**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: N.C. BOARD OF EXAMINERS FOR SPEECH AND LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

RULE CITATION: 21 NCAC 64 .0307

RECOMMENDED ACTION:

 Approve, but note staff’s comment

X Object, based on:

 X Lack of statutory authority

 X Unclear or ambiguous

 Unnecessary

 Failure to comply with the APA

 Extend the period of review

COMMENT:

*In line six I am not certain that the meaning of “lascivious conduct” and what actions are forbidden is clear to all who read the prohibition. However the commissioners have taken different positions on such character issues and terms, often depending on the context. If the commissioners have a problem with this language, I’m sure the agency could satisfy that problem.*

*What concerns me more it that the board has no authority to adopt this rule, at least not the way it is currently written.*

*The board has cited no authority, and counsel is not aware of any authority, to deny licensure based on some sort of qualification relating to sexual activity. G.S. 90-295 and 90-298, the specific statutes setting out the qualifications for licensure refer to qualifications that address only an applicant’s education and experience. There is another statute, G.S. 90-296, that requires passing an examination. (That statute even refers to “an applicant … who has satisfied the academic requirements of G.S. 90-295” without referring to any other qualifications.)*

*There is also no reference in G.S. 90-301, Grounds for suspension or revocation; 90-301A, Unethical acts and practices; or 90-302, Prohibited acts and practices, to any prohibition against “lascivious conduct” or requirement to have good moral character.*

*The Rules Review Commission has consistently taken the position that where the legislature has set out the qualifications for licensure and has not given the agency any further discretion to add to those qualifications or establish new or different qualifications, then the agency cannot do so by rulemaking.*

*It is possible that the board could incorporate a more carefully crafted requirement to refrain from lascivious conduct as part of its code of ethics. Then, under 90-301(3) it would have the authority to suspend or revoke (but not necessarily deny) licensure to someone who violated that code.*

*But based on the language in this rule, the board has not included this prohibition as part of its ethical code of conduct since two words previously in the sentence it also lists “unethical” as well as illegal conduct as grounds for denying or revoking licensure. If the prohibition against “lascivious conduct” were part of the ethics code, then it would not be necessary to list it separately.*

*Again, let me note that depending on how the board might rewrite this rule if the Commission objects to it, the board might not have the authority to deny licensure for the same action they could revoke licensure. Not every act that might be prohibited to a licensed individual is prohibited to a member of the general public. Not every act that might be prohibited to a licensed individual might even be perceived as some sort of bad act if performed by a member of the general public.*

*G.S. 90-301 lists the grounds for suspending or revoking a license. One of those grounds (4) is the “[v]iolation of any lawful order, rule or regulation rendered or adopted by the Board.” The board is entitled to set many qualifications (in other words, “order, rule or regulation”) outside the statutes to remain a licensed individual. It is not entitled to expand those qualifications in order to obtain licensure.*

*Counsel recommends objecting to this rule on several grounds. The first is ambiguity if the Commissioners are concerned about the meaning of the “lascivious” as used in this rule. I am recommending objection based on lack of statutory authority to deny or revoke licensure based on “lascivious” conduct that is not otherwise illegal or unethical. I am also recommending objection based on lack of authority to deny licensure for conduct that is not otherwise forbidden to members of the general public.*

§ 90‑295. Qualifications of applicants for permanent licensure.

(a) To be eligible for permanent licensure by the Board as a speech and language pathologist, the applicant must:

(1) Possess at least a master's degree in speech and language pathology or qualifications deemed equivalent by the Board under rules duly adopted by the Board under this Article. The degree or equivalent qualifications shall be from an accredited institution.

(2) Submit transcripts from one or more accredited colleges or universities presenting evidence of the completion of 75 semester hours constituting a well‑integrated program of course study dealing with the normal aspects of human communication, development thereof, disorders thereof, and clinical techniques for evaluation and management of such disorders.

a. Fifteen of these 75 semester hours must be obtained in courses that provide information that pertains to normal development and use of speech, language and hearing.

b. Thirty‑six of these 75 semester hours must be in courses that provide information relative to communication disorders and information about and training in evaluation and management of speech, language, and hearing disorders. At least 24 of these 30 semester hours must be in courses in speech and language pathology.

c. Credit for study of information pertaining to related fields that augment the work of the clinical practitioner of speech and language pathology or audiology may also apply toward the total 75 semester hours.

d. Thirty‑six of the total 75 semester hours that are required for a license must be in courses that are acceptable toward a graduate degree by the college or university at which they are taken. Moreover, 21 of those semester hours must be in graduate level courses in speech and language pathology.

(3) Submit evidence of the completion of a minimum of 400 clock hours of supervised, direct clinical experience with individuals who present a variety of communication disorders. This experience must have been obtained within the training institution or in one of its cooperating programs in the following areas: (i) Speech – Adult (20 diagnostic and 20 therapeutic); Children (20 diagnostic and 20 therapeutic); or (ii) Language – Adult (20 diagnostic and 20 therapeutic); Children (20 diagnostic and 20 therapeutic). Each new applicant must submit a verified clinical clock hour summary sheet signed by the clinic or program director, in addition to completion of the license application.

(4) Present written evidence of nine months of full‑time professional experience in which bona fide clinical work has been accomplished in speech and language pathology. The professional work must have been supervised by a speech and language pathologist who is State‑licensed or certified by the American Speech‑Language‑Hearing Association. This experience must follow the completion of the requirements listed in subdivisions (1), (2) and (3). Full time is defined as at least nine months in a calendar year and a minimum of 30 hours per week. Half time is defined as at least 18 months in two calendar years and a minimum of 20 hours per week. The supervision must be performed by a person who holds a valid license under this Article, or certificate of clinical competence from the American Speech‑Language‑Hearing Association, in speech and language pathology.

(5) Pass an examination established or approved by the Board.

(b) To be eligible for permanent licensure by the Board as an audiologist, the applicant must:

(1) Possess a doctoral degree in audiology or qualifications deemed equivalent by the Board under rules duly adopted by the Board under this Article. The degree or equivalent qualifications shall be from an accredited institution.

(2) Persons who were engaged in the practice of audiology and do not possess a doctoral degree in audiology before October 1, 2007, shall be exempt from the degree requirement in subdivision (1) of this subsection provided those persons remain continuously licensed in the field.

(3) Submit transcripts from one or more accredited colleges or universities presenting evidence of the completion of 90 semester hours constituting a well‑integrated program of course study dealing with the normal aspects of human communication, the development of human communication, the disorders associated with human communication, and the clinical techniques for evaluation and management of such disorders.

(4) Present written evidence documenting 1,800 clock hours of professional experience directly supervised by an audiologist who is State‑licensed or certified by the American Speech‑Language‑Hearing Association or other Board‑approved agency. The clock hours of professional experience must be with individuals who present a variety of communication and auditory disorders and must have been obtained within the training program at an accredited college or university or in one of its cooperating programs.

(5) Pass an examination established or approved by the Board. (1975, c. 773, s. 1; 1987, c. 665, s. 3; 2007‑436, s. 4; 2009‑138, s. 1.)

§ 90‑296. Examinations.

(a) An applicant for permanent licensure who has satisfied the academic requirements of G.S. 90‑295, shall pass a written examination approved or established by the Board. A person who holds a temporary license during the supervised experience year must take and pass the examination required by the Board for permanent licensure before the end of the temporary license period.

(b) The Board shall administer or approve at least two examinations of the type described in subsection (a) of this section each year, and additional examinations as the volume of applications makes appropriate.

(c) An examination shall not be required as a prerequisite for a license for:

(1) A person who holds a certificate of clinical competence issued by the American Speech‑Hearing‑Language Association in the specialized area for which such person seeks licensure; or

(2) A person who has met the educational, practical experience, and examination requirements of another state or jurisdiction which has requirements equivalent to or higher than those in effect pursuant to this Article for the practice of audiology or speech pathology. (1975, c. 773, s. 1; 1981, c. 572, s. 3; 1987, c. 665, s. 4.)

§ 90‑297. Repealed by Session Laws 1987, c. 665, s. 5.

§ 90‑298. Qualifications for applicants for temporary licensure.

(a) To be eligible for temporary licensure an applicant must:

(1) Meet the academic and clinical practicum requirements of G.S. 90‑295(1), (2), and (3); and

(2) Submit a plan of supervised experience complying with the provisions of G.S. 90‑295(4); and

(3) Pay the temporary license fee required by G.S. 90‑305(5).

(b) A temporary license is required when an applicant has not completed the required supervised experience and passed the required examination. A person who holds a temporary license during the supervised experience year must take and pass the examination required by the Board for permanent licensure before the end of the temporary license period.

(c) A temporary license issued under this section shall be valid only during the period of supervised experience required by G.S. 90‑295(4), and shall not be renewed. (1975, c. 773, s. 1; 1987, c. 665, s. 6.)

§ 90‑301. Grounds for suspension or revocation of license.

Any person licensed under this Article may have his license revoked or suspended for a fixed period by the Board under the provisions of North Carolina General Statutes, Chapter 150B, for any of the following causes:

(1) His license has been secured by fraud or deceit practiced upon the Board.

(2) Fraud or deceit in connection with his services rendered as an audiologist or speech pathologist.

(3) Unethical conduct as defined in this Article or in a code of ethics adopted by the Board.

(4) Violation of any lawful order, rule or regulation rendered or adopted by the Board.

(5) Failure to exercise a reasonable degree of professional skill and care in the delivery of professional services.

(6) Any violation of the provisions of this Article. (1975, c. 773, s. 1; 1981, c. 572, s. 4; 1987, c. 665, s. 7; c. 827, s. 1.)

§ 90‑301A. Unethical acts and practices.

Unethical acts and practices shall be defined as including:

(1) Obtaining or attempting to obtain any fee by fraud or misrepresentation.

(2) Employing directly or indirectly any suspended or unlicensed person to perform any work covered by this Article.

(3) Using, or causing or promoting the use of any advertising matter, promotional literature, testimonial, guarantee, warranty, label, brand, insignia, or any other representation, however disseminated or published, which is misleading, deceiving, improbable, or untruthful.

(4) Aiding, abetting, or assisting any other person or entity in violating the provisions of this Article.

(5) Willfully harming any person in the course of the delivery of professional services licensed by this Article.

(6) Treating a person who cannot reasonably be expected to benefit from treatment.

(7) Charging a fee for treatment or services not rendered.

(8) Providing or attempting to provide services or supervision of services by persons not properly prepared or legally qualified to perform or permitting services to be provided by a person under such person's supervision who is not properly prepared or legally qualified to perform such services.

(9) Guaranteeing the result of any therapeutic or evaluation procedure. (1987, c. 665, s. 8.)

§ 90‑302. Prohibited acts and practices.

No person, partnership, corporation, or other entity may:

(1) Sell, barter, transfer or offer to sell or barter a license.

(2) Purchase or procure by barter a license with intent to use it as evidence of the holder's qualification to practice audiology or speech pathology.

(3) Alter a license.

(4) Use or attempt to use a valid license which has been purchased, fraudulently obtained, counterfeited or materially altered.

(5) Make a false, material statement in an application for a North Carolina license.

(6) Aid, assist, abet, or direct any person licensed under this Article in violation of the provisions of this Article. (1975, c. 773, s. 1; 1987, c. 665, s. 9.)

§ 90‑303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.

(a) There shall be a Board of Examiners for Speech and Language Pathologists and Audiologists, which shall be composed of seven members, who shall all be residents of this State. Two members shall have a paid work experience in audiology for at least five years and hold a North Carolina license as an audiologist. Two members shall have paid work experience in speech pathology for at least five years and hold a North Carolina license as a speech and language pathologist. One member shall be a physician who is licensed to practice medicine in the State of North Carolina. Two members shall be appointed by the Governor to represent the interest of the public at large. These two members shall be neither licensed speech and language pathologists nor audiologists. These members shall be appointed not later than July 1, 1981; one shall be initially appointed for a term of two years; the other shall be appointed for a term of three years. Thereafter all public members shall serve three‑year terms.

(b) The members of the Board shall be appointed by the Governor.

(c) The initial Board shall have members appointed for terms of one year, two years, three years, four years, and five years. All board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1981, shall serve more than two complete consecutive three‑year terms.

(d) Members of the Board shall receive no compensation for their service, but shall receive the same per diem, subsistence and travel allowance as provided in G.S. 138‑5. (1975, c. 773, s. 1; 1981, c. 572, ss. 5, 6; 2007‑436, s. 5.)

§ 90‑304. Powers and duties of Board.

(a) The powers and duties of the Board are as follows:

(1) To administer, coordinate, and enforce the provisions of this Article, establish fees, evaluate the qualifications of applicants, supervise the examination of applicants, and issue subpoenas, examine witnesses, and administer oaths, and investigate persons engaging in practices which violate the provisions of this Article.

(2) To conduct hearings and keep records and minutes as necessary to an orderly dispatch of business.

(3) To adopt responsible rules including rules that establish ethical standards of practice and require continuing professional education and to amend or repeal the same.

(4) To issue annually a list stating the names of persons currently licensed under the provisions of this Article.

(5) To employ such personnel as determined by its needs and budget.

(6) To adopt seals by which it shall authenticate their proceedings, copies of the proceedings, records and the acts of the Board, and licenses.

(7) To bring an action to restrain or enjoin violations of this Article in addition to and not in lieu of criminal prosecution or proceedings to revoke or suspend licenses issued under this Article.

(b) The Board shall not adopt or enforce any rule or regulation which prohibits advertising except for false or misleading advertising. (1975, c. 773, s. 1; 1981, c. 572, s. 7; 1987, c. 665, s. 10; 2007‑436, s. 6.)