No sooner than 6 months before but no later than one year after his or her Certificate expires, a school bus inspector may sit for a Recertification Examination.

1 (j) An applicant for recertification shall:

2 (1) provide written certification from his or her employing LEA(s) that, since he or she
3 passed the last Examination or Recertification Examination, he or she has
4 completed 20 hours of school bus safety equipment or maintenance training offered
5 by DPI, the North Carolina Pupil Transportation Association, school bus original
6 equipment manufacturers or other entity that offers safety training that has been
7 approved by DPI; and

8 (2) pass the Recertification Examination.

9 (k) If the school bus inspector does not pass the Recertification Examination, he or she may retake
10 the Recertification Examination within 120 days of the date of the most recent prior attempt,
11 provided he or she completes the DPI school bus inspection class during the period between
12 Recertification Examinations.

13 (l) Upon the request of DPI, an employing LEA shall direct any certified school bus inspector
14 employed by the LEA to perform a 30-day inspection and brake stroke measurement
15 demonstration under the observation of DPI personnel.

16 (m) If the DPI observer(s) determines that the certified school bus inspector did not satisfactorily
17 complete the 30-day inspection and brake stroke measurement demonstration, DPI shall notify the
18 LEA and certified school bus inspector of that determination and any required remedial safety
19 training.

20 (n) If the certified bus inspector fails to complete the specified school bus remedial safety training
21 within 90 days of receiving the notice described in paragraph (m), DPI will revoke the school bus
22 inspector's Certificate. Revocation of a Certificate shall not prevent an applicant from applying
23 and qualifying for a new Certificate.

24 *History Note: Authority G.S. 115C-12(17); 115C-240; G.S. 115C-248(d);*

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

27 *Eff. December 1, 2020.*