



**STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS**

November 19, 2020

Thomas Ziko
Interim General Counsel, State Board of Education
Sent via email only: Thomas.Ziko@dpi.nc.gov

Re: Objection to Rules 16 NCAC 06D .0212, 06G .0314, and .0519; Determination of Substantial Change in 16 NCAC 06G .0508

Dear Mr. Ziko:

The State Board of Education submitted rewritten versions of rules in response to Rules Review Commission objections entered September 17, 2020. The Commission took the following actions on the rewritten rules at its meeting November 19, 2020.

At its meeting on September 17, 2020, the Commission objected to Rule 16 NCAC 06D .0212 for failure to comply with the APA, ambiguity, and lack of necessity. At its meeting this morning, the Commission continued its objection solely on the grounds of failure to comply with the APA and ambiguity in accordance with G.S. 150B-21.9 and 150B-21.12(c).

At its meeting on September 17, 2020, the Commission objected to Rule 16 NCAC 06G .0314 for lack of statutory authority and clarity. This morning, the Commission continued its objection solely on the grounds of statutory authority in accordance with G.S. 150B-21.9 and 150B-21.12(c).

The Commission determined the rewritten version of 16 NCAC 06G .0519 satisfied the Commission's objection entered September 17, 2020. However, the Commission objected to 16 NCAC 06G .0519 for lack of statutory authority for adding a cross-reference to the accountability models underlying the continuing objection for lack of statutory authority in 16 NCAC 06G .0519.

Please note the Rules Review Commission approved rewritten versions of Rules 16 NCAC 06B .0112; 06D .0310; 06E .0107; 06G .0315, .0505, .0506, .0507, .0509, .0514, .0518, .0520, .0521, and .0522. The rewritten version of Rule 16 NCAC 06G .0508 was approved, but the Commission

Julian Mann, III, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

Linda T. Worth
Deputy Director

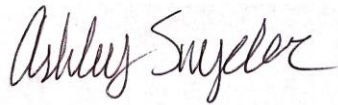
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determined the changes were substantial in accordance with G.S. 150B-21.12, requiring the rule to be re-published and reviewed in accordance with the procedure in G.S. 150B-21.1(a3) and (b).

Please respond to the Commission's objections in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

A handwritten signature in black ink that reads "Ashley Snyder". The signature is written in a cursive, flowing style.

Ashley Snyder
Commission Counsel

RRC STAFF OPINION

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

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06G .0508

RECOMMENDED ACTION:

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

COMMENT:

On September 17, 2020, RRC objected to 16 NCAC 06G .0508 for failure to comply with the APA and multiple instances of ambiguity. The Commission's objection is detailed in the attachments to this staff opinion. Staff thinks the agency has satisfied all of the Commission's objections and therefore recommends approval of the rule. However, staff recommends the Commission determine the addition of a \$1,000 fee constitutes a substantial change.

G.S. 150B-21.12(c) requires the Commission to determine whether a change satisfies the Commission's objection. If it does, the Commission must approve the rule. The Commission is also required to determine whether the change is substantial within the meaning of G.S. 150B-21.2(g). If a change is substantial, the rule will be required to go through the notice, hearing, and publication process for temporary rules as set forth in G.S. 150B-21.1(a3). Following that process, the rule will come back to the Commission for review.

In September, the Commission objected for failure to comply with the APA and ambiguity for mentioning a fee established outside of the rulemaking process. The agency has now set the fee amount at \$1,000 at line 7. G.S. 115C-218.1 grants the agency authority for the fee. Staff recommends approval of the rule and determination the proposed change is substantial because it addresses an issue not addressed in the proposed rule and produces an effect that could not reasonably have been expected.

Ashley Snyder
Commission Counsel

§ 150B-21.12. Procedure when Commission objects to a permanent rule.

(a) Action. - When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:

- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
- (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.

(b) Time Limit. - An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.

(c) Changes. - When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in G.S. 150B-21.2(g). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in G.S. 150B-21.1(a3) and (b).

(d) Return of Rule. - A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

§ 150B-21.2. Procedure for adopting a permanent rule.

...

(g) Adoption. - An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency shall review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

...

§ 115C-218.1. Eligible applicants; contents of applications; submission of applications for approval.

...

(c) The State Board shall establish reasonable fees of no less than five hundred dollars (\$500.00) and no more than one thousand dollars (\$1,000) for initial and renewal charter applications, in accordance with Article 2A of Chapter 150B of the General Statutes. No application fee shall be refunded in the event the application is rejected or the charter is revoked.

Excerpt from letter to agency dated September 18, 2020 detailing RRC's objection:

The Commission objected to 16 NCAC 06G .0508 for failure to comply with the APA and numerous instances of ambiguity that make the Rule as a whole difficult to understand.

The Commission objected to Subparagraph (a)(1) for referring to a fee established outside the rulemaking process. The definition of a "rule" in 150B-2(8a) specifically includes the establishment of a fee, meaning setting the dollar amount in the Rule. Additionally, 115C-218.1(c) requires the State Board to adopt the application fee "in accordance with Article 2A of Chapter 150B." Since the fee amount is established outside of rule, the Commission objects to Subparagraph (a)(1) for failure to comply with the APA and ambiguity since the amount of the fee is unknown.

The Commission also objected to Paragraph (a) for failure to comply with the APA and ambiguity. Subparagraph (a)(1) states, "Prior to each application round, the State Board of Education shall approve the application process, timeline, and non-refundable fee." Establishing the application and timeline outside of rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this Rule would allow the agency to change the application process and timeline before each application round, changing the substance of this Rule without public notice, comment, or review by the Rules Review Commission. Subparagraphs (a)(2)-(4) refer back to the timeline and "application instructions" established outside the rulemaking process in (a)(1). Since the application process and timeline are established outside of rule, the requirements in Paragraph (a) are unclear and the Commission objected for failure to comply with the APA and ambiguity.

Parts (b)(1)(C) and (D) set application requirements that are ambiguous. It is unclear how applications are evaluated or what factors may be considered to determine whether an application "contains viable governance, business, and education plans." It is also unclear what "other requirements" are required by the agency. Therefore, the Commission objected to Parts (b)(1)(C) and (D) for ambiguity.

Additionally, the Commission objected to Paragraph (c) for ambiguity for use of the following terms or phrases, which are undefined or unclear as written: "capability to provide comprehensive learning experiences" in (c)(2); "promotes innovation" in (c)(3)(B); "large," "diverse" and "locally-based" in (c)(3)(D); "accurately" in (c)(3)(F); and "diverse learning environment" in (c)(3)(I). It is further unclear how Paragraph (c) interacts with G.S. 115C-218.5, which governs the State Board's final approval of applications for charter schools. Therefore, the Commission objected to Paragraph (c) for ambiguity.

16 NCAC 06G .0508 is proposed for adoption with changes as published in 34:13 NCAC 1241 as follows:

16 NCAC 06G .0508 CHARTER SCHOOLS APPLICATION AND REVIEW PROCESS

(a) ~~Deadline for Filing Charter School Applications.~~

~~(1) Prior to each application round, the State Board of Education shall approve the application process, timeline, and non-refundable fee.~~

~~(2) Applications for charters, and the nonrefundable \$1,000 fee, must shall be received by the Office of Charter Schools no later than the last Friday in July date and time specified for the charter application round that year.~~

~~(3) (b) Applications and fees received after the deadline specified by the Office of Charter Schools will not be considered, and any affected applicant groups will be notified in writing.~~

~~(4) Rejection of Incomplete Applications. The Charter School Advisory Board and Office of Charter Schools shall review all timely applications and shall reject all incomplete applications. In order to be deemed complete, all sections of the application must be completed as prescribed in the "Application Instructions" and G.S. 115C 218.2.~~

(b) ~~Charter School Advisory Board Responsibilities~~

~~(1) The Charter School Advisory Board, with the assistance of the Office of Charter Schools, shall review each complete application and determine whether the application meets the requirements of G.S. 115C 218.1~~

~~(A) Meets all the requirements of the Charter School Act, G.S. 115C 218 et seq.;~~

~~(B) Would achieve one or more of the purposes set forth in G.S. 115C 218(a);~~

~~(C) Contains viable governance, business, and education plans; and~~

~~(D) Satisfies any other requirements adopted by the SBE.~~

~~(2) The Charter Schools Advisory Board will present its recommendation on each charter school application to the SBE by the May SBE meeting for discussion.~~

(c) ~~SBE Review of Applications and Award of Charters~~

~~(1) The SBE may request information from applicants, their officers, agents or employees or other persons having information regarding the charter application reviewed by the Charter School Advisory Board when the SBE seeks clarification or greater detail regarding an application~~

~~(2) When awarding charters, the SBE may give priority consideration to applications that demonstrate the capability to provide comprehensive learning experiences to students identified as at risk of academic failure.~~

~~(3) (c) When determining whether to award a charter, the SBE mayshall consider any factors relevant to academic, financial, and governance of the school, including the extent to which the application:~~

~~(A)(1) Reflects reflects the applicant's commitment to the purposes of the charter school law stated in G.S. 115C-218(a);~~

~~(B)(2) Promotes promotes the use of different and innovative teaching methods innovation through charter schools;~~

- 1 ~~(C)~~(3) ~~Reflects~~ reflects the applicant's planning, research, and understanding of educational issues,
- 2 including budgeting, financing, and accounting;
- 3 ~~(D)~~(4) ~~Demonstrates the applicant's commitment to governance by participation of a large, diverse and~~
- 4 ~~locally based board~~describes a board whose size, diversity, and regional affiliations represent the
- 5 community and are likely to promote community support for the school;
- 6 ~~(E)~~(5) ~~Contains~~ contains articles of incorporation and by-laws;
- 7 ~~(F)~~(6) ~~Contains~~ contains a budget that ~~accurately~~ reflects anticipated revenues and ~~costs~~; costs, including
- 8 costs associated with maintenance of the school facilities and projected growth;
- 9 ~~(G)~~ ~~Describes student admission requirements and lottery system that comply with G.S. 115C;~~
- 10 ~~(H)~~(7) ~~Describes~~ contains a plan for acquisition and utilization of a facility consistent with the proposed
- 11 budget and timeline for opening school;
- 12 ~~(I)~~(8) ~~Describes~~ describes a five year marketing plan that promotes a diverse student population ~~learning~~
- 13 environment; and
- 14 ~~(J)~~(9) ~~Any~~ any other factor that it determines will promote the purposes of the Charter School Act, G.S.
- 15 115C-218 et seq.

16

17 *History Note:* *Authority G.S. 115C-12; 115C-218, 115C-218.1; 115C-218.5;*

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

19 *Emergency Rule Eff. August 20, 2019;*

20 *Eff. December 1, 2020.*

21

September 18, 2020

Thomas Ziko
Interim General Counsel, State Board of Education
Sent via email only: Thomas.Ziko@dpi.nc.gov

Re: Objection to Rules 16 NCAC 06D .0211, .0212, .0307, .0308, .0309, .0310, and .0311

Dear Mr. Ziko:

At its September 17, 2020 meeting, the Rules Review Commission objected to the above-referenced Rules in accordance with G.S. 150B-21.10.

The Commission objected to 16 NCAC 06D .0211 for failure to comply with the APA, ambiguity, and lack of necessity. The Rule refers to an “Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina.” In Item (1), the Rule states the Invitation provides “the required procedures for submission, evaluation, and adoption of textbooks and a schedule for the process.” The Invitation also includes the “criteria used to evaluate textbooks presented for adoption for their conformity to the North Carolina Standard Course of Study.” These contents meet the definition of a “rule” in G.S. 150B-2(8a). Referring to the Invitation rather than stating its contents in rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this allows the agency to amend the Invitation outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide these procedural requirements in Rule also makes the process for submitting and evaluating textbooks unclear. Therefore, the Commission objected for failure to comply with the APA and ambiguity.

The Commission also objected to Item (2) for lack of necessity. Item (2) directs the General Counsel of the State Board to “review and approve” the Invitation. This statement concerns only the internal management of the agency and is therefore unnecessary. G.S. 150B-2(8a)(a).

The Commission objected to 16 NCAC 06D .0212 for failure to comply with the APA, ambiguity, and lack of necessity. The Rule refers to an “Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina.” In Paragraph (b) the Rule states “Publishers are required to follow

the procedures set forth in the invitation. Failure to comply with all procedure, including stated deadlines, may result in disqualification.” Subparagraph (d)(3) states the Invitation includes the “procedure for reconsideration.” These procedures meet the definition of a “rule” in G.S. 150B-2(8a). Referring to the Invitation rather than stating its contents in rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this allows the agency to amend the Invitation outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide these procedural requirements in rule also makes the process for submitting and evaluating textbooks unclear. Therefore, the Commission objected for failure to comply with the APA and ambiguity.

Additionally, the Commission objected to 16 NCAC .0212(a) for lack of necessity because it repeats the requirements of G.S. 115C-94.

The Commission objected to 16 NCAC 06D .0307 for lack of necessity, clarity, and statutory authority. The Rule is unnecessary because it repeats portions of 16 NCAC 06D .0302, an existing permanent rule.

The Commission objected to Paragraph (f) for lack of statutory authority. The proposed Rule requires LEAs to report scores on districtwide and statewide standardized tests “within thirty (30) days from generation of the score at the LEA level or receipt of the score and interpretive documentation from the NCDPI.” However, G.S. 115C-174.15 requires scores for local tests be provided within 30 days of administration.

16 NCAC 06D .0307 also contained unclear or undefined terms including “secure tests,” “improper administration,” and other unclear terms as set forth in the requests for technical changes. As a result, the Commission objected for lack of clarity.

The Commission objected to 16 NCAC 06D .0308 for lack of necessity and clarity. The proposed Rule is unnecessary because it repeats 16 NCAC 06D .0303, an existing permanent rule. The Rule is also unclear due to ambiguous or undefined terms including “accountability measures,” “North Carolina Testing Program,” “proper,” and “appropriate.”

The Commission objected to 16 NCAC 06D .0309 for lack of necessity, clarity, and statutory authority. The proposed Rule is unnecessary and unclear because it repeats or conflicts with 16 NCAC 06D .0305, an existing permanent rule. The Commission further objected for lack of clarity due to unclear terms including “eligible students,” “alternative assessments,” “Occupational Course of Study,” “immediately,” and other unclear or undefined terms as detailed in the requests for technical changes.

Additionally, the Commission objected for lack of statutory authority to Paragraphs (d), (j), and (k). The agency did not provide, and Commission staff was not able to locate statutory authority for these Paragraphs.

The Commission objected to 16 NCAC 06D .0310 for lack of clarity. As written, it is unclear what purposes are “approved by the Division of Accountability Services and the State Board of Education” for use of State tests.

The Commission objected to 16 NCAC 06E .0311 for lack of necessity, clarity, and compliance with the APA. The proposed Rule is unnecessary because it repeats portions of 16 NCAC 06D .0306, an existing permanent rule.

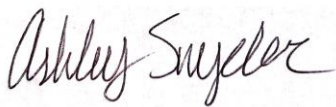
Additionally, the Commission objected to Paragraph (k) for lack of clarity and failure to comply with the APA. The Rule requires teachers to provide instruction that “meets or exceeds the state-adopted curriculum standards.” The curriculum standards appear to be part of the “Standard Course of Study governed by G.S. 115C-81.5. The Commission is not aware of any authority for the Board to adopt curriculum standards outside the rulemaking process. Without the curriculum standards set in rule, the agency can amend the standards outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide these requirements in rule also makes the requirement for teachers to “provide instruction that meets or exceeds the state-adopted curriculum standards” unclear as written. Therefore, the Commission objected to (k) for failure to comply with the APA and lack of clarity.

The Commission further objected to 16 NCAC 06E .0311 for lack of clarity because it is unclear under what circumstances the Rule applies. This Rule sets forth a “testing code of ethics,” but it is unclear whether the requirements of this Rule apply to all standardized tests, final exams, EOCs, or all tests. This Rule also contains unclear terms including “secure,” “immediately,” “proper,” “eligible students,” “fairly,” and other unclear or undefined terms as detailed in the requests for technical changes.

Apart from submission of a revised rule for 16 NCAC 06D .0310, the agency did not respond to technical change requests to clarify terms or questions of statutory authority in advance of the Commission meeting.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission’s actions, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Ashley Snyder". The ink is dark and the signature is fluid.

Ashley Snyder
Commission Counsel

September 18, 2020

Thomas Ziko
Interim General Counsel, State Board of Education
Sent via email only: Thomas.Ziko@dpi.nc.gov

Re: Objection to Rules 16 NCAC 06G .0314, .0315, .0316, .0503, .0506, .0507, .0508, .0509, .0514, .0517, .0518, .0519, .0520, .0521, and .0522

Dear Mr. Ziko:

At its September 17, 2020 meeting, the Rules Review Commission objected to the above-referenced Rules in accordance with G.S. 150B-21.10.

The Commission objected to 16 NCAC 06G .0314 for lack of statutory authority and clarity. Based on the text of Paragraph (c), alternative schools are allowed to select an accountability model from the list in (c)(1)-(3). Subparagraph (c)(1) says, “Alternative schools can participate in School Performance Grades as defined by G.S. 115C-83.15...” (emphasis added). Subparagraphs (c)(2) and (c)(3) then provide alternative options to the “School Performance Grades” model in G.S. 115C-83.15. However, 115C-12(24) requires the State Board to evaluate alternative learning programs “through the application of the accountability system developed under G.S. 115C-83.15 and G.S. 115C-105.35.” The State Board is granted authority to modify the system in G.S. 115C-83.15, but the Commission has not found authority for the agency to provide different accountability models. Therefore, the Commission objected for lack of statutory authority.

Subparagraph (c)(3) allows an alternative school to propose its own accountability model subject to approval by the State Board of Education. The Rule does not specify under what circumstances the alternative model may be approved or what factors the State Board will consider when evaluating the alternative model. Paragraph (d) is also unclear because it uses undefined terms including “significantly,” “appropriate,” and “eligible students.” Therefore, the Commission objected for lack of clarity.

The Commission objected to 16 NCAC 06G .0315 for lack of clarity because it is unclear whether this Rule applies to charter schools, alternative schools, or all public schools. The Rule is also unclear due to undefined terms including “eligible students,” “state assessment program,” “appropriate,” “alternative assessment,” and other undefined terms as listed in the requests for technical changes.

The agency did not respond to technical change requests for 16 NCAC 06G .0315 to clarify terms in advance of the Commission meeting.

The Commission objected to 16 NCAC 06G .0316 for failure to comply with the APA and ambiguity. Item (3) refers to “procedures stated in SBE Policy ADVS-002 (Appointments to Advisory Committees to the State Board of Education.” Referring to Board policy circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this Rule would allow the agency to update the policy outside the rulemaking process, changing the substance of this Rule without public notice, comment, or review by the Rules Review Commission. Since the contents of this policy are not in rule, requiring compliance with procedures in the policy makes the requirements of this rule unclear. Therefore, the Commission objected for failure to comply with the APA and ambiguity.

The Commission also objected on grounds of ambiguity because it is unclear under what circumstances the agency will deem other issues “appropriate” for discussion in (1)(f) and which “field tests(s)/special studies” are being referenced in Item (2).

The Commission objected to 16 NCAC 06G .0503 for failure to comply with the APA and ambiguity. The Rule requires “eligible students” take State-required assessments mandated by law or “State Board of Education policy.” Requiring assessments in policy instead of rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this allows the agency to amend the policy outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to either list the required assessments in this Rule or cross-reference another Rule listing the required assessments makes it unclear which assessments are mandated by the State Board of Education.

The Commission also objected for ambiguity because the Rule does not define “eligible student,” making it unclear who is required to take these assessments. It is further unclear which “accountability measures” charter schools are required to follow as part of the “Every Student Succeeds Act Consolidated State Plan.” It is possible these are federal requirements that could be incorporated by reference in accordance with G.S. 150B-21.6, but since the agency has failed to do so here, the Rule is ambiguous as written.

The Commission objected to 16 NCAC 06G .0505 for failure to comply with the APA and ambiguity. The Rule provides that charter schools shall be placed on financial noncompliance status if a financial condition in (b)(1)-(6) occurs. Subparagraph (b)(1) refers to the “Uniform Education Reporting System (UERS)” which appears to set data reporting requirements. The Commission has not found an exemption from the APA for the UERS. Referring to requirements outside of rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this Rule would allow the agency to update the UERS outside the rulemaking process,

changing the substance of this Rule without public notice, comment, or review by the Rules Review Commission. The reporting requirements for charter schools are also unclear since those requirements are not set in rule. As a result, the Commission objected for failure to comply with the APA and ambiguity.

The Commission also objected for ambiguity. Paragraph (c) states, “funds may be frozen...until the exception is corrected.” The Rule does not clarify under what circumstances funds may or may not be frozen. The Rule also does not specify how the agency determines which level of financial noncompliance in Paragraph (e) to assign a charter school. Additionally, the Rule contains undefined terms including “financial insolvency or weakness” in (b)(3) and “immediately” in (c), (e)(3)(A), and (f).

The Commission objected to 16 NCAC 06G .0506 for ambiguity and failure to comply with the APA. In Paragraph (a), the Rule provides that charter schools “may” be placed on governance noncompliance status if a condition in (a)(1)-(3) occurs. The Rule does not clarify under what circumstances a condition in the list results in noncompliance status nor does it specify how the agency determines which level of noncompliance status in Paragraph (b) to assign a charter school.

Part (a)(3)(B) requires compliance with “Health and Safety Standards” and “State Board of Education Policy.” Referring to requirements established outside of rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this Rule would allow the agency to update policies outside the rulemaking process, changing the substance of this Rule without public notice, comment, or review by the Rules Review Commission. These requirements are also unclear since those requirements are not set in rule. Therefore, the Commission objected to Part (a)(3)(B) for failure to comply with the APA and ambiguity.

Additionally, the Commission objected to the inclusion of several undefined terms or requirements including “failure to have a functioning board” in (a)(1); “regular meetings” in (a)(1); “inability to show progress” in (a)(2); and “immediately” in (b)(3), making the rule ambiguous.

The Commission objected to 16 NCAC 06G .0507 for lack of clarity. The Rule governs the charter school renewal process, and the review is based upon “whether the charter is meeting expected academic, financial, and governance standards.” The agency’s responses in technical change requests indicate information not included in (b) is considered when reviewing a charter school renewal. Therefore, it is unclear what information is considered by the State Board when reviewing a renewal request.

Additionally, the academic standards referenced in 16 NCAC 06G .0507 are unclear. The financial standards are identified in Rule .0505 of this Section and the governance standards are identified in Rule .0506 of this Section. Based on technical change responses, the academic standards are set as part of the original charter application in G.S. 115C-218.1(b)(2). However, that that is not clear in the Rule as submitted. Therefore, the Commission objects for lack of clarity.

The Commission objected to 16 NCAC 06G .0508 for failure to comply with the APA and numerous instances of ambiguity that make the Rule as a whole difficult to understand.

The Commission objected to Subparagraph (a)(1) for referring to a fee established outside the rulemaking process. The definition of a “rule” in 150B-2(8a) specifically includes the establishment of a fee, meaning setting the dollar amount in the Rule. Additionally, 115C-218.1(c) requires the State Board to adopt the application fee “in accordance with Article 2A of Chapter 150B.” Since the fee amount is established outside of rule, the Commission objects to Subparagraph (a)(1) for failure to comply with the APA and ambiguity since the amount of the fee is unknown.

The Commission also objected to Paragraph (a) for failure to comply with the APA and ambiguity. Subparagraph (a)(1) states, “Prior to each application round, the State Board of Education shall approve the application process, timeline, and non-refundable fee.” Establishing the application and timeline outside of rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this Rule would allow the agency to change the application process and timeline before each application round, changing the substance of this Rule without public notice, comment, or review by the Rules Review Commission. Subparagraphs (a)(2)-(4) refer back to the timeline and “application instructions” established outside the rulemaking process in (a)(1). Since the application process and timeline are established outside of rule, the requirements in Paragraph (a) are unclear and the Commission objected for failure to comply with the APA and ambiguity.

Parts (b)(1)(C) and (D) set application requirements that are ambiguous. It is unclear how applications are evaluated or what factors may be considered to determine whether an application “contains viable governance, business, and education plans.” It is also unclear what “other requirements” are required by the agency. Therefore, the Commission objected to Parts (b)(1)(C) and (D) for ambiguity.

Additionally, the Commission objected to Paragraph (c) for ambiguity for use of the following terms or phrases, which are undefined or unclear as written: “capability to provide comprehensive learning experiences” in (c)(2); “promotes innovation” in (c)(3)(B); “large,” “diverse” and “locally-based” in (c)(3)(D); “accurately” in (c)(3)(F); and “diverse learning environment” in (c)(3)(I). It is further unclear how Paragraph (c) interacts with G.S. 115C-218.5, which governs the State Board’s final approval of applications for charter schools. Therefore, the Commission objected to Paragraph (c) for ambiguity.

The Commission objected to 16 NCAC 06G .0509 for failure to comply with the APA and ambiguity. In (a), the Rule requires completion of “all of the planning program requirements.” Incorporating or referring requirements established outside the rulemaking process set forth in G.S. 150B-21.2 would allow the agency to change the requirements of the planning year outside the rulemaking process, changing the substance of this Rule without public notice, comment, or review by the Rules Review Commission. Additionally, Paragraph (a) requires a meeting about “policies and procedures.” It is unclear which policies and procedures the Rule is referring to and whether these policies fall within the definition of a “rule.” Therefore, the Commission objected to Paragraph (a) for failure to comply with the APA and ambiguity.

The Commission also objects for lack of clarity due to undefined terms or phrases including: “clear and compelling need” in (b)(1); “exceptional need” in (b)(2); “unique mission” in (c)(1);

“successful” in (b)(4); “obstacles to educational reform efforts” in (c)(5); “successful charter school board” in (c)(6); and “application due date” in (d).

The Commission objected to 16 NCAC 06G .0514 for lack of clarity. It is unclear under what circumstances the State Board of Education “may impose reasonable additional requirements” during review, application, and approval process of fast track replication of high-quality charters. It is also unclear what the additional requirements may be or how the State Board will determine what to require.

The Commission objected to 16 NCAC 06G .0517-.0522 for lack of statutory authority. Rules .0516-.0522 of this Section govern “alternative charter schools.” Alternative schools and charter schools are different types of public schools. Alternative schools are governed by G.S. 115C, Article 8C and Charter Schools are governed by G.S. 115C, Article 14A. Alternative schools primarily serve at-risk students. It is unclear whether the Board has authority to regulate a school as both an alternative school and a charter school. Charter schools can emphasize serving at-risk students as provided in 115C-218(a)(2). It is unclear what statutory authority the agency has to regulate a charter school targeted toward at-risk students as both a charter school and an alternative school.

Statutes governing alternative schools refer to “local school administrative units.” Charter schools are generally exempt from statutes governing local school administrative units pursuant to G.S. 115C-218.10. Therefore, the Commission could not confirm statutory authority exists for Rules .0517-.0522 of this Section.

The Commission objected to 16 NCAC 06G .0517 for lack of necessity and clarity. The Rule begins, “Unless otherwise prohibited by federal or state law...,” without referencing any federal laws or regulations in the body of the Rule or the history note. Therefore, the Commission is unsure which federal laws may apply and objects for lack of clarity.

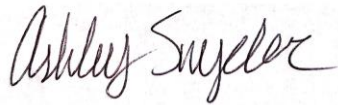
The Rule also states “The purpose of the following rules is to establish the criteria for eligibility and the procedures for applying for this designation [as an Alternative School].” The criteria for eligibility and application requirements are included in Rules 16 NCAC 06G .0518 and .0519. This amounts to a general purpose statement and does not meet the definition of a “rule” in G.S. 150B-2(8a). Therefore, the Commission objected for lack of necessity.

The Commission objected to 16 NCAC 06G .0519 for failure to comply with the APA and ambiguity. Subparagraph (a)(2) refers to accountability options in the “Department of Public Instruction’s School Based Management and Accountability Program under 115C-105.20.” Referring to the “Management and Accountability Program” rather than stating the accountability options in rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this allows the agency to amend the Program outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide the options in rule also make the meaning of this Rule unclear. Therefore, the Commission objected for failure to comply with the APA and ambiguity.

The Commission also objected to Paragraph (b) for ambiguity for use of the undefined term “well-defined.”

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission’s actions, please let me know.

Sincerely,

A handwritten signature in black ink that reads "Ashley Snyder". The signature is written in a cursive, flowing style.

Ashley Snyder
Commission Counsel

August 20, 2020

Thomas Ziko
Interim General Counsel, State Board of Education
Sent via email only: Thomas.ziko@dpi.nc.gov

Re: Objection to Rules 16 NCAC 06E .0204 and .0206

Dear Mr. Ziko:

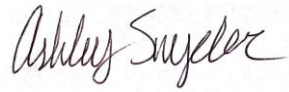
At its meeting this morning, the Rules Review Commission objected to 16 NCAC 06E .0204 and .0206 in accordance with G.S. 150B-21.10.

The Commission objected to Rule 16 NCAC 06E .0204 for lack of clarity, necessity, and statutory authority. The Commission objected for lack of clarity and necessity because the Rule repeats or conflicts with the requirements of 16 NCAC 06E .0202. The Commission objected to the Rule for lack of statutory authority because the State Board did not cite authority to regulate the athletics of charter schools absent a provision to do so in the school's charter. Generally, charter schools are exempt from statutes and rules applicable to local boards of education. G.S. 115C-218.10. The State Board's authority to regulate participation in athletics applies to "interscholastic athletic activities conducted by local boards of education." As written, the Rule applies to all charter schools and therefore exceeds the agency's statutory authority.

The Commission objected to Rule 16 NCAC 06E .0206 for lack of necessity and clarity. The Rule is unnecessary because it repeats portions of 16 NCAC 06E .0203 and is unclear because it differs from portions of 16 NCAC 06E .0203.

Please respond to these objections in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "Ashley Snyder". The signature is fluid and cursive, with the first name "Ashley" written in a larger, more prominent script than the last name "Snyder".

Ashley Snyder
Commission Counsel

Cc: Lou Martin, lou.martin@dpi.nc.gov



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

Mailing address:
6714 Mail Service Center
Raleigh, NC 27699-6700

Street address:
1711 New Hope Church Rd
Raleigh, NC 27609-6285

July 16, 2020

Thomas J. Ziko, Interim General Counsel
State Board of Education
Sent via email only to: Thomas.Ziko@dpi.nc.gov

Re: Extension of the Period of Review for All Rules Submitted in 16 NCAC 06B, 06D, 06E, and 06G

Dear Mr. Ziko:

At its meeting this morning, the Rules Review Commission extended the period of review for the above-captioned rules in accordance with G.S. 150B-21.10. They did so in response to a request from the State Board of Education to extend the period in order to allow the agency to address the requested technical changes and submit the revised rules at a later meeting.

Pursuant to G.S. 150B-21.13, when the Commission extends the period of review, it is required to approve or object to the rules or call a public hearing on the same within 70 days.

If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

Ashley Snyder
Commission Counsel

Administration
919/431-3000
fax: 919/431-3100

Rules Division
919/431-3000
fax: 919/431-3104

Judges and
Assistants
919/431-3000
fax: 919/431-3100

Clerk's Office
919/431-3000
fax: 919/431-3100

Rules Review
Commission
919/431-3000
fax: 919/431-3104

Civil Rights
Division
919/431-3036
fax: 919/431-3103

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Education

RULE CITATION: All Rules; 16 NCAC 06D

DEADLINE FOR RECEIPT: July 10, 2020

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Please format your introductory statements for publication in the Code as shown here: <https://files.nc.gov/ncoah/documents/Rules/Examples---Permanent-Adoption-For-Publication-In-The-Ncac.pdf>. For example, your introductory statement for 06B .0111 will read: "16 NCAC 06B .0111 is adopted as published in 34:13 NCR 1211 as follows." If you make changes in response to technical change requests, it will read "16 NCAC 06B .0111 is adopted with changes as published in 34:13 NCR 1211 as follows:"

Please skip one line between the introductory statement and the name of the rule. See 26 NCAC 02C .0108.

In your history notes, you reference G.S. 115C-12. Please consider referencing 115C-12(17) if that was your intent.

In your history notes, please add "Emergency Rule Eff. August 20, 2019" as it is currently shown in the Code.

In your history notes, please add a proposed effective date. The earliest these rules can be effective is August 1, 2020.

Throughout these Rules, you refer to the "Department" or "NCDPI." If these have the same meaning, please pick one and use the term consistently. Please also be consistent with how you refer to the State Board of Education.

Is "public school" defined for purposes of these rules? Are you using the definition in 115C-5? In .0309(a), you specify that public schools include "traditional, charter, and regional schools." Other rules do not specifically say whether those rules apply to traditional, charter, and regional schools. Please clarify which rules refer to specific types of schools.

What is a Local Education Agency? Is it defined in rule or statute? Does it include or exclude charter schools? As written, 06E .0204 refers to "LEAs and charter school boards" but 06D .0307

Ashley Snyder
Commission Counsel
Date submitted to agency: June 26, 2020

only refers to LEAs. As a result, I read .0307 as applying to traditional schools and not charter schools. Is that correct?

For the rules governing testing, which tests are “end-of-course assessments” vs. “standardized artifacts?” Are there other types of tests? Which tests have been adopted by the State Board? Which rules apply to which types of tests? What is the North Carolina Testing Program? Please review and clarify.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

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 06D .0307

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection to this Rule for lack of necessity, clarity, and statutory authority. The proposed Rule is unnecessary because it repeats portions of 16 NCAC 06D .0302, an existing permanent rule last amended in 2001. The existing permanent Rule is attached with annotations detailing repetitive provisions.

Staff recommends objection to (f) for lack of statutory authority. The proposed Rule requires LEAs to report scores on districtwide and statewide standardized tests "within thirty (30) days from generation of the score at the LEA level or receipt of the score and interpretive documentation from the NCDPI." However, G.S. 115C-174.15 requires scores for local tests be provided within 30 days of administration.

§ 115C-174.15. (For applicability, see editor's note) Report student performance on local standardized tests.

(a) A local board of education shall provide a student's results on standardized tests required by the local board, as reported pursuant to G.S. 115C-174.12(d), to the following persons and according to the following time lines:

- (1) To the student's teachers no later than one week after the standardized test is administered.
- (2) To the student's parents no later than 30 days after the standardized test is administered.

Ashley Snyder
Commission Counsel

(b) If the superintendent of the local school administrative unit determines in writing that extenuating circumstances exist and reports those circumstances to the local board of education, the local board may extend the above time lines in the discretion of the local board of education. (2017-57, s. 7.28A(c).)

Staff also recommends objection for lack of clarity due to unclear or undefined terms including "secure tests," "improper administration," and other unclear terms as set forth in the requests for technical changes.

Staff notes the agency did not provide a revised rule or responses to the requests for technical changes.

Annotated version of existing permanent Rule 16 NCAC 06D .0306. Staff notes in red refer to paragraphs in the proposed Rule.

16 NCAC 06D .0302 TEST ADMINISTRATION

- (a) Employees of the LEA shall administer tests to students who are required or permitted to participate.
- (b) The department shall supply the tests to the LEAs. *Repeats (a)(1).*
- (c) LEAs shall: *Repeats (a)(2).*
 - (1) account to the department for all tests received;
 - (2) provide a locked storage area for all tests received;
 - (3) prohibit the reproduction of all or any part of the test; and
 - (4) prohibit their employees from disclosing the content of, or specific items contained in, the test to persons other than authorized employees of the LEA.
- (d) LEAs must monitor test administration procedures. If school officials discover any instance of improper administration and determine that the validity of the test results has been affected, they must notify the local board of education and order the affected students to be retested. *Repeats part of (b).*
- (e) The Superintendent of Public Instruction may conduct audits of LEAs if he receives written complaints which allege improper test administration, and he may require the retesting of students. *Repeats (c).*
- (f) The department shall provide the mechanism for the scoring of all North Carolina mandated tests. In addition the department shall provide score interpretation services to the LEA. *Compare to (d).*
- (g) LEAs shall, at the beginning of each school year, provide information to students and parents or guardians advising them of the district-wide and state-mandated tests that students will be required to take during that school year. In addition, LEAs shall provide information to the students and parents or guardians to advise them of the dates the tests will be administered and how the results from the tests will be used and the consequences thereof. Also, information provided to parents about tests shall include whether the SBE or the local board of education requires the test. *Repeats (e).*
- (h) LEAs shall report scores resulting from the administration of district-wide and state-mandated tests to students and parents or guardians along with available score interpretation information within 30 days from generation of the score at the LEA level or from the receipt of the score and interpretive documentation from the department. *Repeats (f).*
- (i) At the time the scores are reported for tests required for graduation such as the high school competency tests, the computer skills tests, and the high school exit exam, the LEA shall provide the information to students and parents or guardians to advise whether or not the student has met the standard for the test. If a student fails to meet the standard for the test, the student and parents or guardians shall be informed at the time of reporting, the date(s) when focused remedial instruction will be available and the date of the next testing opportunity. *Not contained in proposed Rule.*
- (j) In order to ensure adequate representation and the generalizability of the data used to develop tests and to conduct evaluation studies, selected LEAs and schools, determined by the department through random stratified samples, shall participate in field testing and other sample testing such as the National Assessment of Educational Progress (NAEP) and other national or international assessments as designated by the department or the SBE. *Repeats (g).*

History Note: Authority G.S. 115C-12(9)c.;
Eff. July 1, 1986;
Amended Eff. May 1, 2001; August 1, 1999; June 1, 1996.

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0307

DEADLINE FOR RECEIPT: July 10, 2020

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Please compare this Rule to Rule .0302 of this Section. Are parts of this Rule unnecessary? Please avoid repeating language already in the Code.

In (a), what is the purpose of "Test Administration –?"

In (a), is "school system" defined?

In (a), is it necessary to say "either permanently or contractually?" If you keep this language, please define "permanently" and "contractually." Are these terms defined elsewhere in rule?

At line 4, what "professional training" is required?

At line 4, please capitalize "State" if you are referring to North Carolina. Please do not capitalize "state" if you are referring to any state.

At line 4, please define "secure tests."

In (2)(B), please define "secure."

In (2)(D), who are the "authorized employees?" Does the LEA decide?

At line 13, please change "must" to "shall."

At lines 13-14, please define "improper administration."

At line 14, how do school officials determine whether the validity of the test results were affected? What factors are considered?

At line 14, please change "must" to "shall."

Ashley Snyder
Commission Counsel
Date submitted to agency: June 26, 2020

At lines 15-16, the Rule states “only the superintendent and the LEA test coordinator have the authority to declare a test misadministration at the local level.” However, lines 13-15 requires school officials who discover improper administration to “declare a misadministration.” Please clarify.

In (c), do you mean “may” or “shall?” If you mean “may,” under what circumstances does the Superintendent conduct audits? Is this in the Superintendent’s discretion?

At line 17, please use “he or she” instead of “he/she.”

In (d), which tests are in the North Carolina Testing Program? Is this explained in rule or statute? Why is this capitalized?

At line 19, please capitalize “Department.”

At line 20, what are “score interpretive services?” Does your regulated public understand what this requires?

At line 22, please capitalize “State” if you are referring to North Carolina. Do not capitalize “state” if you are referring to any state.

At lines 24-25, are any of the tests required by federal law? Does that information have to be provided?

At line 26, please capitalize “State” if you are referring to North Carolina. Do not capitalize “state” if you are referring to any state.

In (f), you refer to “generation of the score at the LEA level” but (d) says “NCDPI shall score or have scored all tests...” Who scores tests and how is that determined? Does NCDPI ask LEAs to score tests? Please clarify.

At line 27, when this was published in the Register it read “30 days,” but was changed to “thirty” post-publication. Please use figures for numbers greater than nine as required by 26 NCAC 02C .0108. Since this was published in the Register, you do not need to show the change, simply do it.

In (f), where is your authority to require LEAs to report scores within 30 days of generation for districtwide testing? How does this comply with G.S. 115C-174.15(a)(2)?

Also, does the requirement to provide scores “within 30 days of generation” meet the requirements of 115C-174.16 for statewide standardized tests?

Why is the language “In order to ensure adequate representation and the generalizability of the data used to develop tests and to conduct evaluations studies” necessary? What are you requiring? If this is just informative, it does not meet the definition of a “rule” in 150B-2(8a).

At line 32, which assessments are “designated by the department or the SBE?”

At line 21, please capitalize “Department.”

Ashley Snyder
Commission Counsel
Date submitted to agency: June 26, 2020

In your history note, why is 115C-12(9) listed?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: June 26, 2020

16 NCAC 06D .0307 is proposed for adoption as follows:

16 NCAC 06D .0307 TEST ADMINISTRATION IN PUBLIC SCHOOLS

(a) Test Administration -- Only persons who are employed by the school system, either permanently or contractually, and have professional training in education and the state testing program shall administer secure tests to students.

(1) The North Carolina Department of Public Instruction (NCDPI) shall supply the tests to the local education agencies (LEAs).

(2) LEAs shall:

(A) account to the NCDPI for all tests received;

(B) provide a secure, locked storage facility for all tests received;

(C) prohibit the reproduction of any or all parts of the test; and

(D) prohibit its employees from disclosing the content of the tests or specific items contained in the tests to persons other than authorized employees of the LEA.

(b) LEAs must monitor test administration procedures. If school officials discover any instance of improper administration and determine that the validity of the test results has been affected, they must notify the local board of education, declare a misadministration, and order the affected students to be re-tested. Only the superintendent and the LEA test coordinator have the authority to declare a test misadministration at the local level.

(c) The Superintendent of Public Instruction may conduct audits of LEAs if he/she receives written complaints that allege improper test administration, and he/she may require the re-testing of students.

(d) The NCDPI shall score or have scored all tests in the North Carolina Testing Program. In addition, the department shall provide score interpretative services to the LEAs.

(e) LEAs shall, at the beginning of each school year, provide information to students and parents or guardians advising them of the districtwide and state-mandated tests that students will be required to take during that school year. In addition, LEAs shall advise students and parents or guardians of the dates the tests will be administered and how the results from the tests will be used. Information LEAs provide to parents shall include whether the State Board of Education or the local board of education requires the test(s).

(f) LEAs shall report scores resulting from the administration of districtwide and state-mandated tests to students and parents or guardians along with available score interpretation information within thirty (30) days from generation of the score at the LEA level or receipt of the score and interpretive documentation from the NCDPI.

(g) In order to ensure adequate representation and the generalizability of the data used to develop tests and to conduct evaluation studies, selected LEAs and schools, determined through stratified random samples, shall participate in field testing and other sample testing such as the National Assessment of Educational Progress (NAEP) and other national or international assessments as designated by the department or the SBE.

History Note: Authority G.S. 115C-12(9); 115C-174.11; 115C-174.12;

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

Emergency Rule Eff. August 20, 2019.

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0308

DEADLINE FOR RECEIPT: July 10, 2020

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Please compare this Rule to Rule .0303 of this Section. Are parts of this Rule unnecessary?

At line 5, what other accountability measures are you referring to? Are these included in the North Carolina Testing Program? If so, what are they and are they in rule?

What is the "North Carolina Testing Program?" Why is it capitalized?

At line 6, are specific training sessions required?

At line 7, please delete or define "proper."

At line 7, please delete or define "appropriate."

Please compare lines 9 and 6. Is an "LEA testing and accountability coordinator" the same as a "LEA test coordinator?" If so, please be consistent.

At lines 9-10, are school test coordinators the test administrators and proctors? Or is the training also provided to the administrators and proctors? Please clarify.

Why is 115C-12(9) listed in your history note?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: June 26, 2020

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 06D .0308

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection to this Rule for lack of necessity and clarity. The proposed Rule is unnecessary because it repeats 16 NCAC 06D .0303, an existing permanent rule last amended in 1999. An annotated version of .0303 is attached.

The proposed rule is also unclear due to ambiguous or undefined terms including "accountability measures," "North Carolina Testing Program," "proper," and "appropriate."

Staff notes the agency did not provide a revised rule or responses to the requests for technical changes.

Ashley Snyder
Commission Counsel

Annotated version of existing permanent Rule 16 NCAC 06D .0303. Staff notes in red refer to paragraphs in the proposed Rule.

16 NCAC 06D .0303 ACCOUNTABILITY COORDINATOR

- (a) The local superintendent shall designate one or more persons to serve as the local testing coordinator and accountability coordinator to assist in the local administration, reporting, and interpretation of tests and other accountability measures. *Repeats (a), but without reference to a local LEA or the NC Testing Program.*
- (b) Coordinators must attend training sessions provided by the Department on the subject of proper test administration, scanning and scoring answer sheets and required processing of test materials. They must then conduct similar sessions within the LEA to provide this instruction to school-based test administrators and proctors. Coordinators shall arrange for the scanning, scoring, and reporting of results from tests adopted by the SBE. *Repeats (b). Proposed Rule adds test security and “appropriate” use of accommodations to list of training requirements. Proposed Rule also adds requirement that training be conducted in-person.*

History Note: Authority G.S. 115C-12(9)c.;
Eff. July 1, 1986;
Amended Eff. August 1, 1999; November 1, 1997.

16 NCAC 06D .0308 is proposed for adoption as follows:

16 NCAC 06D .0308 ROLE OF THE TESTING COORDINATOR

(a) The local superintendent in a local education agency (LEA) shall act as or appoint a school system testing and accountability coordinator to assist in the local administration, reporting, and interpretation of test results and other accountability measures in the North Carolina Testing Program.

(b) LEA testing and accountability coordinators shall attend training sessions provided by the North Carolina Department of Public Instruction regarding proper test administration, test security, appropriate use of accommodations, scanning and scoring answer sheets, and preparation of test materials for scoring at a central site. LEA test coordinators shall conduct in-person training for the school test coordinators in their LEAs for the purpose of providing instruction to local test administrators and proctors. LEA testing and accountability coordinators shall arrange for the scanning, scoring, and reporting of results from tests adopted by the State Board of Education.

History Note: Authority G.S. 115C-12(9); 115C-174.11; 115C-174.12;

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

Emergency Rule Eff. August 20, 2019.

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 06D .0311

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection to this Rule for lack of necessity, clarity, and compliance with the APA. The proposed Rule is unnecessary because it repeats portions of 16 NCAC 06D .0306, an existing permanent rule last amended in 2000. The existing permanent Rule is attached with annotations detailing repetitive provisions.

Staff recommends objection to Paragraph (k) for lack of clarity and failure to comply with the APA. The Rule requires teachers to provide instruction that "meets or exceeds the state-adopted curriculum standards." Staff notes the curriculum standards appear to be part of the "Standard Course of Study governed by G.S. 115C-81.5:

§ 115C-81.5. Standard course of study.

(a) All children can learn. It is the intent of the General Assembly that the mission of the public school community is to challenge with high expectations each child to learn, to achieve, and to fulfill his or her potential. With that mission as its guide, the State Board of Education shall adopt a plan of education and a standard course of study as provided in G.S. 115C-12(9c) for the public schools of the State. It is the intent of the General Assembly that the focus of State educational funding shall be to ensure that each student receives a sound basic education. It is further a goal of the General Assembly to provide supplemental funds to low-wealth counties to allow those counties to enhance the instructional program and student achievement. Instruction shall be offered in the areas of arts, communication skills, physical education and personal health and safety, mathematics, media and computer skills, science, second languages, social studies, and career and technical education. In addition, instruction shall be offered in all of the areas provided in this Part.

(b) The standard course of study shall provide all of the following:

Ashley Snyder
Commission Counsel

- (1) A core curriculum for all students that takes into account the special needs of children.
- (2) A set of competencies, by grade level, for each curriculum area.
- (3) A list of textbooks for use in providing the curriculum.
- (4) Standards for student performance and promotion based on the mastery of competencies, including standards for graduation, that take into account children with disabilities and, in particular, include appropriate modifications.
- (5) A program of remedial education.
- (6) Required support programs.
- (7) A definition of the instructional day.
- (8) Class size recommendations and requirements.
- (9) Prescribed staffing allotment ratios.
- (10) Material and equipment allotment ratios.
- (11) Facilities guidelines that reflect educational program appropriateness, long-term cost efficiency, and safety considerations.
- (12) Any other information the Board considers appropriate and necessary.

Staff is not aware of any authority for the Board to adopt curriculum standards outside the rulemaking process. Without the curriculum standards set in rule, the agency can amend the standards outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide these requirements in Rule also makes the requirement for teachers to “provide instruction that meets or exceeds the state-adopted curriculum standards” unclear as written. Therefore, staff recommends objection to (k) for failure to comply with the APA and lack of clarity.

Staff also recommends objection for lack of clarity because it is unclear to staff under what circumstances this Rule applies. This Rule sets forth a “testing code of ethics,” but it is unclear whether the requirements of this Rule apply to all standardized tests, final exams, EOCs, or all tests. Staff further recommends objection for lack of clarity due to unclear terms including “secure,” “immediately,” “proper,” “eligible students,” “fairly,” and other unclear or undefined terms as detailed in the requests for technical changes.

Annotated version of existing permanent Rule 16 NCAC 06D .0306. Staff notes in red refer to paragraphs in the proposed Rule.

16 NCAC 06D .0306 TESTING CODE OF ETHICS

(a) This Rule shall apply to all public school employees who are involved in the state testing program. **Repeats (a), but does not specifically mention charter and regional school employees.**

(b) The superintendent or superintendent's designee shall develop local policies and procedures to ensure maximum test security in coordination with the policies and procedures developed by the test publisher. The principal shall ensure test security within the school building. **Repeats (b).**

- (1) The principal shall store test materials in a secure, locked area. The principal shall allow test materials to be distributed immediately prior to the test administration. Before each test administration, the building level test coordinator shall accurately count and distribute test materials. Immediately after each test administration, the building level test coordinator shall collect, count, and return all test materials to the secure, locked storage area. **Repeats (c), (i)(1), and (i)(2).**
- (2) "Access" to test materials by school personnel means handling the materials but does not include reviewing tests or analyzing test items. The superintendent or superintendent's designee shall designate the personnel who are authorized to have access to test materials. **Repeats (d).**
- (3) Persons who have access to secure test materials shall not use those materials for personal gain. **Repeats (d)(1).**
- (4) No person may copy, reproduce, or paraphrase in any manner or for any reason the test materials without the express written consent of the test publisher. **Repeats (d)(2).**
- (5) The superintendent or superintendent's designee shall instruct personnel who are responsible for the testing program in testing administration procedures. This instruction shall include test administrations that require procedural modifications and shall emphasize the need to follow the directions outlined by the test publisher. **Repeats (c).**
- (6) Any person who learns of any breach of security, loss of materials, failure to account for materials, or any other deviation from required security procedures shall immediately report that information to the principal, building level test coordinator, school system test coordinator, and state level test coordinator. **Repeats (f).**

(c) Preparation for testing.

- (1) The superintendent shall ensure that school system test coordinators: **Repeats (g)(1)-(4).**
 - (A) secure necessary materials;
 - (B) plan and implement training for building level test coordinators, test administrators, and proctors;
 - (C) ensure that each building level test coordinator and test administrator is trained in the implementation of procedural modifications used during test administrations; and
 - (D) in conjunction with program administrators, ensure that the need for test modifications is documented and that modifications are limited to the specific need.
- (2) The principal shall ensure that building level test coordinators: **Repeats (i)(1), (3), and (4).**
 - (A) maintain test material security and accountability of test materials;
 - (B) identify and train personnel, proctors, and backup personnel for test administrations; and
 - (C) encourage a positive atmosphere for testing.
- (3) Test administrators shall be school personnel who have professional training in education and the state testing program. **Repeats (j).**
- (4) Teachers shall provide instruction that meets or exceeds the standard course of study to meet the needs of the specific students in the class. Teachers may help students improve test-taking skills by: **Repeats (k).**
 - (A) helping students become familiar with test formats using curricular content;
 - (B) teaching students test-taking strategies and providing practice sessions;
 - (C) helping students learn ways of preparing to take tests; and
 - (D) using resource materials such as test questions from test item banks, testlets and linking documents in instruction and test preparation.

(d) Test administration.

- (1) The superintendent or superintendent's designee shall: **Repeats (l).**
 - (A) assure that each school establishes procedures to ensure that all test administrators comply with test publisher guidelines;

- (B) inform the local board of education of any breach of this code of ethics; and
- (C) inform building level administrators of their responsibilities.
- (2) The principal shall: **Repeats duties of “school test coordinator” in (m). It is unclear to staff whether the “school test coordinator” role is assigned to a school principal.**
 - (A) assure that school personnel know the content of state and local testing policies;
 - (B) implement the school system's testing policies and procedures and establish any needed school policies and procedures to assure that all eligible students are tested fairly;
 - (C) assign trained proctors to test administrations; and
 - (D) report all testing irregularities to the school system test coordinator.
- (3) Test administrators and proctors shall: **Repeats (n).**
 - (A) administer tests according to the directions in the administration manual and any subsequent updates developed by the test publisher;
 - (B) administer tests to all eligible students;
 - (C) report all testing irregularities to the school system test coordinator; and
 - (D) provide a positive test-taking climate.
- (4) Proctors shall serve as additional monitors to help the test administrator assure that testing occurs fairly. **Repeats (o).**
- (e) Scoring. The school system test coordinator shall: **Repeats (p).**
 - (1) ensure that each test is scored according to the procedures and guidelines defined for the test by the test publisher;
 - (2) maintain quality control during the entire scoring process, which consists of handling and editing documents, scanning answer documents, and producing electronic files and reports. Quality control shall address at a minimum accuracy and scoring consistency;
 - (3) maintain security of tests and data files at all times, including:
 - (A) protecting the confidentiality of students at all times when publicizing test results; and
 - (B) maintaining test security of answer keys and item-specific scoring rubrics.
- (f) Analysis and reporting. Educators shall use test scores appropriately. This means that the educator recognizes that a test score is only one piece of information and must be interpreted together with other scores and indicators. Test data help educators understand educational patterns and practices. The superintendent shall ensure that school personnel analyze and report test data ethically and within the limitations described in this Paragraph. **Repeats (q).**
 - (1) Educators shall release test scores to students, parents, legal guardians, teachers, and the media with interpretive materials as needed.
 - (2) Staff development relating to testing must enable personnel to respond knowledgeably to questions related to testing, including the tests, scores, scoring procedures, and other interpretive materials.
 - (3) Items and associated materials on a secure test shall not be in the public domain. Only items that are within the public domain may be used for item analysis.
 - (4) Educators shall maintain the confidentiality of individual students. Publicizing test scores that contain the names of individual students is unethical. **Compare to (q)(1). Proposed Rule adds additional language.**
 - (5) Data analysis of test scores for decision-making purposes shall be based upon:
 - (A) disaggregation of data based upon student demographics and other collected variables;
 - (B) examination of grading practices in relation to test scores; and
 - (C) examination of growth trends and goal summary reports for state-mandated tests.
- (g) Unethical testing practices include, but are not limited to, the following practices: **Repeats (r).**
 - (1) encouraging students to be absent the day of testing;
 - (2) encouraging students not to do their best because of the purpose of the test;
 - (3) using secure test items or modified secure test items for instruction;
 - (4) changing student responses at any time;
 - (5) interpreting, explaining, or paraphrasing the test directions or the test items;
 - (6) reclassifying students solely for the purpose of avoiding state testing;
 - (7) not testing all eligible students;
 - (8) failing to provide needed modifications during testing, if available;
 - (9) modifying scoring programs including answer keys, equating files, and lookup tables;
 - (10) modifying student records solely for the purpose of raising test scores;
 - (11) using a single test score to make individual decisions; and
 - (12) misleading the public concerning the results and interpretations of test data.

(h) In the event of a violation of this Rule, the SBE may, in accordance with the contested case provisions of G.S. 150B, impose any one or more of the following sanctions: **Repeats (s).**

- (1) withhold ABCs incentive awards from individuals or from all eligible staff in a school;
- (2) file a civil action against the person or persons responsible for the violation for copyright infringement or for any other available cause of action;
- (3) seek criminal prosecution of the person or persons responsible for the violation; and
- (4) in accordance with the provisions of 16 NCAC 6C .0312, suspend or revoke the professional license of the person or persons responsible for the violation.

History Note: Authority G.S. 115C-12(9)c.; 115C-81(b)(4);
Eff. November 1, 1997;
Amended Eff. July 1, 2000.

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0311

DEADLINE FOR RECEIPT: July 10, 2020

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Please compare this Rule to Rule .0306 of this Section. Are parts of this Rule unnecessary?

Throughout this Rule, please capitalize "State" if you are referring to North Carolina and do not capitalize "state" if you are referring to any state.

Throughout this Rule, please replace "superintendent/charter school director" with either "superintendent or charter school director" or "superintendent and charter school director."

At lines 4-5, what is the "state testing program" and which employees are "involved" such that this Rule applies to them?

At line 10, which "testing administration procedures" are you referring to?

At line 11-12, are testing accommodations outlined by the test publisher?

In (d)(1), define "personal gain."

In (d)(2), do you mean "may" or "shall?"

In (d)(2), is it necessary to say "for any manner or for any reason?"

In (e), how does a principal "ensure test security?" What is required? Are these requirements set by the State Board or the test publisher?

At line 20, please define "secure."

At line 19, please delete or define "immediately."

In (f), define "breach of security."

In (f), are "loss of materials" and "failure to account for materials" the same?

Ashley Snyder
Commission Counsel

Date submitted to agency: June 26, 2020

At line 23, what are the “required security procedures?”

At line 23, please delete or define “immediately.”

In (g)(1), what materials are considered “necessary?” And how are they required to be secured?

In (g)(3), are the “policies and procedures” for administering a test set by the State Board or the test publisher? If the State Board, are these in rule?

At line 30, please delete or define “proper.”

At line 33, how do you determine if the accommodation is limited to the specific need? Is this in the discretion of the superintendent or charter school director?

In (i)(1), please consider deleting “accurately.”

In (i)(2), please delete or define “immediately.”

In (i)(2), please delete or define “secure.”

Please review (i)(2). Is this supposed to be two separate items in the list?

In (i)(2), which school policies are “needed?” Is this in the discretion of the principal?

In (i)(4), what does it mean to “encourage a positive atmosphere for testing?” What are you requiring here?

In (j), what “professional training” is required?

In (j), what is the “state testing program?”

In (k), what are the “state-adopted curriculum standards?”

Please review the list in (k). Is (1) supposed to be part of (k) with (2)-(5) renumbered as (1)-(4)?

In (m)(1), what are the state testing policies? Are you referring to the “Rules of this Section?”

In (m)(2), define “eligible students.”

In (m)(2), please delete or define “fairly.”

In (m)(4), please define “testing irregularities.”

In (n)(2), define “eligible students.”

In (n)(3), please define “testing irregularities.”

In (n)(4), define “a positive test-taking environment.” Specifically, what are you requiring test administrators to do?

In (o), what is required for testing to occur “fairly?”

In (p)(2), is it necessary to say “at a minimum?” Rules always set minimum requirements.

In (q), line 9, please define “appropriately.” What are you requiring? Consider: “Educators shall use test scores as one piece of information to be interpreted together with other scores and indicators.”

Why is the third sentence in (q) necessary? If it is informational, it does not meet the definition of a “rule” in 150B-2(8a).

On page 3, line 12, please delete or define “ethically.”

At line 12, please capitalize “Paragraph.”

At line 16, is this prohibition as applied to the State Board of Education or any employee of the State Board of Education internal agency management? See 150B-2(8a)(a).

Is (q)(2) necessary? Does it repeat the requirements of 115C-174.15 and 174.16?

Is (q)(4) necessary given 115C-174.13?

In (q)(5), whose decision-making are you regulating? Educators?

In (r), please delete “but are not limited to” because it is unnecessary.

In (r)(6), please delete or define “solely.”

In (r)(7), please define “eligible students.”

In (r)(8), what are “required accommodations” and how are they determined?

In (r)(10), please delete or define “solely.”

In (r)(11), decisions about what?

In (r)(12), what is considered “misleading the public?” What are you prohibiting?

In (s), specifically which statute or statutes are you referring to in 150B? Why is this reference to 150B necessary? Please clarify your intent here.

In (s)(1), please delete or define “applicable.”

In your history note, why is 115C-12(9) listed?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: June 26, 2020

16 NCAC 06D.0311 is proposed for adoption as follows:

16 NCAC 06D .0311 TESTING CODE OF ETHICS

(a) This Rule sets out the administrative testing procedures and testing code of ethics and shall apply to all public school employees, including charter school and regional school employees, who are involved in the state testing program.

(b) The superintendent/charter school director or superintendent's/charter school director's designee shall develop local policies and procedures to ensure maximum test security in coordination with the policies and procedures developed by the test publisher.

(c) The superintendent/charter school director or superintendent's/charter school director's designee shall instruct personnel who are responsible for the testing program in testing administration procedures. This instruction shall include test administrations that require testing accommodations and shall emphasize the need to follow the directions outlined by the test publisher.

(d) The superintendent/charter school director or superintendent's/charter school director's designee shall designate the personnel who are authorized to have access to secure test materials. "Access" to test materials by school personnel means handling the materials but does not include reviewing tests or analyzing test items.

(1) Persons who have access to secure test materials shall not use those materials for personal gain.

(2) No person may copy, reproduce, or paraphrase in any manner or for any reason the test materials without the express written consent of the test publisher.

(e) The principal shall ensure test security within the school building. The principal shall store test materials in a secure, locked facility. The principal shall allow test materials to be distributed immediately before the test administration.

(f) Any breach of security, loss of materials, failure to account for materials, or any other deviation from required security procedures shall be reported immediately to the principal, school test coordinator, school system (LEA) test coordinator, superintendent/charter school director, and regional accountability coordinator.

(g) Preparation for testing. The superintendent/charter school director shall ensure that school system (LEA) test coordinators:

(1) secure necessary materials;

(2) plan and implement training for school test coordinators, test administrators, and proctors;

(3) ensure each school test coordinator and test administrator is trained before each test administration on the policies and procedures for conducting a proper test administration and for processing and returning test materials; and

(4) in conjunction with program administrators, ensure the need for test accommodations is documented and that accommodations are limited to the specific need.

(h) The principal or the principal's designee shall serve as school test coordinator.

(i) The principal shall ensure the school test coordinator maintains test security and accountability of test materials, including taking the following actions:

- 1 (1) before each test administration, the school test coordinator shall accurately count and distribute test

2 materials, and
- 3 (2) immediately after each test administration, the school test coordinator shall collect, count, and return

4 all test materials to the secure, locked storage facility establishes any needed school policies and

5 procedures to assure all eligible students are tested fairly;
- 6 (3) identifies and trains personnel, proctors, and backup personnel for test administrations; and

7 (4) encourages a positive atmosphere for testing.
- 8 (j) Test administrators shall be school personnel who have professional training in education and the state-testing

9 program.
- 10 (k) Teachers shall provide instruction that meets or exceeds the state-adopted curriculum standards to meet the needs

11 of the specific students in the class.
- 12 (1) Teachers may help students improve test-taking skills by:

13 (2) helping students become familiar with test formats using curricular content;

14 (3) teaching students test-taking strategies and providing practice sessions;

15 (4) helping students learn ways of preparing to take tests; and

16 (5) using resource materials such as test questions from test item banks and linking documents in

17 instruction and test preparation.
- 18 (l) With respect to test administration, the superintendent/charter school director or superintendent's/charter school

19 director's designee shall:
- 20 (1) assure each school establishes procedures to ensure all test administrators comply with test publisher

21 guidelines;

22 (2) inform the local board of education of any breach of this code of ethics; and

23 (3) inform school system (LEA) test coordinators and principals of their responsibilities.
- 24 (m) The school test coordinator shall:
- 25 (1) assure school personnel know the content of state and local testing policies;

26 (2) implement the school system and local testing policies and procedures to assure all eligible students

27 are tested fairly;

28 (3) ensure trained proctors are assigned to test administrations by the principal; and

29 (4) ensure all testing irregularities are reported to the school system (LEA) test coordinator.
- 30 (n) Test administrators shall:
- 31 (1) administer tests according to the directions in the assessment guide and any subsequent updates

32 developed by the test publisher;

33 (2) administer tests to all eligible students;

34 (3) report all testing irregularities to the school test coordinator; and

35 (4) provide a positive test-taking environment.
- 36 (o) Proctors shall serve as additional monitors to help the test administrator assure that testing occurs fairly.
- 37 (p) Scoring. The school system test coordinator shall:

- (1) ensure each test is scored according to the procedures and guidelines defined for the test by the test publisher;
 - (2) maintain quality control during the entire scoring process, which consists of handling and editing documents, scanning answer documents, and producing electronic files and reports. Quality control shall address at a minimum accuracy and scoring consistency.
 - (3) maintain security of tests and data files at all times, including:
 - (A) protecting the confidentiality of students at all times when publicizing test results; and
 - (B) maintaining test security of answer keys and item-specific scoring rubrics.
- (q) Analysis and reporting. Educators shall use test scores appropriately. This means that the educator recognizes that a test score is only one piece of information and must be interpreted together with other scores and indicators. Test data help educators understand educational patterns and practices. The superintendent shall ensure that school personnel analyze and report test data ethically and within the limitations described in this paragraph.
- (1) Educators shall maintain the confidentiality of individual students. Publicizing test scores or any written material containing personally identifiable information from the student's educational records shall not be disseminated or otherwise made available to the public by a member of the State Board of Education, any employee of the State Board of Education, the State Superintendent of Public Instruction, any employee of the North Carolina Department of Public Instruction, any member of a local board of education, any employee of a local board of education, or any other person, except as permitted under the provisions of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g.
 - (2) Educators shall release test scores to students, parents, legal guardians, teachers, and the media with interpretive materials as needed.
 - (3) Staff development relating to testing must enable school personnel to respond knowledgeably to questions related to testing, including the tests, scores, scoring procedures, and other interpretive materials.
 - (4) Items and associated materials on a secure test shall not be in the public domain. Only items that are within the public domain may be used for item analysis.
 - (5) Data analysis of test scores for decision-making purposes shall be based upon:
 - (A) disaggregation of data based upon student demographics and other collected variables;
 - (B) examination of grading practices in relation to test scores; and
 - (C) examination of growth trends and goal summary reports for state-mandated tests.
- (r) Unethical testing practices include, but are not limited to, the following practices:
- (1) encouraging students to be absent the day of testing;
 - (2) encouraging students not to do their best;
 - (3) using secure test items or modified secure test items for instruction;
 - (4) changing student responses at any time;
 - (5) interpreting, explaining, or paraphrasing the test directions or the test items;

1 (6) classifying students solely for the purpose of avoiding state testing;

2 (7) not testing all eligible students;

3 (8) failing to provide required accommodations during testing;

4 (9) modifying scoring programs including answer keys, equating files, and lookup tables;

5 (10) modifying student records solely for the purpose of raising test scores;

6 (11) using a single test score to make individual decisions; and

7 (12) misleading the public concerning the results and interpretations of test data.

8 (s) In the event of a violation of this Rule, the State Board of Education may, in accordance with the contested case
9 provisions of Chapter 150B of the General Statutes, impose any one or more of the following sanctions:

10 (1) withhold any applicable monetary incentive awards;

11 (2) file a civil action against the person or persons responsible for the violation for copyright
12 infringement or for any other available cause of action;

13 (3) seek criminal prosecution of the person or persons responsible for the violation; and

14 (4) in accordance with the provisions of 16 NCAC 6C .0312, suspend or revoke the professional license
15 of the person or persons responsible for the violation.

16 History Note: Authority G.S. 115C-12(9); 115C-174.11; 115C-174.12;

17 Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);

18 Emergency Rule Eff. August 20, 2019.

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 06E .0204

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection for lack of clarity, necessity, and statutory authority. Staff recommends objection for lack of clarity because this Rule conflicts with requirements in 16 NCAC 06E .0202, a permanent rule last amended in 2000. The existing permanent Rule is attached, and conflicting portions are annotated. This Rule is also unclear because the provisions of the waiver allowed in Paragraph (h) are tied to unclear factors such as "undue hardship."

Staff recommends objection for necessity because this Rule repeats portions 16 NCAC 06E .0202. The repetitive portions of the Rule are noted in the attached annotated version.

Staff also recommends objection for lack of statutory authority because the State Board has not provided authority to regulate the athletics of charter schools unless a provision to do so is included in the school's charter. Generally, charter schools are exempt from statutes and rules applicable to local boards of education. See G.S. 115C-218.10. The State Board's authority to regulate participation in athletics applies to "interscholastic athletic activities conducted by local boards of education." As written, this proposed rule applies to all charter schools. If an exception applies allowing the State Board to regulate charter school athletics, staff has not been able to find it and it was not provided by the agency in the history note. Therefore, staff recommends objection for lack of clarity, necessity, and statutory authority.

Ashley Snyder
Commission Counsel

§ 115C-218.10. Charter school exemptions.

Except as provided in this Article and pursuant to the provisions of its charter, a charter school is exempt from statutes and rules applicable to a local board of education or local school administrative unit.

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

- (23) Power to Adopt Eligibility Rules for Interscholastic Athletic Competition. - The State Board of Education shall adopt rules governing interscholastic athletic activities conducted by local boards of education, including eligibility for student participation. With regard to middle schools and high schools, the rules shall provide for the following: ...

Annotated version of existing permanent Rule 16 NCAC 06E .0202. Staff notes in red refer to Paragraphs in the proposed Rule. Highlighted portions conflict with the proposed Rule.

16 NCAC 06E .0202 INTERSCHOLASTIC ATHLETICS

(a) Only students in grades 7-12 may participate in interscholastic athletic competition. In order to qualify for public school participation, a student must meet the following requirements: Paragraph (a) says grades 6-12 may participate; exempts grade 6 for football. The existing Rule does not regulate charter schools.

- (1) The student must meet the residence criteria of G.S. 115C-366(a). The student may participate only at the school to which the student is assigned by the LEA, or, if over the age requirements, the school to which the student would be assigned at the next higher grade level. Repeats (a)(1).
- (2) The student must meet age requirements at each grade level to participate. The principal must have evidence of the legal birth date of the student. A student who is ineligible to participate at one grade level due to age is eligible to participate at the next higher grade level only. However, no student may participate at the high school level for a period lasting more than eight consecutive semesters, beginning with the student's first entry into grade nine or participation on a high school team, whichever occurs first. Repeats (a)(2).
 - (A) A student is eligible to participate in high school athletic contests during a school year if the student does not reach the 19th birthday on or before October 16 of that school year.
 - (B) A student shall not participate on a ninth grade junior high school team if the student becomes 16 years of age on or before October 16 of that school year.
 - (C) A student shall not participate on a seventh or eighth grade team if the student becomes 15 years of age on or before October 16 of that school year. Proposed rule uses August 31 as the cut-off date instead of October 16.
- (3) In grades 9-12, the student must pass at least 75% of the maximum of possible courses each semester and meet promotion standards established by the LEA. In grades 7 and 8, the student must pass at least one less course than the number of required core courses each semester and meet promotion standards established by the LEA. Regardless of the school organization pattern, a student who is promoted from the eighth grade to the ninth grade automatically meets the courses passed requirement for the first semester of the ninth grade. Proposed rule requires students in grades 9-12 to pass "at least five courses." Remainder of this Subparagraph repeats Paragraph (c).
- (4) The student must receive a medical examination each year (365 days) by a duly licensed physician, nurse practitioner, or physician assistant, subject to the provisions of G.S. 90-9, G.S. 90-18.1, and G.S. 90-18.2. Repeats (d).
- (5) The student may not participate after any of the following: Repeats (e).
 - (A) graduation;
 - (B) becoming eligible to graduate;
 - (C) signing a professional athletic contract;
 - (D) receiving remuneration as a participant in an athletic contest; or

- (E) participating on an all-star team or in an all-star game that is not sanctioned by the association of which the student's school is a member. The student is ineligible only for the specific sport involved.
- (b) Each principal of a school which participates in interscholastic athletics must certify a list of eligible students for each sport. **Repeats (f).**
- (c) Any student-athlete, coach or school official in grades 7-12 who is ejected from any athletic contest shall be penalized as follows: **Repeats (g). Proposed Rule refers to grades 6-12 instead of 7-12.**
- (1) for the first offense, the person shall be reprimanded and suspended for the next game at that level of play (varsity or junior varsity) and for any intervening games at either level;
 - (2) for a second offense, the person shall be placed on probation and suspended for the next two games at that level of play (varsity or junior varsity) and for any intervening games at either level.
 - (3) for a third offense, the person shall be suspended for one calendar year.
 - (4) a coach who is suspended at any level of grades 7-12 (middle school, junior high or high school) may not coach in any other grade level in grades 7-12 during the period of suspension.
 - (5) penalties are cumulative from sport to sport and from sport season to sport season. If no member of the school's coaching staff is present to assume an ejected coach's duties, the contest shall be terminated by a forfeit.
- (d) LEAs may allow their schools to belong to the North Carolina High School Athletic Association (NCHSAA), which has established as a minimum the rules adopted by the SBE. The NCHSAA may waive any eligibility requirement contained in this Rule, except the age requirement, if it finds that the rule fails to accomplish its purpose or it works an undue hardship when applied to a particular student. The NCHSAA may enforce penalties for the violation of this Rule at the high school level. **Repeats (h).**
- (e) The LEA which has jurisdiction over the school may impose additional penalties. LEAs or conferences may adopt and impose penalties at the middle and junior high school levels. **Repeats (i).**

History Note: Filed as a Temporary Amendment Eff. December 27, 1994 for a period of 180 days or until the permanent rule becomes effective, whichever is sooner;
Codifier of Rules Objected to the Findings of Need for the Temporary Rule Eff. December 9, 1994;
Authority G.S. 115C-47(4);
Eff. July 1, 1986;
Amended Eff. June 1, 1996; July 1, 1995; July 1, 1994; July 1, 1990;
Amended Eff. August 1, 2000.

16 NCAC 06E .0204 is proposed for adoption as follows:

16 NCAC 06E .0204 INTERSCHOLASTIC ATHLETICS

(a) Local Education Agencies (LEAs) and charter school boards are authorized to determine whether and to what extent students in grades 6-12 may participate in interscholastic athletics; provided, however, that students in sixth grade are not eligible to participate in football.

(b) In order to qualify for participation in public school athletics, a student shall meet the following requirements:

(1) The student shall meet the residence criteria of G.S. 115C-366(a). The student shall participate only at the school to which the student is assigned by the LEA or, if over the age requirements, the school to which the student would be assigned at the next higher grade level.

(2) The student shall meet age requirements at each grade level to participate. The principal shall have evidence of the legal birth date of the student. A student who is ineligible to participate at one grade level due to age is eligible to participate at the next higher grade level only. However, no student shall participate at the high school level for more than eight consecutive semesters, beginning with the student's first entry into grade nine or participation on a high school team, whichever occurs first. No student is eligible to participate at the middle school level for a period lasting longer than six consecutive semesters, beginning with the student's entry into sixth grade.

(A) A student is eligible to participate in high school athletic contests during a school year if the student does not reach the 19th birthday on or before August 31 of that school year.

(B) A student shall not participate on a ninth grade junior high school team if the student becomes 16 years of age on or before August 31 of that school year.

(C) A student shall not participate on a sixth, seventh or eighth grade team if the student becomes 15 years of age on or before August 31 of that school year.

(c) In grades 9-12, the student shall pass at least five courses (or the equivalent for non-traditional school schedules) each semester to be eligible anytime during the present semester and meet promotion standards established by the LEA/Charter School. In grades 6, 7 and 8, the student shall pass at least one less course than the number of required core courses each semester and meet promotion standards established by the LEA/Charter School. Regardless of the school organization pattern, a student who is promoted from the eighth grade to the ninth grade automatically meets the courses passed requirement for the first semester of the ninth grade. Regardless of the school organization pattern, a student who is promoted from the fifth grade to the sixth grade automatically meets the courses passed requirement for the first semester of the sixth grade.

(d) The student shall receive a medical examination each year by a duly licensed physician, nurse practitioner, or physician assistant, subject to the provisions of G.S. 90-9, 90-18.1, and 90-18.2.

(e) The student shall not participate in interscholastic athletics after any of the following:

(1) graduation;

(2) becoming eligible to graduate;

(3) signing a professional athletic contract;

(4) receiving remuneration as a participant in an athletic contest; or

- 1 (5) participating on an all-star team or in an all-star game that is not sanctioned by the association of
2 which the student's school is a member. The student is ineligible only for the specific sport involved.
- 3 (f) Each principal of a school that participates in interscholastic athletics shall certify a list of eligible students for each
4 sport.
- 5 (g) Any student-athlete, coach or school official in grades 6-12 who is ejected from any athletic contest shall at least
6 be penalized as follows:
- 7 (1) for the first offense, the person shall be reprimanded and suspended for the next game at that level
8 of play (varsity or junior varsity) and for any intervening games at either level;
- 9 (2) for a second offense, the person shall be placed on probation and suspended for the next two games
10 at that level of play (varsity or junior varsity) and for any intervening games at either level;
- 11 (3) for a third offense, the person shall be suspended for one calendar year;
- 12 (4) a coach who is suspended at any level of grades 6-12 (middle school, junior high or high school)
13 may not coach in any other grade level in grades 6-12 during the period of suspension.
- 14 (5) Penalties are cumulative from sport to sport and from sport season to sport season. If no member of
15 the school's coaching staff is present to assume an ejected coach's duties, the contest shall be
16 terminated by a forfeit.
- 17 (h) LEAs and charter schools may allow their schools to belong to the North Carolina High School Athletic
18 Association (NCHSAA), which has established as a minimum the rules adopted by the SBE. The NCHSAA may
19 waive any eligibility requirement contained in this Rule, except the age requirement, if it finds that the rule fails to
20 accomplish its purpose, or it works an undue hardship when applied to a particular student. The NCHSAA may enforce
21 penalties for the violation of this Rule at the high school level.
- 22 (i) The LEA or Charter School that has jurisdiction over the high school may impose additional penalties. LEAs or
23 charter schools or conferences may adopt and impose penalties at the middle and junior high school levels.

24
25 *History Note: Authority G.S. 115C-12(12); 115C-12(23);*

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

27 *Emergency Rule Eff. August 20, 2019.*
28

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 06E .0206

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection for lack of necessity and clarity. Portions of this Rule are unnecessary because they repeat portions of 16 NCAC 06E .0203, a permanent Rule last amended in 2002. Staff recommends objection for lack of clarity because the rule differs from requirements set in Rule .0203.

Repetitive and differing provisions are noted in the attached annotated version of .0203.

Ashley Snyder
Commission Counsel

Annotated version of existing permanent Rule 16 NCAC 06E .0203. Staff notes in red refer to Paragraphs in the proposed Rule. Highlighted portions differ from the proposed Rule.

16 NCAC 06E .0203 ATHLETIC INJURY MANAGEMENT

(a) Each LEA must designate for each high school within its jurisdiction either a licensed athletic trainer who is qualified pursuant to G.S. 90, Article 34 or a first responder. These persons may be employed on a full-time or part-time basis or may serve as a volunteer. **Repeats Paragraph (a)**

(b) A first responder must complete and maintain certification or be in the process of completing courses in the following:

- (1) cardio-pulmonary resuscitation as certified by an organization such as the American Red Cross or the American Heart Association; **Repeats (b)(1)**
- (2) first aid as certified by an organization such as the American Red Cross or the American Heart Association; and **Repeats (b)(2)**
- (3) injury prevention and management as certified by an organization such as the National Athletic Trainers Association, the North Carolina Athletic Trainers Association, or the North Carolina High School Athletic Association. **Repeats (b)(4)**

Note: The contents of (b)(3) are not included in the existing rule.

In addition, each first responder must complete **20 hours** in staff development each school year. **Compare to (b)(5) which requires 10 hours.**

(c) The licensed athletic trainer or first responder may not have coaching responsibilities during the season in which the person is working as a licensed athletic trainer or first responder. A licensed athletic trainer or first responder must attend all football practices and games, unless excused by the superintendent due to emergency. The LEA may require a licensed athletic trainer or first responder to attend practices or games that involve other sports. **Repeats (c), (d), and (e).**

The contents of the last sentence are proposed to be deleted in the new Rule.

*History Note: Authority G.S. 115C-12(12); N.C. Constitution, Article IX, Sec. 5;
Eff. July 1, 1986;
Codifier determined that findings did not meet criteria for temporary rule on December 10, 2001;
Temporary Amendment Eff. December 31, 2001;
Amended Eff. September 30, 2002 (Executive Order No. 33).*

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06E .0206

DEADLINE FOR RECEIPT: July 10, 2020

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Please compare this Rule with Rule .0203 of this Section. Please avoid repetition.

In (a), please change "must" to "shall."

At line 5, is "first responder" defined?

In (b)(5), are you requiring 10 hours total or 10 hours in each type of training listed?

In (b)(5), please add a comma after "recognition" or replace the comma with an "and" after "first aid" if "injury recognition and prevention" is one topic.

In (c), line 18, do you mean "may" or "shall?"

At line 21, please define "emergency." Or, is the definition of "emergency" up to each local superintendent?

In (e), please capitalize "Rule."

Why is (f) necessary? Specifically, what are you requiring LEAs to do?

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: June 29, 2020

16 NCAC 06E .0206 is proposed for adoption as follows:

16 NCAC 06E .0206 ATHLETIC TRAINERS

(a) Each Local Education Agency (LEA) must designate for each high school within its jurisdiction either a licensed athletic trainer who is qualified pursuant to Article 34 of Chapter 90 of the General Statutes of North Carolina or a first responder. These persons may be employed on a full-time or part-time basis or may serve as a volunteer.

(b) If not a licensed athletic trainer, a first responder shall:

(1) have completed and continue to maintain certification in cardiopulmonary resuscitation as certified by an organization such as the American Red Cross or the American Heart Association;

(2) have completed and continue to maintain certification in first aid as certified by an organization such as the American Red Cross or the American Heart Association;

(3) have completed and continue to maintain training in concussion management as offered by an organization such as the National Federation of State High School Associations (NFHS).

(4) have completed and continue to maintain continuing education in injury prevention and management as offered by an organization such as the National Federation of State High School Associations (NFHS); and

(5) complete 10 hours of staff development each school year specific to first aid, injury recognition and prevention. The 10 hours may include hours necessary for recertification/renewals.

(c) The licensed athletic trainer or first responder may not have concurrent coaching responsibilities during the time in which the person is working as a licensed athletic trainer or first responder.

(d) A licensed athletic trainer or first responder shall attend all football practices and games, unless excused by the superintendent due to emergency.

(e) Each LEA shall monitor school athletic trainer's or the first responder's compliance with this rule.

(f) LEAs shall work toward having a licensed athletic trainer or first responder available for all school practices and games of all sports at both the high school and middle school.

History Note: Authority G.S. 115C-12(12); 115C-12(23).

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

Emergency Rule Eff. August 20, 2019.

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Education

RULE CITATION: All Rules; 16 NCAC 06G

DEADLINE FOR RECEIPT: July 10, 2020

PLEASE NOTE: *This request may extend to several pages. Please be sure you have reached the end of the document.*

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Please format your introductory statements for publication in the Code as shown here: <https://files.nc.gov/ncoah/documents/Rules/Examples---Permanent-Adoption-For-Publication-In-The-Ncac.pdf>. For example, your introductory statement for 06B .0111 will read: "16 NCAC 06B .0111 is adopted as published in 34:13 NCR 1211 as follows." If you make changes in response to technical change requests, it will read "16 NCAC 06B .0111 is adopted with changes as published in 34:13 NCR 1211 as follows:"

Please skip one line between the introductory statement and the name of the rule. See 26 NCAC 02C .0108.

In your history notes, why is it necessary to say "Interim rule status conferred..."

In your history notes, please add a proposed effective date. The earliest these rules can be effective is August 1, 2020.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Ashley Snyder
Commission Counsel
Date submitted to agency: June 29, 2020

RRC STAFF OPINION

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

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06G .0508

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection for failure to comply with the APA and numerous instances of ambiguity that make the Rule as a whole difficult to understand.

Staff recommends objection to Subparagraph (a)(1) for referring to a fee established outside the rulemaking process. The definition of a "rule" in 150B-2(8a) specifically includes the establishment of a fee, meaning setting the dollar amount in the Rule. Additionally, 115C-218.1(c) requires the State Board to adopt the application fee "in accordance with Article 2A of Chapter 150B." Since the fee amount is established outside of rule, staff recommends objection to Subparagraph (a)(1) for failure to comply with the APA and ambiguity since the amount of the fee is unknown.

Staff recommends objection to Paragraph (a) for failure to comply with the APA and ambiguity. Subparagraph (a)(1) states, "Prior to each application round, the State Board of Education shall approve the application process, timeline, and non-refundable fee." Establishing the application and timeline outside of rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this Rule would allow the agency to change the application process and timeline before each application round, changing the substance of this Rule without public notice, comment, or review by the Rules Review Commission. Subparagraphs (a)(2)-(4) refer back to the timeline and "application instructions" established outside the rulemaking process in (a)(1). Since the application process and timeline are established outside of rule, the requirements in Paragraph (a) are unclear and staff recommends objection for failure to comply with the APA and ambiguity.

Parts (b)(1)(C) and (D) set application requirements that are ambiguous. It is unclear how applications are evaluated or what factors may be considered to determine whether an application “contains viable governance, business, and education plans.” It is also unclear what “other requirements” are required by the agency. Therefore, staff recommends objection to Parts (b)(1)(C) and (D) for ambiguity.

Staff also recommends objection to Paragraph (c) for ambiguity for use of the following terms or phrases, which are undefined or unclear as written: “capability to provide comprehensive learning experiences” in (c)(2); “promotes innovation” in (c)(3)(B); “large,” “diverse” and “locally-based” in (c)(3)(D); “accurately” in (c)(3)(F); and “diverse learning environment” in (c)(3)(I). Staff is also unsure how Paragraph (c) interacts with G.S. 115C-218.5, which governs the State Board’s final approval of applications for charter schools. Therefore, staff recommends objection to Paragraph (c) for ambiguity.

§ 150B-2. Definitions.

As used in this Chapter,

- (8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. **The term includes the establishment of a fee and the amendment or repeal of a prior rule.** The term does not include the following:

§ 115C-218.1. Eligible applicants; contents of applications; submission of applications for approval.

(c) The State Board shall establish reasonable fees of no less than five hundred dollars (\$500.00) and no more than one thousand dollars (\$1,000) for initial and renewal charter applications, in accordance with Article 2A of Chapter 150B of the General Statutes. No application fee shall be refunded in the event the application is rejected or the charter is revoked.

§ 115C-218.5. Final approval of applications for charter schools.

- (a) The State Board may grant final approval of an application if it finds the following:
- (1) The application meets the requirements set out in this Article and such other requirements as may be adopted by the State Board of Education.
 - (2) The applicant has the ability to operate the school and would be likely to operate the school in an educationally and economically sound manner.
 - (3) Granting the application would achieve one or more of the purposes set out in G.S. 115C-218.

In reviewing applications for the establishment of charter schools within a local school administrative unit, the State Board is encouraged to give preference to applications that demonstrate the capability to provide comprehensive learning experiences to students identified by the applicants as at risk of academic failure.

(b) The State Board shall make final decisions on the approval or denial of applications by August 15 of a calendar year on all applications it receives prior to a date established by the Office of Charter Schools for receipt of applications in that application cycle. The State Board may make the final decision for approval contingent upon the successful completion of a planning period prior to enrollment of students.

(c) The State Board of Education may authorize a school before the applicant has secured its space, equipment, facilities, and personnel if the applicant indicates the authority is necessary for it to raise working capital. The State Board shall not allocate any funds to the school until the school has obtained space.

(d) The State Board of Education may grant the initial charter for a period not to exceed 10 years.

(e), (f) Repealed by Session Laws 2016-79, s. 1.1, effective June 30, 2016, and applicable beginning with the 2016-2017 school year.

16 NCAC 06G .0508 is proposed for adoption as follows:

16 NCAC 06G .0508 CHARTER SCHOOLS APPLICATION AND REVIEW PROCESS

(a) Deadline for Filing Charter School Applications.

- (1) Prior to each application round, the State Board of Education shall approve the application process, timeline, and non-refundable fee.
- (2) Applications for charters, and the nonrefundable fee, must be received by the Office of Charter Schools no later than the date and time specified for the charter application round that year.
- (3) Applications and fees received after the deadline specified by the Office of Charter Schools will not be considered, and any affected applicant groups will be notified in writing.
- (4) Rejection of Incomplete Applications. The Charter School Advisory Board and Office of Charter Schools shall review all timely applications and shall reject all incomplete applications. In order to be deemed complete, all sections of the application must be completed as prescribed in the "Application Instructions" and G.S. 115C-218.2.

(b) Charter School Advisory Board Responsibilities

- (1) The Charter School Advisory Board, with the assistance of the Office of Charter Schools, shall review each complete application and determine whether the application meets the requirements of General Statute 115C-218.1
 - (A) Meets all the requirements of the Charter School Act, G.S. 115C-218 et seq.;
 - (B) Would achieve one or more of the purposes set forth in G.S. 115C-218(a);
 - (C) Contains viable governance, business, and education plans; and
 - (D) Satisfies any other requirements adopted by the SBE.
- (2) The Charter Schools Advisory Board will present its recommendation on each charter school application to the SBE by the May SBE meeting for discussion.

(c) SBE Review of Applications and Award of Charters

- (1) The SBE may request information from applicants, their officers, agents or employees or other persons having information regarding the charter application reviewed by the Charter School Advisory Board when the SBE seeks clarification or greater detail regarding an application
- (2) When awarding charters, the SBE may give priority consideration to applications that demonstrate the capability to provide comprehensive learning experiences to students identified as at risk of academic failure.
- (3) When determining whether to award a charter, the SBE may consider any factors including the extent to which the application:
 - (A) Reflects the applicant's commitment to the purposes of the charter school law stated in G. S. 115C-218(a);
 - (B) Promotes innovation through charter schools;
 - (C) Reflects the applicant's planning, research and understanding of educational issues, including budgeting, financing and accounting;

- 1 (D) Demonstrates the applicant’s commitment to governance by participation of a large,
2 diverse and locally-based board;
3 (E) Contains articles of incorporation and by-laws;
4 (F) Contains a budget that accurately reflects anticipated revenues and costs; including costs
5 associated with maintenance of the school facilities and projected growth;
6 (G) Describes student admission requirements and lottery system that comply with G.S. 115C;
7 (H) Describes a plan for acquisition and utilization of a facility;
8 (I) Describes a five (5) year marketing plan that promotes a diverse learning environment; and
9 (J) Any other factor that it determines will promote the purposes of the Charter School Act,
10 G.S. 115C-218 et seq.

11
12 History Note: Authority G.S. 115C-12; 115C-218, 115C-218.1; 115C-218.5;

13 Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);

14 Emergency Rule Eff. August 20, 2019.
15