



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

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

Julian Mann, III, Director
Chief Administrative Law Judge

Fred G. Morrison, Jr.
Senior Administrative Law Judge

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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.

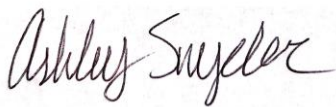
Additionally, the Commission objected to Paragraph (k) for lack of clarity and failure to comply with the APA. The Rule requires teachers to provide instruction that “meets or exceeds the state-adopted curriculum standards.” The curriculum standards appear to be part of the “Standard Course of Study 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 signature is written in dark ink on a light-colored background.

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 06D .0309

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- X ☐ Object, based on:
 - X 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 to this Rule for lack of necessity, clarity, and statutory authority. The proposed Rule is unnecessary and unclear because it repeats or conflicts with 16 NCAC 06D .0303, an existing permanent rule last amended in 1999. The existing permanent Rule is attached with annotations detailing repetitive and conflicting provisions.

Staff further recommends objection 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.

In requests for technical changes, staff asked the agency to provide statutory authority for Paragraphs (d), (j), and (k). The agency has not provided, and staff has not been able to locate statutory authority for these Paragraphs. Therefore, staff recommends objection to Paragraphs (d), (j), and (k) for lack of statutory authority.

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. Highlighted portions Conflict with the proposed Rule.

16 NCAC 06D .0305 END-OF-COURSE ASSESSMENTS

- (a) The LEA shall include each student's end-of-course assessment results in the student's permanent records and high school transcript. **Repeats (b).**
- (b) The LEA shall give each end-of-course assessment within the final five days of the course on a block schedule and the final 10 days of the course on a traditional schedule. **Repeats first sentence of (d).**
- (c) LEAs shall use results from all operational end-of-course assessments as at least 25% of the student's final grade for each respective course. LEAs shall adopt policies regarding the use of end-of-course assessment results in assigning final grades. **Paragraph (d) sets minimum at 20%.**
- (d) Students who are enrolled for credit in courses in which end-of-course assessments are required shall take the appropriate end-of-course assessment. **Repeats (e).**
- (e) Students who are exempt from final exams by local board of education policy shall not be exempt from end-of-course assessments. **Repeats (f).**
- (f) Each student shall take the appropriate end-of-course assessment the first time the student takes the course even if the course is an honors or advanced placement course. **Repeats (g).**
- (g) Students shall take the appropriate end-of-course assessment at the end of the course or an alternate assessment regardless of the grade level in which the course is offered. **Repeats (h), but (h) removes mention of "alternate assessments."**
- (h) Students who are identified as failing a course for which an end-of-course assessment is required shall take the appropriate end-of-course assessment. **Repeats (i).**
- (i) Students may drop a course with an end-of-course assessment within the first 10 days of a block schedule or within the first 20 days of a traditional schedule. **Repeats first sentence of (j).**
- (j) Students who are enrolled in the Integrated Math sequence shall take the Algebra I, Geometry, and Algebra II end-of-course assessments. The LEA shall administer these assessments as follows: **Contents of this Paragraph not contained in proposed Rule.**
- (1) The Algebra I end-of-course assessment shall be administered during the final five days of the Integrated Math II course if taken on a block schedule or the final 10 days if taken on a traditional schedule.
 - (2) The Geometry end-of-course assessment shall be administered during the Integrated Math III course on a locally established test date.
 - (3) The Algebra II end-of-course assessment shall be administered during the final five days of the Integrated Math III course if taken on a block schedule or the final 10 days if taken on a traditional schedule.

History Note: *Authority G.S. 115C-12(9)c.; 115C-81(b)(4);
Eff. November 1, 1997;
Amended Eff. October 1, 2006; January 2, 2006; April 1, 2002; September 1, 2001; August 1, 2000;
August 1, 1999.*

REQUEST FOR TECHNICAL CHANGE

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0309

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 .0305 of this Section. Are parts of this Rule unnecessary?

Throughout this Rule, please consider removing the use of explanatory parentheticals and incorporate any needed language into the text of the sentences.

At line 3, define "eligible students." Which students are eligible and how is this determination made?

At line 3, what are "end-of-course assessments?" Please be specific. Based on the list in .0313, are you only referring to the exams listed in (a)(4)-(7)?

At line 4, what "accommodations" or "alternative assessments" are you referring to?

At line 4, please capitalize "Rule."

At line 9, what is the "designated testing window?" Is it the timeline established in 115C-174.12(a)(4)?

In (d), what are "operational" EOC assessments?

Where is your statutory authority for the 20% requirement in (d)?

Please compare Paragraph (d) and .0305(c).

In (d)(1), what is the "Occupational Course of Study Pathway?"

In (d)(1), do you need an "and" before "English Learner?"

Why is there an "and" at the end of (d)(1)? Should (d)(2) be part of (d)(1)?

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

Please review the list in (d)(1)-(3). Are (d)(2) and (3) part of the list? Please review and consider making this a list of exceptions as introduced at line 11 and incorporating the text of (d)(3) into (d).

At line 14, is it necessary to say "and beyond?" Also, is it still necessary to say "effective with the 2018-19 school year?"

At line 15, please delete or define "immediately."

At line 16, what do you mean by "due to standard setting?"

In (e), which courses require EOC assessments? At line 20, define "appropriate."

In (f), what is considered a "final exam" vs. an "EOC assessment?" Is this difference explained in statute or rule?

In (g)-(k) please delete or define "appropriate" when referring to the "appropriate EOC assessment."

Where is your statutory authority for (j)?

Where is your statutory authority for (k)?

In (k), I take it this means some courses share the same EOC assessment?

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.

16 NCAC 06D .0309 is proposed for adoption as follows:

16 NCAC 06D .0309 REQUIREMENTS REGARDING END-OF-COURSE ASSESSMENTS

(a) All eligible students shall participate in the administration of end-of-course assessments (standard administrations with or without accommodations or an alternate assessment). This rule shall apply to all public schools, including traditional, charter, and regional schools.

(b) Public schools shall include each student's end-of-course (EOC) assessment results in the student's permanent records and high school transcript.

(c) Public schools shall administer EOC assessments within the North Carolina Department of Public Instruction's designated testing window.

(d) Public schools shall use results from all operational EOC assessments as a minimum of twenty percent (20%) of the student's final grade for each respective course with the exception of:

(1) students following the Occupational Course of Study Pathway; English Learner (EL) students in their first year in a U.S. school; and

(2) effective with the 2018–19 school year and beyond, all students enrolled in a course during the initial implementation year of the new assessment for that course where scores are not immediately available due to standard setting.

(3) For these exceptions, public schools shall adopt policies regarding the use of EOC assessment results in assigning final grades.

(e) Public school students who are enrolled for credit in courses in which EOC assessments are required shall take the appropriate EOC assessment at the completion of the course.

(f) Public school students who are exempt from final exams by local board of education policy shall not be exempt from EOC assessments.

(g) Public school students shall take the appropriate EOC assessment the first time the student takes the course requiring the assessment.

(h) Public school students shall take the appropriate EOC assessment at the end of the course regardless of the grade level in which the course is offered.

(i) Public school students who are identified as failing a course for which an EOC assessment is required shall take the appropriate EOC assessment.

(j) Public school students may drop a course with a required EOC assessment within the first 10 days of enrollment in a semester block schedule or within the first 20 days of enrollment in a yearlong traditional schedule. Students who are enrolled for credit after the 10/20 days, regardless of course delivery (e.g., traditional classroom, NC Virtual Public School, vendor-based online) shall not drop a course with a required EOC assessment and shall participate in the appropriate EOC assessment at the completion of the course.

(k) Public school students enrolled in courses requiring the administration of the EOC assessment who previously obtained a proficient score on the appropriate EOC assessment may use the proficient score as a minimum of 20% of their final course grade or they may elect to retake the appropriate EOC assessment at the completion of the course and use the most recent score for the final grade calculation.

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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.