

**RULES REVIEW COMMISSION MEETING  
MINUTES  
September 17, 2020**

The Rules Review Commission met on Thursday, September 17, 2020 in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina, and via WebEx. The Commissioners held a WebEx meeting to ensure compliance with Executive Orders limiting mass gatherings, and to encourage social distancing. The meeting was conducted in accordance with the provisions of G.S. 166A-19.24.

Commissioners Jeff Hyde and Tommy Tucker were present in the Commission Room, and Commissioners present via teleconference were Andrew Atkins, Bobby Bryan, Anna Baird Choi, Margaret Currin, Jeanette Doran, Garth Dunklin, Randy Overton, and Paul Powell.

Staff members present were Commission Counsel Ashley Snyder and Amanda Reeder; and Julie Brincefield and Alex Burgos. Commission Counsel Amber Cronk May and Karlene Turrentine were present via WebEx.

The meeting was called to order at 9:01 a.m. with Chairman Hyde presiding.

The Chair read the notice required by G.S. 138A-15(e) and reminded the Commission members that they have a duty to avoid conflicts of interest and the appearance of conflicts of interest.

**APPROVAL OF MINUTES**

The Chair asked for any discussion, comments, or corrections concerning the minutes of the August 20, 2020 meeting. There were none and the minutes were approved as distributed.

Upon the call of the Chair, the minutes were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

The Chair notified the Commissioners that the following items on the agenda would be taken up out of order at the end of the agenda: Follow-up matters for the State Board of Education Tabs F,G,H, and I.

**FOLLOW UP MATTERS**

**Crime Victims Compensation Commission**

14B NCAC 09 .0303 and .0304 - The agency is addressing the objections from the June meeting. No action was required by the Commission.

**Private Protective Services Board**

14B NCAC 16 .1001, .1002, .1003, .1207, .1304, and .1404 - Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

**Environmental Management Commission**

15A NCAC 02D .0530 - Upon the call of the Chair, the rule was approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

15A NCAC 02D .0403, .0501, .0502, .0503, .0504, .0506, .0507, .0508, .0509, .0510, .0511, .0512, .0513, .0514, .0515, .0516, .0517, .0519, .0521, .0524, .0527, .0528, .0529, .0531, .0532, .0533, .0534, .0535, .0536, .0537, .0538, .0539, .0541, .0542, .0543, .0544, and .0615 - The agency is

addressing the technical change requests from the August meeting. No action was required by the Commission.

#### **Environmental Management Commission**

15A NCAC 02D .0932, .0960, .1401, .1402, .1403, .1404, .1405, .1407, .1408, .1409, .1410, .1411, .1412, .1413, .1414, .1415, .1418, .1423, .1701, .1702, .1703, .1704, .1705, .1706, .1707, .1708, .1709, .1710, and .2615 - Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

15A NCAC 02D .0901, .0902, .0903, .0906, .0909, .0912, .0918, .0919, .0922, .0923, .0924, .0925, .0926, .0927, .0928, .0930, .0931, .0933, .0935, .0937, .0943, .0944, .0945, .0947, .0948, .0949, .0951, .0952, .0955, .0956, .0957, .0958, .0959, .0961, .0962, .0963, .0964, .0965, .0966, .0967, and .0968 - The agency is addressing the technical change requests from the August meeting. No action was required by the Commission.

#### **Environmental Management Commission**

15A NCAC 13B .0531, .0532, .0533, .0534, .0535, .0536, .0537, .0538, .0539, .0540, .0541, .0542, .0543, .0544, .0545, .0547, .1601, .1602, .1603, .1604, .1617, .1618, .1619, .1620, .1621, .1622, .1623, .1624, .1625, .1626, .1627, .1629, .1630, .1631, .1632, .1633, .1634, .1635, .1636, .1637, and .1680 - The agency is addressing the technical change requests from the August meeting. No action was required by the Commission.

#### **State Board of Education**

16 NCAC 06B .0111 - Upon the call of the Chair, the rule was approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

Upon the call of the Chair, the Commission objected to 16 NCAC 06B .0112, .0113, and .0114 by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

The Commission objected to 16 NCAC 06B .0112 for ambiguity. This Rule requires LEAs to purchase school buses “that meet the safety specifications listed in the request for bids for the statewide term contracts.” It is unclear to what the safety requirements are since they are not specified in the rule.

The Commission objected to 16 NCAC 06B .0113 for lack of statutory authority, clarity, and necessity. Licensure requirements for activity bus drivers are set in G.S. 20-218(a), making this Rule unnecessary.

Activity bus licensure requirements are explicitly governed by G.S. 20-218(a) under the authority of the DMV. The statutes provided in the history note allow the State Board of Education to regulate school buses and school bus drivers but make no mention of authority over activity buses. Activity buses are specifically referred to in other Education statutes. E.g. G.S. 115C-247; 115C-248; 115C-255. In DMV’s statutes, “school bus” and “school activity bus” are separate defined terms. No authority was provided for the State Board of Education to set licensure requirements for activity bus drivers.

The Commission also objected for lack of clarity because the term “school related activity” in Paragraphs (b) and (c) is not defined.

Additionally, the Commission objected to 16 NCAC 06B .0114 for lack of clarity and necessity. If the “vehicle inspection training and certification requirements” are “mandated by the Department of Public Instruction” and not the State Board of Education, it is unclear why this Rule is necessary. Further, it

is unclear what the “vehicle inspection training and certification requirements” are or where those requirements can be found. It seems the standards are set by DPI, but it is further unclear whether that authority has been delegated by the State Board. The agency did not respond to follow-up technical change requests for this Rule to provide clarity in advance of the Commission meeting.

#### **State Board of Education**

16 NCAC 06C .0334, .0335, .0336, .0337, .0338, .0339, .0340, .0341, .0342, .0344, .0345, .0346, .0349, .0350, .0351., .0352, .0353, .0354, .0357, .0358, .0359, .0360, .0361, .0362, .0363, .0364, .0365, .0366, .0367, .0369, .0370, .0371, .0372, .0373, .0374, .0375, .0376, .0378, .0379, .0380, .0381, .0382, .0383, .0384, .0385, .0386, .0387, .0388, .0389, .0390, .0391, .0392, .0393, .0394, .0395, .0396, and .0397 - Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

16 NCAC 06C .0343, .0347, .0348, .0355, .0356, .0368, .0377, and .0701 were withdrawn at the request of the agency. No action was required by the Commission.

#### **State Board of Education**

Prior to the review of the rules from the State Board of Education 06G, Chairman Hyde recused himself and did not participate in any discussion or vote concerning these Rules because he is a member of two North Carolina Charter School Boards and the rules pertain to charters.

The Commission considered Subchapters 06D, 06E, and 06G separately.

Upon the call of the Chair, the Commission objected to 16 NCAC 06D .0211, .0212, .0307, .0308, .0309, .0310, and .0311 by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

16 NCAC 06D .0313 was withdrawn at the request of the agency. No action was required by the Commission.

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 06D .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 06D .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 06D .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.

16 NCAC 06E .0204 and .0206 – The Commission objected to these Rules in August. The agency is in the process of repealing repetitive or conflicting existing permanent rules. No action was required of the Commission.

Upon the call of the Chair, the Commission objected to 16 NCAC 06E .0107 by roll-call vote, ayes - 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

The Commission objected to 16 NCAC 06E .0107 for failure to comply with the APA and ambiguity. In Paragraph (a), the rule requires the information listed in this Rule to be reported “in conformity with the State’s Uniform Education Reporting System (UERS).” The Commission is not aware of and the agency has not provided any authority exempting the UERS from the rulemaking process. 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 are also unclear since those requirements are not set in rule. Therefore, the Commission objected for failure to comply with the APA and ambiguity.

The Commission also objected on clarity grounds because the rule requires LEAs to report crimes and offenses identified by statute to the State Board of Education, but the statutes listed in (a)(4), (a)(5), and the first statute in (a)(6) have been recodified. Additionally, (a)(21) lists G.S. 14-50.16, but that statute was repealed in 2017. As a result, the reporting requirements tied to these statutes are unclear as written.

Paragraph (b) is also unclear since it states “failure to follow reporting requirements under this provision may justify disciplinary action. . . .” As written, it is unclear when a failure to report will “justify disciplinary action.”

The agency did not respond to technical change requests to clarify terms or statutory references in advance of the Commission meeting.

First Vice-Chair Doran presided over the discussion and vote on the State Board of Education rules in Subchapter 06G.

Upon call of the First Vice Chair, 16 NCAC 06G .0504, .0510, .0511, .0512, .0513, .0514, .0515, .0516, .0523, and .0524 were approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Dunklin, Overton, Powell, and Tucker – 8. Voting in the negative: None.

Upon call of the First Vice-Chair, 16 NCAC 06G .0314, .0315, .0316, .0503, .0505, .0506, .0507, .0508, .0509, .0514, .0517, .0518, .0519, .0520, .0521, and .0522 were objected to by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Dunklin, Overton, Powell, and Tucker – 8. Voting in the negative: None.

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 objected 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 objected 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 to 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 objected 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 .0517-.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 G.S. 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.”

Tom Ziko, General Counsel with the agency, addressed the Commission.

Prior to the review of the rules from the State Board of Education 06G, Chairman Hyde recused himself and did not participate in any discussion or vote concerning these Rules because he is a member of two North Carolina Charter School Boards and the rules pertain to charters.

Chairman Hyde resumed presiding over the meeting.

#### **State Board of Education**

16 NCAC 06H .0114 - Upon the call of the Chair, the rule was approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

Upon the call of the Chair, the Commission objected to 16 NCAC 06H .0113, .0115, .0116, and .0117; 06K .0101, .0103, .0104, and .0105 by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

The Commission objected to 16 NCAC 06H .0113 for lack of statutory authority, clarity, and necessity, as well as failure to comply with the APA. Specifically, in Subparagraph (a), the rule states that the meals shall be “consistent with the current edition of the Dietary Guidelines for Americans, Federal Regulations as approved for North Carolina and State Board of Education Policy on Nutrition Standards for School Meals.” The rule does not provide any additional information on the Dietary Guidelines, including how those guidelines are created, who created it, and where it can be found. The rule further does not address what federal regulations will apply, and it does not address who will approve them. Thus, this is unclear as written.

Additionally, in Subparagraph (a)(1), the agency refers to the “State Board Education Policy on Nutrition Standards for School Meals.” The Commission found that the agency cannot refer in rule to a policy that it created without violating the APA, as the policy can change without going through notice and comment, and the effect of the rule would change. Further, policies are not rules, as set forth in G.S. 150B-2(7a). Thus, as written, the rule violates the APA. In (b)(7), the rule refers to allowing foods found in the “Food Buying Guide for Child Nutrition Programs” with no additional information of what this is or who created it. The Commission found this standard to be ambiguous as written.

In (c)(1), the rule refers to meeting “meal pattern requirements specified by the US Department of Agriculture” but does not include what those requirements are, nor where they can be located. The Commission found this language to be ambiguous as written. Paragraph (d) of the rule states that the nutrition standards (presumably, meaning this Rule) must be implemented for all elementary schools no later than the first day of the 2008 school year. However, G.S. 115C-264.3 required achievement by the end of the 2009-2010 school year. The Commission found that the agency does not have authority of to set an earlier effective date than that required by statute. Further, as the deadline in this Paragraph passed 12 years ago, the Commission found that this language was also unnecessary.

In Paragraph (e), the rule says that the staff of DPI will review the nutrition standards and, “modify the standards as needed based on several criteria, including, but not limited to, current science, best practices in the food and beverage industry, and the availability and affordability of new foods and beverages.” The rule does not address what constitutes “current science” nor “best practices in the food and beverage industry.” Further, there is no indication on what the phrase “availability and affordability” mean in this Rule. Therefore, the Commission found that this language was ambiguous as written.

In Paragraph (h), the rule states that students with special nutritional needs “shall be exempt from the standards.” The Commission found it was unclear whether the intent of this Rule was to govern programs or individual students.

The Commission objected to 16 NCAC 06H .0115 for ambiguity. The Commission found that the Rule included several ambiguous terms, such as “official policy manual” in Paragraph (a), “understandable and uniform format” in Subparagraph (a)(7), and “brief” in Part (a)(7)(A). The agency did not respond to technical change requests to clarify these terms in advance of the Commission meeting.

The Commission objected to 16 NCAC 06H .0116 for ambiguity. The Commission found that the rule included several ambiguous terms, such as “other supporting documents” in Paragraph (c) and “understandable and uniform format” in Subparagraph (e)(3). The agency did not respond to technical change requests to clarify these terms in advance of the Commission meeting.

The Commission objected to 16 NCAC 06H .0117 for ambiguity and failure to comply with the APA. Specifically, the rule states that the Department shall reclaim or withhold funds for failure to comply with “state policies” until compliance occurs. The Commission found that the rule does not say what policies it is referring to and is therefore ambiguous as written. Further, the Commission found that even if the rule did name those policies, pursuant to the APA, policies cannot be used in a rule to control actions taken by the agency. Therefore, as written, the rule violates the APA.

The Commission objected to 16 NCAC 06K .0101 for ambiguity. Specifically, the Commission found the term “Education Services for Deaf and Blind Schools” was unclear, and that the agency did not seem to be setting any standards within the rule. The agency did not respond to technical change requests to clarify the term in advance of the Commission meeting.

The Commission objected to 16 NCAC 06K .0103 for lack of clarity and statutory authority. Specifically, the Commission found that the terms “Education Services for the Deaf and Blind,” “NC Standard Course of Study,” “Extended Course Standards,” and “Occupational Course of Study” unclear as written. Additionally, the rule provides that these courses will be used for subjects “when a standard is provided” but does not state when this will occur nor who will provide them. Therefore, the rule is ambiguous as written.

Further, the Commission found that G.S. 115C-85 requires the agency to adopt a standard course of study. The agency did not provide any authority for that adoption to be done outside of rulemaking. The Commission found that the agency lacked statutory authority to do so.

The Commission objected to 16 NCAC 06K .0104 for lack of statutory authority, clarity, and necessity. Specifically, the Commission found the following terms within the Rule to be ambiguous as written: “Education Services for the Deaf and Blind,” “Standard Course of Study,” “Occupational Course of Study,” and “Extended Content Standards.” The Rule does not state what these standards entail. Further, the Commission found that the agency provided no authority to establish these standards outside of rulemaking.

Paragraph (a) of the rule refers to being consistent with “federal regulations” but does not state which regulations it is referring to. The Commission found this language was ambiguous as written.

Further, the Commission found that the rule contains statements that are not regulating any matters, but appear to be asides or suggestions, such as in Paragraph (b), “It is important that the school representative has authority...” ; in Paragraph (d), “(Schools should consider...)”; and in Paragraph (f), “[T]he EDSB school representative should take a copy ”. As written, these phrases do not convey a mandate and therefore are not, “reasonably necessary to implement or interpret an act of the General Assembly” as required by G.S. 150B-21.9(a)(3).

The Commission objected to 16 NCAC 06K .0105 lack of clarity and statutory authority. Specifically, the Commission found the terms “unauthorized weapon” in Paragraph (a) to be unclear. Further, the rule defines “weapon” in Paragraph (b) to include a “BB gun, stun gun, air rifle, and air pistol.” However, G.S. 14-269.2, which is cited to by the agency in the rule, states that these are exempt from the definition of the term. The agency did not provide any authority to change the statutory definition, and the Commission found that the agency is without authority to do so.

In addition, in Part (c)(2)(B), the rule creates an exception for those individuals allowed to carry weapons on the premises. That list partially captures the list of exemptions in G.S. 14-269.2(g), but does not include all of those individuals. The agency did not provide any authority to change the statutory exemptions, and the Commission found that the agency is without authority to do so.

The agency did not respond to technical change requests to clarify these terms and questions of statutory authority in advance of the Commission meeting.

Danice Henderson with Kinetic Minds, LLC, addressed the Commission.

Eskabonna Henderson with Kinetic Minds, LLC, addressed the Commission.

#### **LOG OF FILINGS (PERMANENT RULES)**

##### **Radiation Protection Commission**

10A NCAC 15 .1418 - Upon the call of the Chair, the rule was approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

##### **Commission for Public Health 10A**

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

##### **Criminal Justice Education and Training Standards Commission**

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

##### **Coastal Resources Commission**

Upon the call of the Chair, the period of review was extended by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

##### **Wildlife Resources Commission**

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

##### **Commission for Public Health 15A**

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

##### **Board of Barber Examiners**

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 8, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 8. Voting in the negative: None.

Prior to the review of the rules from the Board of Barber Examiners, Commissioner Choi recused herself and did not participate in any discussion or vote concerning the rules because her law firm provides legal advice on numerous issues to the Board.

##### **Board of Examiners of Fee-Based Practicing Pastoral Counselors**

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

##### **Addictions Specialist Professional Practice Board**

Upon the call of the Chair, all rules except 21 NCAC 68 .0216, .0227, .0228, and .0708 were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

The Commission objected to 21 NCAC 68 .0216 for lack of statutory authority. Paragraph (f) automatically subjects applicants to “sanctions” based on their criminal history. Depending on the crimes at issue, the rule requires applicants to wait a set number of years since the applicant has completed his or her sentence to be eligible for licensure.

G.S. 93B-8.1(b) prohibits occupational licensing boards from automatically denying licensure to an applicant based upon the applicant’s criminal history. Instead, G.S. 93B-8.1(b1) requires occupational licensing boards to consider a list of factors prior to denying licensure. Additionally, the Board is required to make written findings and provide a copy of those findings to the applicant in order to deny an applicant licensure on the basis of his or her criminal history. Therefore, the Commission objected to the rule for lack of statutory authority.

The Commission objected to 21 NCAC 68 .0227 and .0228 for lack of statutory authority. Specifically, in .0227(a)(2) and .0228(a)(2), the Board states that applicants based on military service or status as a military spouse shall submit an application fee. Both rules list G.S. 93B-15.1 in their history notes. That statute was amended in 2017 to specifically forbid a licensing board from charging an application fee. Therefore, the requirement for these applicants to pay an application fee is beyond the statutory authority of the Board.

The Commission also objected to 21 NCAC 68 .0708 for lack statutory authority and necessity. Interventions in Article 3A hearings are already governed by G.S. 150B-38(f) and Rule 24 of the North Carolina Rules of Civil Procedure, making the contents of this Rule unnecessary. The rule also lacks statutory authority because the additional criteria added by the Board for permissive interventions in (b) are not contained in Rule 24. The agency has not provided authority to alter the requirements set in Rule 24.

### **Building Code Council**

Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

### **LOG OF FILINGS (TEMPORARY RULES)**

#### **Department of Commerce/Division of Employment Security**

04 NCAC 24G .0104 - Upon the call of the Chair, the rule was approved by roll-call vote, ayes 8, noes 1 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, and Powell – 8. Voting in the negative: Tucker - 1.

Regina Adams, with the agency, addressed the Commission.

#### **Wildlife Resources Commission**

15A NCAC 10D .0103 - Upon the call of the Chair, the rules was approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

#### **Board of Physical Therapy Examiners**

21 NCAC 48D .0107, .0109, .0111; and 48E .0101 - Upon the call of the Chair, the rules were approved by roll-call vote, ayes 9, noes 0 as follows: Voting in the affirmative: Atkins, Bryan, Choi, Currin, Doran, Dunklin, Overton, Powell, and Tucker – 9. Voting in the negative: None.

21 NCAC 48B .0103 was withdrawn at the request of the agency. No action was required by the Commission.

**COMMISSION BUSINESS**

The Commission's Bylaws require that elections be held at the September meeting. The Commission waived its bylaws to allow the nomination of all candidates in one motion.

The following members were elected as officers:

Jeanette Doran was elected Chair.

Anna Choi was elected 1st Vice-Chair.

Andrew Atkins was elected 2nd Vice-Chair.

The meeting adjourned at 11:07 a.m.

The next regularly scheduled meeting of the Commission is Thursday, October 15, 2020 at 9:00 a.m.

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Alexander Burgos, Paralegal

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Minutes approved by the Rules Review Commission:  
Jeff Hyde, Chair

## Rules Review Commission Meeting September 17, 2020 Held Via WebEx

FirstName	LastName	Title	Company
Catherine	Rosfjord		
Mikel	mahalay	Mikel mahalay MD	sdigbvib
Jessica	Montie		NC DEQ DWM
Terry	Chappell		
Kirsten	Goshorn		law office
Lee	Cox	Chief	
Nadine	Pfeiffer	Rulemaking Coordinator	DHHS-DHSR
shane	smith	Branch Head	NC DHHS
Walker	Reagan	Rulemaking Coordinator	NC ABC Commission
dave	machado	Director	Office of Charter Schools
Dennis	Seavers	Executive Director	Board of Barber Examiners
Daniel	Krchnavek		
Jessica	Bullock		
Charminique	Williams	Rulemaking Coordinator	DOI
Alice	Isley		State of NC, DHHS
Robert	Cooke	Dr	NCFBPPC Board of Examiners
Kirby	Consier		
Scott	Shone		NCSLPH
Kirsten	Leloudis	Policy and Legal Specialist	DHHS
Christine	Ryan	General Counsel	DSHR
Carrie	Pickett	Rule Development Branch Engineer	DENR
Paris	Penny	Rulemaking Coordinator	DHHS
John	Barkley		
Larry	Michael		NC DOJ919
Virginia	Niehaus	Rulemaking Coordinator	DSHR
Thomas	Tomberlin		
Carl	Martin	Rulemaking Coordinator	DOI/Fire Marshall
Deanna	Townsend-Smith		
Burt	Jenkins	Chief Code Consultant	
Thomas	Ziko	Director of Board Operations and Policy	DPI
Bradley	Howard		
Carmella	Fair	Interim General Counsel	State Board of Education
LaTricia	Townsend	Chief, Wildlife Management Division	
Kathy	Arney	Rulemaking Coordinator	NCP Board
Claire	Porter		
Sherry	Thomas		
Les	Spell		NCBPTE
Tammy	Howard		Office of Charter Schools
Andrew	Sioberg	Director, EC Division	

Ashley	Baquero		Department of Public Instruction
Danice	Henderson	Program Director	Kinetic Minds, Inc.
Carrie	Ruhlman	Rule-making Coordinator	Wildlife Resources Commission
Joelle	Burleson	Rule-making Coordinator	DENR
Deborah	Ragan	Rule-making Coordinator	NCP Board
Kevin	Harrison	Rule-making Coordinator	Wildlife Resources Commission
Eskabonna	Henderson	Director	Kinetic Minds, Inc.
Kim	Evans		
Jennifer	Everett	NC Board of PT Examiners Deputy Director	NC Board of PT Examiners
David	Gadd	Section Chief	NC DPI
Lou	Martin	Rule-making Coordinator	Department of Public Instruction
Regina	Adams	Rule-making Coordinator	Division of Employment Security