

Burgos, Alexander N

Subject: FW: [External] RE: 16 NCAC 06E .0204 Objection letter

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Wednesday, June 15, 2022 9:21 AM
To: Walker, Brandon <Brandon.Walker@dpi.nc.gov>
Cc: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: Re: [External] RE: 16 NCAC 06E .0204 Objection letter

Good morning,

I think we have everything we need. Thanks for checking.

Best,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission
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(984)236-1948
brian.liebman@oah.nc.gov

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From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Wednesday, June 15, 2022 9:19:50 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Objection letter

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Good morning, Brian and Alex,

I just wanted to follow up with you to make sure you didn't need anything further for tomorrow's meeting.

Thank you,

BCW

Burgos, Alexander N

Subject: FW: [External] RE: 16 NCAC 06E .0204 Objection letter

Alexander Burgos

Paralegal
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1940
Alexander.burgos@oah.nc.gov

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Thursday, June 9, 2022 5:15 PM
To: Walker, Brandon <Brandon.Walker@dpi.nc.gov>
Cc: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Objection letter

Hi Brandon, Tom, Lou,

First, if you wouldn't mind, please copy our paralegal, Alex Burgos on all communications related to pending rules, so he can post our correspondence on the RRC website. I've copied him here.

I think the rule looks fine, and I will recommend RRC approve it at the upcoming meeting. Just FYI, I found a typo on p.5, line 7, "prescribe" which should be "prescribed". I fixed it, and if you OK it, I will send it on to Dana for filing.

Thanks for all your work on this!

Brian

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From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Thursday, June 9, 2022 2:15 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Objection letter

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Hello Brian,

Thank you for your comments. Not a dumb question. G.S. 115C-407.55 mandates, “The State Board of Education shall adopt rules governing high school interscholastic athletic activities conducted by public school units . . .” The only party subject to the SBE rules and capable of being aggrieved is the PSU. The PSU, in turn, enforces its decisions against students, coaches, and principals. Under G.S. 115C-45(c), students, coaches, and principals aggrieved by a local decision have the ability to appeal the decision to the local board or superintendent. But it is the PSU that must carry the dispute to the administering organization or independent appeals board. That is why the rule limits appeals to the PSU.

I have made the other requested changes. Finally, the email address for the office of general counsel can be found on the State Board of Education website at <https://www.dpi.nc.gov/about-dpi/education-directory/state-board-education>

Let me know if you have any questions or comments. Thanks again for all your help with this matter.

BCW

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Thursday, June 9, 2022 11:57 AM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Cc: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>; Lou Martin <lou.martin@dpi.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Objection letter

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Good morning Brandon,

Thanks for sending this over. I also think you have a better rule here. I have some thoughts on the added language, below.

Because this is a temporary rule, the substantial change provisions of 150B-21.2(g) do not apply. This is good, because if this had been a permanent rule, it’s my opinion that these changes would almost certainly be substantial under the statutory definition. However, as I said, this is a moot point, but something to watch out for in future permanent rulemaking.

As to the language itself, if this is implementing the requirement in 115C-407.55(4), the statute says that the rules shall provide for “an independent appeals board, notice of the infraction and the appeals process to the **party** that receives the penalty, and an opportunity to be heard...” Is it your understanding that the only party subject to these rules and capable of being aggrieved would be a PSU? Or would individual teachers, students, administrators, etc. be able to bring an appeal on their own behalf? Pardon my ignorance if this is a dumb question. 😊 If the former, the language is fine. If the latter, I think limiting the appeal to a PSU would be improper, and you should change “PSU” to “party” in the Rule.

Also, I had a few minor typos/errors to fix:

First, in (m)(1)D, line 30, I believe it should say ...appeal to the Office of General Counsel for the State Board...” Also, where can your regulated public find the email address?

Second, the last two sentences of (m)(3) are repetitive of (m)(4) and (5). Please delete the extra language. I would suggest deleting the language from (3), rather than deleting (4) and (5) entirely, as I think that would make these requirements clearer.

Finally, in (4), please state how you are requiring service to be made.

Thanks, and please let me know if I can be of help in making any further corrections.

Brian

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From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Thursday, June 9, 2022 9:31 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Objection letter

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Good morning, Brian,

I am following up regarding finalizing the athletics rule. I've attached a final version of 16 NCAC 06E .0204 Interscholastic Athletics and Administering Organizations for High School Athletics. This version fully integrates the language we sent earlier describing the administering organization's obligations to send a notice of decision that contains important information for the appealing PSU, including notice of appeal rights. As a result of inserting that information, the numbering in paragraph (m) needed to be changed, so I took the opportunity to break that longer paragraph into subparagraphs without changing the content. Finally, I fixed a subject/verb disagreement in paragraph (m)(2)D. – "PSU believe" is now "PSU believes."

Thanks for your help. I think this is a better rule now. We hope it meets your approval and be in the NCAC by July 1. We will use the permanent rulemaking process to iron out any wrinkles that we discover between now and then. As always, do not hesitate to contact me if you have any questions.

BCW

Brandon C. Walker
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From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Wednesday, June 1, 2022 2:31 PM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Cc: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Objection letter

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Hi Brandon,

Thanks for sending this over. I will review and get back to you shortly.

Best,
Brian

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Burgos, Alexander N

Subject: FW: [External] RE: 16 NCAC 06E .0204 Objection letter
Attachments: 16 NCAC 06E .0204(m) Amended Notice and Appeal.docx

From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Wednesday, June 1, 2022 7:52 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Objection letter

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Hello Brian,

Attached is an amendment to 16 NCAC 06E .0204(m) that specifies the contents of the administering organization's notice of decision and reformats and corrects a typo in the PSU's appeal. Basically, we tried to make the final decision and appeal follow APA and State Human Resource standards. If you think this is satisfactory, we will remove the definition of "receipt" and send you a revised 16 NCAC 06E .0204 with the attached language inserted. Thank you for all your help with this matter.

BCW

(m) The State Board of Education will appoint an appeals board to hear and act upon appeals from final decisions of an administering organization regarding student eligibility, penalties, fees imposed, retaliation, or discrimination. Panels of no fewer than three members of the appeals board may hear and decide matters on behalf of the board. A PSU aggrieved by a final decision of the administering organization may file an appeal with the State Board of Education's Office of General Counsel within five days after receipt of notice of the administering organization's final decision. The notice shall be mailed to the Superintendent or board of trustees of the PSU.

(1) The administering organization's notice shall contain:

- A. findings of fact;
- B. conclusions of law, including citation to any rules related to the decision;
- C. a description of any penalties; and
- D. a statement that the PSU may file a notice of appeal within five days of receipt of the administering organization's decision by mailing the notice to the State Board of Education's Office of General Counsel, 301 S. Wilmington Street, Raleigh, N.C. 27601, and emailing a copy of the notice of appeal to Office of General for the State Board of Education.

(2) The PSU's appeal shall:

- ~~(1)~~A. be in writing;
- ~~(2)~~B. include a description of the facts of the dispute;
- ~~(3)~~C. include any evidence submitted to the administering organization; and
- ~~(4)~~D. present an argument explaining why the PSU ~~believe~~ believes the administering organization's final decision was not based on substantial evidence or affected by an error of law.

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Tuesday, May 31, 2022 1:15 PM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>

Cc: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>

Subject: RE: [External] RE: 16 NCAC 06E .0204 Objection letter

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Hi Brandon and Tom,

Thank you for your response. I hope that we can reach some kind of agreement on this Rule today as well.

As to the basis for the objection and your response, with the benefit of this more expansive explanation, I do think the Board can delegate the enforcement of hardship exceptions to the AO. Thank you for clarifying this for me. I think the language as it is, is sufficient for me to recommend approval.

However, there was one other area of the Rule that needed attention. SL 2021-184 directs the Board to establish an appeals process that includes “notice of the infraction,” yet the Rule is silent as to notice. In response to my request for changes, the Rule was amended to define “receipt” with respect to notice provided to those on the receiving end of penalties, yet the Rule itself does not use this term in that context. I think either you need to remove the definition of “receipt” or add language operationalizing the term. I think the easiest thing to do is remove the definition, and if you are so inclined, address this issue in the subsequent permanent rule.

Provided you make the change with respect to “receipt,” I think you can go forward with what you have here.

Thanks,
Brian

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From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Monday, May 30, 2022 10:00 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>
Subject: [External] RE: 16 NCAC 06E .0204 Objection letter

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Brian,

I have attached the SBE’s response to the Staff Opinion on 16 NCAC 06E .0204. I hope our explanation will lead you to a better understanding of the SBE’s authority. If we cannot persuade you to drop your objection to the temporary rule, we want to discuss how we can make the changes necessary to secure your approval. We need this temporary rule in place by July 1. We can deal with any remaining substantive issues during the permanent rulemaking process. The SBE meets next Wednesday, June 1. If at all possible, we would like to have an unobjectionable rule to share with the SBE

during that meeting. Tom Ziko and I can be available anytime on Tuesday, and perhaps even Wednesday morning to discuss any remaining concerns. Let us know when you want to talk. As always, thanks for your work on this and all our rules.

Brandon C. Walker
Agency Legal Consultant
NC State Board of Education
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From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Friday, May 20, 2022 11:31 AM
To: Davis, Eric A. <Eric.Davis@ncdps.gov>
Cc: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Subject: 16 NCAC 06E .0204 Objection letter

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Good morning,

Attached, please find a letter regarding the RRC's objection to the above-captioned temporary rule considered at yesterday's meeting.

Please do not hesitate to contact me with any questions or concerns.

Thanks,

Brian Liebman
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TEMPORARY RULE
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
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

The State Board of Education has adopted a temporary rule in response to Session Law 2021-184, which creates a new Article within Chapter 115C of the General Statutes specifically governing High School Interscholastic Athletic Activities. The SL authorizes the Board to “submit temporary rules for high school interscholastic athletic activities to the Rules Review Commission” within 180 days of the effective date of the Act (Nov. 23, 2021). The SL also states that the Board shall not be required to submit a written statement of its findings of need with its submission of temporary rules.

In substance, the SL allows the Board to enter into a memorandum of understanding with an “administering organization” to administer and enforce rules adopted by the Board. Moreover, the SL empowers the Board to delegate the authority to establish penalty rules, administrative rules, gameplay rules, and fee rules to the administering organization. The SL does not provide the Board with authority to delegate student participation (i.e. eligibility)

rules. See the highlighted portions of the relevant Session Law, below. Nonetheless, Paragraph (k)(1) of the Rule states:

(k) The State Board of Education may delegate to an administering organization its authority over participating schools to:

- (1) waive any student eligibility requirement contained in this Rule, except the age requirement, if it finds that the rule requirement fails to accomplish its purpose, or it works an undue hardship on a student who has lost eligibility due to circumstances that made participation impossible such as prolonged illness or injury. The NCHSAA may enforce penalties for the violation of this Rule at the high school level. injury;

Thus, staff recommends objecting to this rule for lack of statutory authority.

STATE BOARD OF EDUCATION'S RESPONSE TO RRC STAFF OPINION.

Prior to the enactment of S.L. 2021-180, G.S. 115C-12(23) granted the State Board of Education (SBE) these powers:

(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. . . . The State Board of Education may authorize a designated organization to apply and enforce the Board's rules governing participation in interscholastic athletic activities at the high school level.

Prior to the enactment of S.L. 2021-180 and consistent with its authority under G.S. 115C-12(23), 16 NCAC 06E. 0204(h) provided:

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 on a student who has lost eligibility due to circumstances that made participation impossible such as prolonged illness or injury.

S.L. 2021-180, Part II, Section 2(a) amended G.S. 115C-12(23) as follows:

~~Power to Adopt Eligibility Rules for Interscholastic Athletic Competition. Activities.~~ – The State Board of Education shall adopt rules governing interscholastic athletic activities conducted by local boards of education, including eligibility for student ~~participation.~~ participation, in accordance with this subdivision and Article 29E of this Chapter. With regard to middle schools and high schools, the rules shall provide for the following:

...

~~The State Board of Education may authorize a designated organization to apply and enforce the Board's rules governing participation in interscholastic athletic activities at the high school level.~~

Thus, after July 1, 2022, the effective date of S.L. 2021-180 (see, Part II, Section 2(f)), the SBE's authority over middle and high school interscholastic activities will be governed by G.S. 115C-407.55 and 407.60.

G.S. 115C-407.55 requires the SBE to adopt rules governing high school interscholastic athletic activities conducted by public school units. The mandate includes the obligation to adopt rules in the following specific areas as further defined in the statute: (1) student participation rules; (2) student health and safety rules; (3) penalty rules; (4) appeals rules; (5) administrative rules; (6) gameplay rules; (7) fees; (8) administering organization rules; and (8) reporting rules.

G.S. 115C-407.55 (3), (5), (6), and (7) explicitly provide that in the case of rules governing penalties, administration, gameplay, and fees:

The State Board may by rule delegate the authority to establish all or a portion of [these] rules to an administering organization.

(Emphasis added.) With respect to rules in those areas, G.S. 115C-407.60(a) specifically exempts the administering organization from the rulemaking requirements of Chapter 150B. However, G.S. 115C-407.55(8)(a) grants the SBE authority to invalidate any rule or regulation adopted by the administering organization and, thereby, preserves the SBE's ultimate control over high school athletic activities.

Notably, G.S. 115C-407.55 (1), (2), (4), (8) and (9) do not grant the SBE authority to delegate to the administering organization the power to establish of rules for student participation, student health and safety, appeals, administering organization, and reporting.

In accordance with its obligations under G.S. 115C-407.55 (1) Student Participation Rules, the SBE has adopted a temporary rule, 16 NCAC 06E .0204 Interscholastic Athletics and Administering Organizations for High School Athletics, to govern middle and high school interscholastic activities. Within that rule, 16 NCAC 06E. 0204(c) through .0204(h) establish specific rules for student eligibility for participation in middle school and high school athletic activities.

Along with other amendments and additions, the SBE amended the existing waiver provisions of 16 NCAC 06E. 0204 as follows:

(k) The State Board of Education may delegate to an administering organization its authority over participating schools to:

- (1) waive any student eligibility requirement contained in this Rule, ~~except the age requirement~~, if it finds that the rule requirement fails to accomplish its purpose, or it works an undue hardship on a student who has lost eligibility due to circumstances that made participation impossible such as prolonged illness or ~~injury~~. ~~The NCHSAA may enforce penalties for the violation of this Rule at the high school level.~~ injury;

The RRC Staff has objected to the SBE's decision to authorize an administering organization to waive the student eligibility and participation rules. According to the RRC Staff, S.L. 2021-180 does not grant the SBE authority to delegate to the administering organization the authority to waive

student participation rules, i.e., eligibility rules. In support of this objection, RRC Staff cites G.S. 115C-407.55(1) which does not authorize the SBE to delegate to an administering organization the authority to establish rules governing student participation rules but is silent on the authority to delegate the power to grant waivers from the rules the SBE has adopted.

The RRC Staff's objection is based on a constrained reading of S.L. 2021-180. It is true that G.S. 115C-407.55(1) obligates the SBE to adopt student participation rules and, unlike 115C-407.55(3) through (7), does not specifically authorize the SBE to delegate that rulemaking authority. However, the SBE has, in fact, not delegated the authority to adopt those student participation rules to the administering organization. To the contrary, in 16 NCAC 06E .0204(c) through .0204(h), the SBE has adopted detailed student participation and eligibility rules.

But, in addition to adopting student participation rules, the SBE has also adopted a rule that authorizes an administering organization to "waive" those student participation rules. 16 NCAC 06E. 0204(k) states, in pertinent part:

(1) if [an administering organization] finds that the rule requirement fails to accomplish its purpose, or it works an undue hardship on a student who has lost eligibility due to circumstances that made participation impossible such as prolonged illness or injury.

The question, therefore, is not whether the SBE has avoided its obligation to adopt student participation rules, as it plainly has not. Rather, the question is whether the General Assembly has granted the SBE authority to delegate to the administering organization the authority to "waive" the student participation rules that the SBE has adopted. The resolution of that question requires a closer examination of S.L. 2021-180.

The standards for determining the scope of an agency's authority are well established.

In evaluating the scope of an agency's authority, our courts are to examine the scope of authority our legislators intended to grant to the agency. This evaluation should be based upon 'the language of the statute, the spirit of that act, and what the act seeks to accomplish.'

In re Declaratory Ruling by the Env'tl. Mgmt. Comm'n v. Env'tl. Mgmt. Comm'n, 155 N.C. App. 408, 413-14, 573 S.E.2d 732, 736 (2002)(quoting), *Comm'r of Insurance v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980) (citation omitted). An analysis of the SBE's actions in light of those standards follows.

I. S.L. 2021-180 Grants the SBE Authority to Delegate the Power to Enforce Its Rules

S.L. 2021-180 explicitly grants the SBE authority to delegate the power to enforce its rules to an administering organization. G.S. 115C-407.55 first defines an "administering organization" as

(1) Administering organization. -- A nonprofit organization that has entered into and is in compliance with a memorandum of understanding with the State Board of Education to administer and enforce the adopted rules and requirements of this Article for interscholastic athletic activities at the high school level.

(Emphasis added.)

G.S. 115C-407.60(a) then specifically states:

The State Board of Education may enter into a memorandum of understanding for a term of four years with one or more nonprofit organizations to administer and enforce the requirements of this Article and the rules adopted by the State Board for interscholastic athletic activities at the high school level.

(Emphasis added.)

In light of the plain language of these statutes, there can be no doubt but that the General Assembly authorized the SBE to delegate to the administering organization the authority to enforce the SBE's rules. Furthermore, in light of the history of high school athletics in North Carolina, it is the General Assembly's plain intent that the SBE would continue delegate to one or more administering organizations the authority to administer and enforce the SBE's rules. In fact, most all of S.L. 2021-180 is devoted to governing the relationship between the SBE and the administering organizations.

The question then becomes whether the SBE's decision to grant the administering organization the authority to "waive" its student participation rules is consistent with the General Assembly's intent. Again, a close review of the statutes confirms that the General Assembly intended to give the SBE authority to delegate the authority to "waive" student participation rules to the administering organization.

To properly understand the General Assembly's intent and the SBE's full authority, it is necessary to look beyond the connotations associated with the word "waive" and see the full range of the SBE's student participation rules. G.S. 115C-407.55(1) defines "Student participation rules" as follows

(1) Student participation rules. – These rules shall govern student eligibility to participate in interscholastic athletic activities and shall include, at a minimum, academic standards, enrollment and transfer requirements, attendance requirements, medical eligibility requirements, recruiting limitations, and hardship exceptions.

(Emphasis added.)

A full reading of the definition of "student participation rules" irrefutably proves that the General Assembly explicitly required the SBE to include "hardship exceptions" in its "student participation rules." Thus, it is clear that the General Assembly considered "hardship exceptions" to be as integral to "student participation rules" as any rules defining age, grade, academic, or other student eligibility criteria. In short, "hardship exceptions" are "student participation rules."

Insofar as the "hardship exceptions" are required and inseparable from the other "student participation rules," it naturally follows that the SBE has the authority to delegate to an administering organization the power to enforce those "hardship exceptions" along with all the other "student participation rules" that the SBE has adopted. In accordance with its explicit authority to delegate to an administering organization the power to "administer and enforce" its rules (G.S.

115C-40760(a)), the SBE has delegated the authority to administer and enforce the student participation hardship rules. As amended, 16 NCAC 06E .0204(k) provides:

The State Board of Education may delegate to an administering organization its authority over participating schools to:

(1) waive any student eligibility requirement contained in this Rule, if it finds that the requirement fails to accomplish its purpose, or it works an undue hardship on a student who has lost eligibility due to circumstances that made participation impossible such as prolonged illness or injury[.]

Granted, describing the “enforcement” of the “hardship exception” as a “waiver” may, on first reading, lead one to assume that this rule grants the administering organization the authority to set aside the SBE’s “student participation rules.” That is not the case. As noted above, the General Assembly explicitly required the SBE to include “hardship exceptions” within its “student participation” rules. Thus, it necessarily follows that the administering organization’s decision to “waive” a student eligibility requirement, i.e., grant a “hardship exception” is no different from its authority to “enforce” any other “student participation rule.” In the full context of S.L. 2021-180 and the proposed temporary 16 NCAC 06E .0204, the administering organization is simply “enforcing” the statutorily mandated “hardship rule.”

Granted, phrasing the enforcement of the “undue hardship exception” as a “waiver” does make it sound like the SBE authorizing the administering organization to set aside the SBE student participation rules. If RRC Staff is concerned about confusion around the SBE’s exercise of its authority, then the “hardship exception” could be rewritten as follows:

(k) The State Board of Education may delegate to an administering organization its authority over participating schools to:

(1) administer and enforce all student eligibility requirements contained in this Rule, provided the particular enforcement accomplishes the purpose of the requirement and does not work an undue hardship on a student who has lost eligibility due to circumstances that made participation impossible such as prolonged illness or injury[.]

This technical change would be an alternative means for the SBE to satisfy its obligation under G.S. 115C-407.55(1) to include “hardship exceptions” in its “student participation rules” and clarify that, consistent with its authority under G.S. 115C-407.60(a), the SBE has delegated the authority to “enforce” that “hardship exception” along with other student participation rules to the administering organization.

II. The Spirit of the Act Was to Clarify, Not Change, Administration of High School Athletics.

The title of S.L. 2021-180 is “AN ACT TO RESTRUCTURE OVERSIGHT OF PUBLIC HIGH SCHOOL INTERSCHOLASTIC ATHLETIC ACTIVITIES TO ENSURE ACCOUNTABILITY AND FAIR PLAY.” When compared to the prior statute, G.S. 115C-12(23), it is clear that the “spirit” of S.L. 2021-180 is to clarify the rulemaking authority of the SBE and the

“administering organization,” to expand the SBE’s authority to enter into memoranda of understanding with multiple “administering organizations,” to make the administration of high school athletics more transparent, and to provide for an independent review of “administering organization’s” decisions.

Notably absent from all the changes included in S.L. 2021-180 is any change in the SBE’s authority to permit the administering organization to operate the high school athletic activities on a day-to-day basis. In fact, S.L. 2021-180 repeatedly states that, as long as the SBE has a memorandum of understanding that meets the statutory requirements with an administering organization, then the SBE can delegate to the administering organization the authority to “the administer and enforce” all the SBE’s rules. There is literally nothing in S.L. 2021-180 to indicate that the General Assembly intended to force the SBE to be directly responsible for administering the thousands of high school athletic activities and deciding all the student eligibility issues that arise within those activities across North Carolina. That is not how the SBE has administered high school athletics in the past and there is nothing in S.L. 2021-180 to indicate that the General Assembly intended to change that part of the high school athletics system.

Therefore, the SBE’s decision to delegate to the administering organization the authority to enforce student participation rules, including the necessary hardship exceptions, is entirely in keeping with the “spirit” of S.L. 2021-180.

III. What the Act Does Not Seek to Make the SBE Responsible for Administering High School Athletics, But Rather to Make the Administering Organization’s Decisions Subject to Independent Review.

When one compares G.S. 115C-12(23), prior to the enactment of S.L. 2021-180, with the new statutes, G.S. 115C-407.50 to 407.60, it is clear that the Act intended to accomplish one major change in the administration of North Carolina high school athletics. The major objective of S.L. 2021-180 was to require the SBE to create an appeals process that allows schools that believe they have been treated unfairly to appeal the administering organization’s decisions to an independent appeals board. G.S. 115C-407.55(a)(4). In fact, that objective is explicitly stated in the title which says it is the General Assembly’s desire to “. . . ENSURE ACCOUNTABILITY AND FAIR PLAY.”

In fulfillment of that objective, the SBE has adopted 16 NCAC 06E .0204(m). That rule grants schools aggrieved by a decision of the administering organization the right to appeal that decision to an independent board. The independent board’s obligation to make final decisions on a formal record assures schools and the public that disputes over the administering organization’s administration and enforcement of the SBE’s rules will be fairly adjudicated and the administering organization will be held accountable.

Again, there is nothing in S.L. 2021-180 to indicate that the General Assembly intended the SBE to be directly involved in the administration and enforcement of its rules, including the statutorily mandated student participation and hardship rules. In fact, the SBE’s statutory obligation to create an appeals board, independent of the SBE and the administering organization, to review the

administering organization's enforcement of rules demonstrates that the General Assembly had no intention of requiring the SBE to be involved in the administration and enforcement of high school athletic activities.

IV. SUMMARY

While 16 NCAC 06E .0204(k) utilizes the word "waiver" to describe the authority it is delegating to the administering organization, the truth is that this rule does nothing more than authorize the administering organization to administer and enforce the statutorily required "hardship exceptions" to the student participation rules. When read in that context, it is clear that 16 NCAC 06E .0204(k) is entirely in keeping with the language of the statute, the spirit of that act, and what the act seeks to accomplish.

Therefore, the SBE requests that the RRC withdraw its recommendation that the RRC object to the rule and recommend that the RRC approve the rule as written.

Alternatively, the SBE requests that RRC permit it to make the following technical change to 16 NCAC 06E .0204(k):

(k) The State Board of Education may delegate to an administering organization its authority over participating schools to:

(1) ~~waive any~~ administer and enforce all student eligibility requirement requirements contained in this Rule, except the age requirement, if it finds that the rule fails to accomplish its purpose, provided the particular enforcement accomplishes the purpose of the requirement ~~or it works and does not work~~ an undue hardship on a student who has lost eligibility due to circumstances that made participation impossible such as prolonged illness or injury. The NCHSAA may enforce penalties for the violation of this Rule at the high school level. injury;

The effect of this change would be avoid describing the authority delegated to the administering organization as a "waiver" of the student participation rules and, instead, describe the delegation as part and parcel of the administering organization's authority to administer and enforce all the student participation rules, including the statutorily mandated hardship exceptions.

Excerpt from SL 2021-184, Part 1, Section 1.(a):

SECTION 1.(a) Chapter 115C of the General Statutes is amended by adding a new article to read:

....

"§ 115C-407.55. Rules for high school interscholastic athletic activities.

The State Board of Education shall adopt rules governing high school interscholastic athletic activities conducted by public school units that include the following:

(1) Student participation rules. – These rules shall govern student eligibility to participate in interscholastic athletic activities and shall include, at a minimum, academic standards, enrollment and transfer requirements, attendance requirements, medical eligibility requirements, recruiting limitations, and hardship exceptions.

(2) Student health and safety rules. – These rules shall govern requirements to ensure student health and safety during participation in interscholastic athletic activities, including rules related to concussions and emergency action plans as required by G.S. 115C-12(23).

(3) Penalty rules. – These rules shall establish a system of demerits for infractions of rules which may result in reprimands, probations, suspensions, forfeitures of contests, forfeitures of titles, and disqualifications. The State Board may by rule delegate the authority to establish all or a portion of the penalty rules to an administering organization.

(4) Appeals rules. – These rules shall establish an appeals process for enforcement of rules that provides for an independent appeals board, notice of the infraction and the appeals process to the party that receives the penalty, and an opportunity to be heard before the independent appeals board.

(5) Administrative rules. – These rules shall govern classifications of schools into divisions and conferences, administration of games, and requirements for coaching, officiating, sportsmanship, and scheduling of seasons. The State Board may by rule delegate the authority to establish all or a portion of the administrative rules to an administering organization.

(6) Gameplay rules. – These rules shall be adopted in accordance with the requirements of the governing organization for each sport, including the requirements of the National Federation of State High School Associations. The State Board may by rule delegate the authority to establish all or a portion of the gameplay rules to an administering organization.

(7) Fees. – These rules shall establish the fees and other amounts that may be charged to a participating school for participation in interscholastic athletic activities. The State Board may by rule delegate the authority to establish all or a portion of the fees to an administering organization.

(8) Administering organization rules. – These rules shall require that to be designated as an administering organization, a nonprofit must enter into and remain compliant with a memorandum of understanding with the State Board. The rules shall also require the following:

a. The State Board may, by majority vote, invalidate any rule or regulation adopted by the administering organization.

b. The administering organization be audited annually by a reputable independent auditing firm, engage in open meetings as set out in the memorandum of understanding, and provide the State Board access to records of the administering organization, including financial information, annual audit reports, and any matters related to or impacting participating schools.

c. The administering organization shall enter into written agreements with each participating school.

d. The memorandum of understanding shall incorporate by reference any subsequent changes to rules or statutes made after the parties enter into the memorandum.

(9) Reporting rules. – These rules shall establish a process for reporting issues or concerns related to the administration of interscholastic athletic activities.

Burgos, Alexander N

Subject: FW: 16 NCAC 06E .0204 Objection letter
Attachments: 05.2022 - Board of Education Temp Rule Objection Letter.pdf

From: Liebman, Brian R
Sent: Friday, May 20, 2022 11:31 AM
To: Davis, Eric A. <Eric.Davis@ncdps.gov>
Cc: Walker, Brandon
Subject: 16 NCAC 06E .0204 Objection letter

Good morning,

Attached, please find a letter regarding the RRC's objection to the above-captioned temporary rule considered at yesterday's meeting.

Please do not hesitate to contact me with any questions or concerns.

Thanks,

Brian Liebman
Counsel to the North Carolina Rules Review Commission
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(984)236-1948
brian.liebman@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Wednesday, May 18, 2022 2:33 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Thank you, Brian. What do you need from us to ensure that we are on the June calendar for approval?

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Wednesday, May 18, 2022 2:30 PM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Hi Brandon,

I thought the deadline was you had 180 days to submit your rules to RRC, which you've met, and the objection doesn't change.

Nonetheless, if you're shooting for 7/1/22, yes, you can still make it. Temporary rules go into effect the date that the Codifier enters them into the code, which is typically a few days after approval. The meeting is 6/16, so provided the rule is approved by RRC in June, it'll be in the code before 7/1.

Thanks,
Brian

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From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Wednesday, May 18, 2022 2:24 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>

Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Hello Brian,

Again, thank you for your response. I am working with Tom and our team to make the requisite revisions. My question to you is towards the scheduling and timeline moving forward. As you know, we have a July 1, 2022, deadline for the rules. I want to make sure we are still on track for the July 1, 2022, deadline. I understand that revisions still need to be made per your comments. This is a top priority for us, and I want to make sure we adhere to that deadline. I am relatively new, and I am not experienced in your procedures. Do you think that we still have the ability to meet the July 1, 2022, deadline from the GA? I am looking for a bit of guidance on our steps moving forward. Any insight you have is greatly appreciated.

Thank you,

BCW

Burgos, Alexander N

From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Tuesday, May 17, 2022 6:10 PM
To: Liebman, Brian R
Cc: Burgos, Alexander N; Ziko, Thomas
Subject: Re: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Thank you, Brian. I will review and discuss with Tom. I will let you know if we have any questions. Thank you for your help on this matter.

BCW

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From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Tuesday, May 17, 2022 5:26:03 PM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Brandon,

Attached, please find a copy of the staff opinion recommending objection to the temporary rule. This will be posted online shortly.

Please let me know if you have any questions or concerns.

Best,
Brian

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brian.liebman@oah.nc.gov

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From: Liebman, Brian R
Sent: Tuesday, May 17, 2022 2:39 PM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Ziko, Thomas
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

Hi Brandon,

Thanks for getting these back to me. Unfortunately, I still have concerns, and I think because of how close we are to the meeting and the volume of other matters on the agenda this month, we won't have the time to address these concerns before the meeting. Thus, I plan to recommend objection to the Rule. That being said, I think we can definitely fix these problems next month, once we have a little more time. I'll try to get the staff opinion out to you today, tomorrow morning at the latest.

So, see below for my continued concerns. I'm going to just cut and paste from the change request document, and keep the conversation going from there. My additional questions/comments in blue.

In (h), p.2, with respect to the rules imposing penalties upon students, coaches, and schools, do your rules otherwise provide for how notice is to be given of the infraction? The version of 115C-407.55(4) in the SL states that appeals rules "shall establish" a process "that provides for... notice of the infraction...." I don't see anything here discussing notice of the infraction. See added definition of "receipt" on page 1, line 8. Without comment on the definition itself, where is this term used in the body of the Rule? I see "receipt" several times but it is in reference to the Board being in receipt of something, not the person subject to the infraction being in receipt of the infraction from the Board. I think the point of my question was that you don't have a process for notifying the person subject to the infraction, and I still don't see that here.

In (k)(1), p.3, line 17-21, can you delegate the ability to waive eligibility requirements to an AO? 115C-407.55 explicitly places student participation rules in the Board's purview, and does not state that the Board can by rule delegate its authority over student participation rules to the AO. The version of 16 NCAC 06E .0204(h) that is currently in effect, states: "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 on a student who has lost eligibility due to circumstances that made participation impossible such as a prolonged illness or injury." This rule was approved by the RRC in 2020. We have attached the revised rule that shows the permissive "may" struck in line 14 on page 3 and reinserted in section (k) line 18 on page 3.

G.S. 115C-12(23) states: "The State Board of Education may authorize a designated organization to apply and enforce the Board's rules governing participation in interscholastic athletic activities at the high school level."

I think the previous version of the rule needs to be changed in light of the Session Law, which deletes the above quoted portion of 115C-12(23) from the statute, and inserts the requirement that the rules be adopted "in accordance with this subdivision and Article 29E of this Chapter" which refers to G.S. 115C-407.50, 115C-407.55, 115C-407-60, and 115C-407.65. So, while the rule language may have passed muster in 2020, it does not now do so, since the underlying statute has changed.

In (m), p. 4, does the language regarding appeals comply with the version of 115C-407.55(4) in the SL? The language of the SL says that the Board "shall establish an appeals process for enforcement of rules...." While Paragraph (m) does establish an appeals board, it limits its jurisdiction to "appeals from final decisions of an administering organization..." I understand that the Board intends to enter into a MOU with an AO, but the statute does provide that if an MOU is not reached, the administration of HS athletics goes to DPI. Should the Rule not also provide for appeals from DPI, in the event you do not reach a MOU? Please see attached MOU entered between the SBE and the NCHSAA. I understand you have a MOU in place, but I think the Rule still needs to include DPI if the MOU is not renewed or otherwise falls through.

Additionally, in the last version you sent me, any changes made to the Rule need to be highlighted, struck through, or underlined, so RRC and the public can readily identify your changes.

Thanks,
Brian

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From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Tuesday, May 17, 2022 10:08 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Hello Brian,

Again, thank you for your patience in this matter. Attached is the revised rule, along with our responses to your questions. I have also attached a copy of the MOUs between the SBE and athletic associations. Please do not hesitate to contact me if you have any questions.

Also, Tom Ziko (rules coordinator) will also be joining me on Thursday to answer any questions. I have copied him on this email. Again, thank you for all your help!

BCW

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Monday, May 16, 2022 4:23 PM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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If you can shoot for noon tomorrow, that'd be great. I will need some time to review these and we'll need time to make any changes that might be necessary. I appreciate y'all working hard on this as well, and I apologize on my end for not getting these to you a little sooner.

Best,
Brian

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From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Monday, May 16, 2022 4:21 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Thank you so much Brian! Tom and I really appreciate your indulgence on the deadline. This is not our standard operating procedure to delay you in any way. I am working to get you the requested revisions by the end of the day, but at the latest we will have them to you tomorrow afternoon. Please let me know if this is acceptable. I understand that we are working on a tight time schedule and I will do my best to expedite the process. Again, this is a bit of an unique situation and I really appreciate your patience. Let me know what you think.

Thank you,

BCW

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Monday, May 16, 2022 3:56 PM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Hi Brandon,

Thanks for the update. Just so you know, we need to have everything completed really no later than 5 PM tomorrow.

Thanks,
Brian

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From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Monday, May 16, 2022 3:31 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Hello Brian,

We are still working on providing a revised version of the rule. I am awaiting feedback from our team and will provide you an update ASAP.

BCW

From: Brandon Walker
Sent: Monday, May 16, 2022 8:40 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

Thank you so much!

BCW

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Friday, May 13, 2022 12:07 PM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: Re: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Brandon,

No worries at all. Yes, Monday would be totally fine.

Brian

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From: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Sent: Friday, May 13, 2022 12:03:40 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: [External] RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Hello Brian,

Thank you for follow up. I just left you a voice message. I apologize for my delayed response. I have had meetings all morning and much of my afternoon is the same. I understand you have a 5pm deadline for the revised rule. Is it possible to have a couple more hours and get you the revisions before I leave the office today? If not, I will adjust my schedule accordingly. Thanks so much for your help!

BCW

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Thursday, May 12, 2022 5:15 PM
To: Brandon Walker <Brandon.Walker@dpi.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

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Hi Brandon,

I'm the attorney who reviewed the temporary rule submitted by the State Board of Education for the May 2022 RRC meeting. The RRC will formally review this rule at its meeting on Thursday, May 19, 2022, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an evite should be sent to you as we get closer to the meeting. If there are any other representatives from your agency who will want to attend virtually, let me know prior to the meeting, and we will get evites out to them as well.

Please submit the revised rule to me via email, no later than 5 p.m. on Friday, May 13, 2022. As this is a pretty close deadline, please let me know if you'll need additional time, and we can work that out.

Let me know if you have any questions or concerns.

Thanks!
Brian

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From: Liebman, Brian R
Sent: Thursday, May 12, 2022 4:04 PM
To: Walker, Brandon
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: 16 NCAC 06E .0204 Temp Rule for May 2022 RRC

Hi Brandon,

I'm reviewing the temp rule submitted earlier this week and plan to have some requests for changes out to you before the end of the day. Apologies for any delay on these. Before I do, I had a preliminary question. Along with the Temporary Rule-Making Findings of Need Form, you submitted an email exchange with Carrie Hollis regarding the need for a fiscal note. It appears that this was in regard to a different Rule - 16 NCAC 06D .0403. Was this erroneous, or is there another Rule you intended to file that I don't have?

Thanks,
Brian

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Visit us on the web at <https://dpi.nc.gov> . All e-mail correspondence to and from this address is subject to the North Carolina Public Records Law, which may result in monitoring and disclosure to third parties, including law enforcement.

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**Request for Changes Pursuant to
N.C. Gen. Stat. § 150B-21.10**

Staff reviewed these Rules to ensure that each Rule is within the agency's statutory authority, reasonably necessary, clear and unambiguous, and adopted in accordance with Part 2 of the North Carolina Administrative Procedure Act. Following review, staff has issued this document that may request changes pursuant to G.S. 150B-21.10 from your agency or ask clarifying questions.

If the request includes questions, please contact the reviewing attorney to discuss.

In order to properly submit rewritten rules, please refer to the following Rules in the NC Administrative Code:

- Rule 26 NCAC 02C .0108 – The Rule addresses general formatting.
- Rule 26 NCAC 02C .0404 – The Rule addresses changing the introductory statement.
- Rule 26 NCAC 02C .0405 – The Rule addresses properly formatting changes made after publication in the NC Register.

Note the following general instructions:

1. You must submit the revised rule via email to oah.rules@oah.nc.gov. The electronic copy must be saved as the official rule name (XX NCAC XXXX).
2. For rules longer than one page, insert a page number.
3. Use line numbers; if the rule spans more than one page, have the line numbers reset at one for each page.
4. Do not use track changes. Make all changes using manual strikethroughs, underlines and highlighting.
5. You cannot change just one part of a word. For example:
 - Wrong: “~~a~~Association”
 - Right: “~~association~~ Association”
6. Treat punctuation as part of a word. For example:
 - Wrong: “day;; and”
 - Right: “~~day,~~ day, and”
7. Formatting instructions and examples may be found at:
www.ncoah.com/rules/examples.html

If you have any questions regarding proper formatting of edits after reviewing the rules and examples, please contact the reviewing attorney.

TEMPORARY RULE
REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06E .0204

DEADLINE FOR RECEIPT: Friday, May 13, 2022

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 email the reviewing attorney to inquire concerning the staff recommendation.

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

In (f)(3), p.2, line 24, I'm reading this to mean that there are two ideas here, one that the item be consumable AND nontransferable, or two, the item be labeled in a permanent manner. Thus, I believe a comma should be added between "nontransferable" and "or labeled". Change completed.

In (h), p.2, with respect to the rules imposing penalties upon students, coaches, and schools, do your rules otherwise provide for how notice is to be given of the infraction? The version of 115C-407.55(4) in the SL states that appeals rules "shall establish" a process "that provides for... notice of the infraction...." I don't see anything here discussing notice of the infraction. See added definition of "receipt" on page 1, line 8.

In (k)(1), p.3, line 17-21, can you delegate the ability to waive eligibility requirements to an AO? 115C-407.55 explicitly places student participation rules in the Board's purview, and does not state that the Board can by rule delegate its authority over student participation rules to the AO. The version of 16 NCAC 06E .0204(h) that is currently in effect, states: "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 on a student who has lost eligibility due to circumstances that made participation impossible such as a prolonged illness or injury." This rule was approved by the RRC in 2020. We have attached the revised rule that shows the permissive "may" struck in line 14 on page 3 and reinserted in section (k) line 18 on page 3.

G.S. 115C-12(23) states: "The State Board of Education may authorize a designated organization to apply and enforce the Board's rules governing participation in interscholastic athletic activities at the high school level."

In (l)(5), p.4, line 7, delete the period following "level." Change completed.

In (m), p. 4, does the language regarding appeals comply with the version of 115C-407.55(4) in the SL? The language of the SL says that the Board “shall establish an appeals process for enforcement of rules....” While Paragraph (m) does establish an appeals board, it limits its jurisdiction to “appeals from final decisions of an administering organization...” I understand that the Board intends to enter into a MOU with an AO, but the statute does provide that if an MOU is not reached, the administration of HS athletics goes to DPI. Should the Rule not also provide for appeals from DPI, in the event you do not reach a MOU? Please see attached MOU entered between the SBE and the NCHSAA.

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

Brian Liebman
Commission Counsel
Date submitted to agency: May 12, 2022

1 16 NCAC 06E .0204 is proposed for adoption under temporary procedures as follows:

2 **16 NCAC 06E .0204 INTERSCHOLASTIC ATHLETICS AND ADMINISTERING ORGANIZATIONS**
3 **FOR HIGH SCHOOL ATHLETICS**

4 (a) ~~Local Education Agencies (LEAs) Definitions:~~

5 (1) "Administering organization" is defined in G.S. 115C-407.50(1).

6 (2) "Participating school" is defined in G.S. 115C-407.50(7).

7 (3) "Public school unit" is defined in G.S. 115C-5(7a).

8 (4) "Receipt" is defined as receipt of any notice or communication by the NCHSAA's final decision by
9 the superintendent of a public school operated by a local school administrative unit, as defined in
10 G.S. 115C-5(6), or the superintendent's designee(s); or the governing body of any charter school or
11 school operated under Article 7A or Article 9C of G.S. 115C or that body's designee(s).

12 (b) Public school units (PSUs) are authorized to determine whether and to what extent students in grades 6-12 6
13 through 12 may participate in interscholastic athletics; provided, however, that students in sixth grade 6 are not eligible
14 to participate in tackle football. This Rule shall not apply to charter school athletic programs in kindergarten through
15 grade 8.

16 ~~(b)(c) In order to qualify for participation~~ To participate in public school interscholastic athletics, a student shall meet
17 the following requirements:

18 (1) ~~The A student shall meet the residence criteria of G.S. 115C-366(a), who attends a school supervised~~
19 by a local board of education ~~The student shall only participate only at in~~ the school to which the
20 student is assigned ~~by the LEA or, if under G.S. 115C-366. A student enrolled in a charter, regional,~~
21 statewide public school, or school operated by the University of North Carolina, must meet all the
22 enrollment criteria for that school and attend that school. If a student is over the age requirements,
23 for the school the student attends, the student may participate at the school to which the student
24 would be assigned or attend at the next higher grade level.

25 (2) ~~The A student shall meet the age requirements at each grade level to participate. The principal PSUs~~
26 shall have determine the age of participating students based on a preponderance of the evidence of
27 the legal birth date of the student, known to them. A student ~~who is~~ ineligible to participate at one
28 grade level due to age ~~is shall be~~ eligible to participate at the next higher grade level ~~only. However,~~
29 only, provided, no student ~~is shall be~~ eligible to participate at the middle school level for a period
30 lasting longer than six consecutive semesters, beginning with the student's entry into ~~sixth grade.~~
31 grade 6, and No no student shall be eligible to participate at the high school level for more than eight
32 consecutive semesters, beginning with the student's first entry into grade ~~nine 9~~ or participation on
33 a high school team, whichever occurs first.

34 (A) A student shall not participate on a ~~sixth, seventh, or eighth grade 6, 7, or 8~~ team if the
35 student becomes 15 years of age on or before August 31 of that school year.

36 (B) A student shall not participate on a ~~ninth grade 9 through 12 junior high school~~ team if the
37 student becomes ~~16 19~~ years of age on or before August 31 of that school year.

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

4 ~~(e)(d)~~ To be eligible to ~~compete~~ participate during any semester in grades 6, 7, ~~and or~~ 8, the student shall have passed
5 at least one less course than the number of required core courses the immediate prior semester and meet promotion
6 standards established by the ~~LEA.~~ PSU, provided, a student who is promoted from grade 5 to grade 6 shall be deemed
7 to have satisfied the requirement set forth in this Paragraph to participate in the first semester of grade 6. To be eligible
8 to compete during any semester in grades ~~9-12, 9 through 12,~~ the student shall have passed at least five courses (or
9 the equivalent for non-traditional school schedules) the immediate prior semester and meet promotion standards
10 established by the ~~LEA.~~ Regardless of the school organization pattern, PSU, provided, a student who is promoted
11 from the fifth grade to the sixth grade automatically meets the courses passed requirement for the first semester of the
12 sixth grade. Regardless of the school organization pattern, a student who is promoted from the eighth grade 8 to the
13 ninth grade 9 automatically meets the courses passed requirement for the first semester of the ninth grade shall be
14 deemed to have satisfied the requirement set forth in Paragraph to participate in the first semester of grade 9.

15 ~~(4)(c)~~ The To be eligible to participate, a student shall receive a medical examination each year every 395 days by a
16 licensed physician, nurse practitioner, or physician assistant, subject to the provisions of G.S. 90-9, 90-18.1, and 90-
17 18.2.

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

19 (1) ~~graduation;~~ graduation, except that the student may continue to participate in playoff and state
20 championship contests in spring sports after graduation;

21 (2) ~~becoming eligible to graduate;~~

22 ~~(3)(2)~~ signing a professional athletic contract; contract, except that the student may continue to participate
23 in any sport for which the student has not signed a professional contract;

24 ~~(4)(3)~~ receiving remuneration as a participant in an athletic contest, or contest, except that the student may
25 accept a gift, merchandise, trophy, or other thing of value, provided that:

26 (A) the value does not exceed two hundred fifty dollars (\$250.00) per student per sports season;

27 (B) the item is totally consumable and nontransferable, or labeled in a permanent manner, for
28 example, monogrammed or engraved items; and

29 (C) the item is approved by the student's principal and superintendent; or

30 ~~(5)(4)~~ participating on an all-star team or in an all-star game that is not sanctioned by the association
31 administering organization of which the student's school is a member. The member, provided, the
32 student is shall be ineligible only for the specific sport involved.

33 ~~(f)(g)~~ Each PSU shall require the principal of a school that participates in interscholastic athletics ~~shall to~~ certify a
34 list of eligible students for each sport.

35 ~~(g)(h)~~ Any A PSU shall impose at least the following penalties on a student, student athlete, coach, or school official
36 in grades 6-12 6 through 12 who is ejected from any an interscholastic athletic contest shall at least be penalized as
37 follows:

- 1 (1) for the first offense, the person shall be reprimanded and suspended from participating in ~~for the~~
2 next game at that level of play (varsity or junior varsity); ~~varsity) and for any intervening games at~~
3 either level;
- 4 (2) for a second offense, the person shall be placed on probation and suspended from participating in
5 ~~for the next two games at that level of play (varsity or junior varsity); varsity) and for any intervening~~
6 games at either level;
- 7 (3) for a third offense, the person shall be suspended for one calendar year; and
- 8 (4) a coach who is suspended ~~at any level of grades 6-12 (middle school, junior high or high school)~~
9 shall not coach any team for in any ~~other~~ grade level ~~in grades 6-12~~ during the period of suspension.

10 ~~(5)~~ Penalties are cumulative from sport to sport and from sport season to sport season. If no member of the school's
11 coaching staff is present to assume an ejected coach's duties, the contest shall be terminated by a forfeit.

12 ~~(h)(i) LEAs PSUs may allow their schools to belong to the North Carolina High School Athletic Association~~
13 ~~(NCHSAA), which has established as a minimum the rules adopted by the SBE. an administering organization~~
14 ~~designated by the State Board of Education. The NCHSAA may~~

15 (j) An administering organization entering into a memorandum of understanding with the State Board of Education
16 for the purpose of administering interscholastic athletics under this Rule must apply and enforce all of the requirements
17 of this Rule.

18 (k) The State Board of Education may delegate to an administering organization its authority over participating
19 schools to:

- 20 (1) waive any student eligibility requirement contained in this Rule, ~~except the age requirement~~, if it
21 finds that the ~~rule~~ requirement fails to accomplish its purpose, or it works an undue hardship on a
22 student who has lost eligibility due to circumstances that made participation impossible such as
23 prolonged illness or ~~injury~~. ~~The NCHSAA may enforce penalties for the violation of this Rule at the~~
24 ~~high school level. injury~~;
- 25 (2) adopt, apply, and enforce penalty rules that establish a system of demerits that includes reprimands,
26 probations, suspensions, forfeitures of contests, forfeitures of titles, and disqualifications;
- 27 (3) adopt, apply, and enforce administrative rules, as defined in G.S. 115C-407.55(5);
- 28 (4) adopt, apply, and enforce gameplay rules, as defined in G.S. 115C-407.55(6); and
- 29 (5) establish and collect from all its members a uniform membership fee of either:
 - 30 (A) one thousand dollars (\$1,000) for each participating school, or
 - 31 (B) one dollar (\$1.00) for each student enrolled in a participating school.

32 (l) An administering organization shall:

- 33 (1) enter into a memorandum of understanding with the State Board of Education no later than March
34 15 prior to the academic year in which it is to begin administering interscholastic athletics and before
35 each subsequent renewal of a memorandum of understanding;
- 36 (2) be audited by a reputable independent auditing firm and submit the audit to the State Board of
37 Education no later than March 15 each year;

- 1 (3) broadcast the meetings of its membership and board of directors in a manner that is announced on
2 its website and which may be viewed electronically by any member of the public;
- 3 (4) provide to the State Board of Education within 30 days any requested organizational records,
4 including but not limited to, financial information, annual audit reports, and any matters related to
5 or impacting participating schools;
- 6 (5) enter into written agreements with PSUs that allow their eligible schools to participate in
7 interscholastic sports, which agreements shall include an explanation of the fees to be charged, the
8 obligations of the PSU and participating schools, penalties for the violation of this Rule at the high
9 school level that may be imposed, and an explanation of the process to contest or appeal adverse
10 decisions; and
- 11 (6) publish the organization's rules through a link on the first page of its website.

12 (m) The State Board of Education will appoint an appeals board to hear and act upon appeals from final decisions of
13 an administering organization regarding student eligibility, penalties, fees imposed, retaliation, or discrimination.
14 Panels of no fewer than three members of the appeals board may hear and decide matters on behalf of the board. A
15 PSU aggrieved by a final decision of the administering organization may file an appeal with the State Board of
16 Education's Office of General Counsel within five days after receipt of the administering organization's final decision.
17 The PSU's appeal shall:

- 18 (1) be in writing;
- 19 (2) include a description of the facts of the dispute;
- 20 (3) include any evidence submitted to the administering organization;
- 21 (4) present an argument explaining why the PSU believe the administering organization's final decision
22 was not based on substantial evidence or affected by an error of law.

23 The administering organization may file a response to the PSU's submissions within five days. The panel may shorten
24 the time to for filing the administering organization's response if the decision affects a student's or coach's eligibility
25 to participate in an intervening athletic contest. All documents filed in the appeal shall be simultaneously served on
26 all parties. Any hearing shall be recorded.

27 No later than 30 days after the State Board of Education's receipt of the appeal, a panel of the appeals board shall issue
28 its decision. The panel shall affirm the administering organization's final decision unless a majority of the panel
29 determines that the final decision is not supported by substantial evidence or affected by an error of law.

30 The panel's decision shall be final.

31 ~~(n)~~ The LEA PSU that has jurisdiction over the high a school may impose additional penalties, penalties in addition
32 to those imposed by an administering organization. If there is no administering organization governing a group of
33 schools, a PSU LEAs or conferences may adopt and impose penalties at the middle and junior high school levels. for
34 schools under its jurisdiction.

35
36 *History Note:* Authority G.S. 115C-12(12); 115C-12(23); 115C-47(4); 115C-407.50, 115C-407.55; 115C-407.60;
37 115C-407.65; 116-235(b);

1 *Emergency Adoption Eff. August 20, 2019;*
2 *Amended Eff. March 1, 2021;*
3 *Eff. July 1, 2022.*
4
5

STATE OF NORTH CAROLINA

COUNTY OF WAKE

**MEMORANDUM OF UNDERSTANDING BETWEEN THE NORTH
CAROLINA STATE BOARD OF EDUCATION AND THE CAROLINA
ATHLETIC ASSOCIATION FOR SCHOOLS OF CHOICE REGARDING
THE CONDUCT OF HIGH SCHOOL INTERSCHOLASTIC ATHLETICS**

This Memorandum of Understanding (“MOU”) is hereby entered into by and between the North Carolina State Board of Education (“State Board”) and the Carolina Athletic Association For Schools Of Choice, Inc. (“CAASC”). The State Board and the NCHSAA are collectively referred to herein as the “Parties.”

WHEREAS, the State Board is a Constitutional Body, created by Article IX, Section 4 of the North Carolina Constitution; and

WHEREAS, the North Carolina Constitution further provides, in Article IX, Section 5, that the State Board “shall supervise and administer the free public school system and the educational funds provided for its support, . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly”; and is vested with the general supervision and administration of the free public school system; and

WHEREAS, the State Board is authorized and required by N.C. Gen. Stat. § 115C-12(23) and Article 29E of Chapter 115C of the North Carolina General Statutes to adopt rules governing interscholastic athletic activities, including eligibility for student participation, and;

WHEREAS, the State Board, pursuant to N.C. Gen. Stat. § 115C-12(23) and Article 29E of Chapter 115C of the North Carolina General Statutes also may authorize a designated organization to apply and enforce the State Board’s Rules governing participation in interscholastic athletic activities at the high school level; and

WHEREAS, the State Board has adopted Rules governing interscholastic athletic activities, including those regulating the eligibility of students to participate in interscholastic athletic activities conducted by participating schools; and

WHEREAS, the CAASC is a nonprofit corporation organized and existing under North Carolina law, formed for the educational purpose of coordinating athletic activities among high schools in North Carolina; and

WHEREAS, the State Board and the CAASC desire to enter into an agreement for the administration of interscholastic high school athletic activities;

NOW, THEREFORE, the Parties hereby agree as follows:

I. INTERSCHOLASTIC ATHLETIC ACTIVITIES

A. Oversight of athletic activities. The CAASC shall administer and enforce all Rules adopted by the State Board (“Rules”) to govern interscholastic athletics at the high school level. The CAASC shall oversee the conduct of interscholastic athletic activities among its member high schools (“participating schools”). The CAASC shall take all actions necessary to facilitate the oversight of interscholastic athletic activities; provided, however, that the CAASC’s actions shall be consistent with all State Board Rules and the terms of this MOU.

B. Regulations. The CAASC shall adopt, apply, and enforce regulations as set forth below. For the 2021-2022 school year, the regulations set forth in the CAASC’s Bylaws and Handbook shall apply. Beginning with the first full school year after the Effective Date of this MOU, the CAASC shall not adopt a regulation until the proposed regulation has been published on the CAASC’s website and the CAASC has allowed a reasonable opportunity to the public for notice and comment on the regulation. All regulations established by the CAASC must be consistent with State Board Rules. The State Board may, by majority vote, deem any regulation adopted by the CAASC invalid and unenforceable.

1. Student participation regulations. The CAASC shall establish any regulations necessary to enforce all State Board Rules governing student eligibility to participate in interscholastic athletic activities (“student participation regulations”). The CAASC shall make the student participation State Board Rules and CAASC regulations publicly available at no cost on the CAASC’s website.

2. **Administrative regulations.** The CAASC shall adopt, apply, and enforce regulations governing the classifications of schools into divisions and conferences, administration of games, and requirements for coaching, officiating, sportsmanship, and scheduling of seasons. The CAASC shall make the administrative regulations publicly available at no cost on the CAASC's website.
3. **Gameplay regulations.** The CAASC shall adopt, apply, and enforce regulations for the conduct of athletic competition in accordance with the requirements of the administering organization, including the requirements of the National Federation of State High School Associations, for each sport. The CAASC shall make information about how to access the gameplay regulations publicly available at no cost on the CAASC's website.
4. **Penalty regulations.** The CAASC shall adopt, apply, and enforce regulations governing the penalties for infractions of student participation, gameplay, and administrative regulations. The penalty rules shall establish a system of demerits for infractions of student participation rules and gameplay rules; such infractions may result in reprimands, probations, suspensions, forfeitures of contests, forfeitures of titles, and disqualifications. The CAASC shall make the penalty rules publicly available at no cost on the CAASC's website.

C. **Classification.** The CAASC shall establish classifications of participating schools in a fair, impartial, and transparent manner, based primarily on average daily membership.

D. **Conferences.** The CAASC shall align participating schools into conferences in a fair, impartial, and transparent manner, based primarily on geographic location of the schools, division classification, and average daily membership.

E. **Appeals.** The CAASC shall coordinate and administer the appeals process as established by the State Board and in accordance with the following requirements:

1. **Levels of appeal.**

- a. **Initial ruling.** Any dispute, inquiry, or report about a suspected violation of the student participation rules, administrative rules, or gameplay rules shall first be directed to the Executive Director of the CAASC. The Executive Director, or the Executive Director's designee, shall provide a ruling on any such issue, including, if applicable, the imposition of a penalty allowed by the penalty rules. If this ruling is given orally then, as soon as is reasonably possible thereafter, this ruling, and the basis for the decision, shall be reduced to writing and immediately provided to the participating school(s) affected by the ruling. The CAASC shall require the school to notify all impacted students. Written notification of the ruling shall constitute notification of the ruling for purposes of determining the time to appeal.
- b. **Independent Appeal.** The State Board of Education will appoint an Appeals Board to hear and act upon appeals from final decisions of administering organizations regarding student eligibility, penalties, fees imposed, retaliation, discrimination. Panels of no less than three members of the appeals board may hear and decide matters on behalf of the Board. A PSU aggrieved by a final decision of the administering organization may file an appeal with the State Board of Education's Office of General Counsel within 5 days after receipt of the administering organization's final decision. The PSU's appeal shall:
- (1) be in writing;
 - (2) include a description of the facts of the dispute;
 - (3) include any evidence submitted to the administering organization;
 - (4) present an argument explaining why the PSU believe the administering organization's final decision was not based on substantial evidence or the applicable law, policy, regulation, or Rule of

the State Board of Education or administering organization.

- (5) The administering organization must respond to the PSU's submissions within 5 days.
- (6) No later than thirty days after the State Board of Education's receipt of the appeal, a panel of the Appeals Board shall review the appeal, and any response by the PSU and issue its decision. The panel shall affirm the administering organization's final decision unless a majority of the panel determines that the final decision is not supported by substantial evidence or an applicable law, policy, regulation, or Rule of the State Board of Education or administering organization.
- (7) The timeline for hearing and responding to appeals may be shortened and the written document submissions may be waived by the Appeal Board panel appointed to hear the matter as necessary to make timely decisions that impact the ability of a student or coach to participate in an athletic contest.
- (8) A decision of a panel of the appeals board will be final.

2. **Independent Appeals Board.**

- a. The Independent Appeals Board shall be composed of professional educators, who have experience overseeing or implementing high school interscholastic athletic programs. Current members of the CAASC's Board of Directors are not eligible for membership on the Committee. However, past CAASC Board members who can serve as fair and impartial members of the committee will be encouraged to serve.
- b. The members of the Appeals Panel will receive training, conducted jointly by the State Board, the CAASC, and any other administering organization with an MOU with

the State Board, as to their duties and responsibilities, including the obligation to avoid conflicts of interest, to remain independent and impartial and to recuse themselves from considering a matter if they believe that they cannot be impartial or have a conflict of interest. The Appeals Board will also receive training on the application of State Board Rules and administering organizations' regulations.

c. The CAASC agrees that its representatives, employees or agents will not communicate with the Appeals Panel members about the substance of an appeal or lobby for a specific conclusion to the appeal prior to an independent appeals hearing.

3. Procedures for appeal. The CAASC shall make available on its website the procedures, including deadlines and other requirements, for appeals.

F. Complaints and Non-retaliation. The CAASC shall not retaliate against any participating school, the employees or students of those schools, or any other person for reporting, in good faith, to the CAASC, State Board, or any government entity any concerns about the conduct of or decisions about the high school interscholastic program it administers, including the following: suspected violations of laws or rules; circumstances giving rise to a substantial and specific danger to student or school personnel health and safety; fraud; misappropriation of resources; or gross mismanagement or abuse of authority. The Department of Public Instruction shall designate an individual or division within the Department to receive such complaints and process them. The CAASC will be given an opportunity to respond and/or address concerns or complaints. The application of penalties not challenged on appeal, or upheld upon review under the appeals process, shall not be considered retaliation.

II. MEMBERSHIP AND GOVERNANCE

A. Board of Director's Ethics The CAASC must have an Ethics Policy that requires its board members to avoid conflicts of interest and the appearance of impropriety. All members of the Board of Directors must agree to the organization's Ethics Policy

B. Membership. PSUs with high schools are eligible to allow their high schools to become members of the CAASC.

1. CAASC Handbook. For each school year, the CAASC shall adopt a handbook for participating schools ("CAASC Handbook"). The CAASC shall make its current Handbook publicly available at no cost on the CAASC's website.
2. Membership dues. The CAASC shall charge its members dues of \$1,000 for each participating school.
3. Gate receipts. The CAASC shall retain no amount of gate receipts or ticket sales for any games except for state tournament games. The CAASC shall annually establish the percentage of net proceeds from state tournament games, by sport, that it will retain. "Net proceeds" is defined as the amount remaining after all reasonable expenses incurred have been reimbursed to the participating schools and the CAASC. The State Board of Education reserves the right to reject the CAASC's annual determination of the net proceeds from gate receipts that it may retain if finds the monies being retained are unnecessary or excessive in light of the financial needs of the CAASC. As used in this MOU, "state tournament games" shall mean any playoff contest in a bracketed team sport and any regional or state event in an individual sport.
4. Other receipts. The CAASC shall not retain any portion of receipts collected from concessions or sale of merchandise by a participating school.

5. **Intellectual property.** The CAASC shall not regulate or control the intellectual property of PSUs whose schools participate in CAASC activities, including team logos, mascots, and audio or video of any game other than state tournament games.
6. **Non-commercial recordings.** The CAASC shall not restrict the recording of audio or video for personal, non-commercial use at any game, including state tournament games, by any parent of a student participating in the game or any employee of the school participating in the game.
7. **Insurance.** Under G.S. Section 58-31A-60, the Commissioner of Insurance has the duty to offer catastrophic insurance for covered students or school personnel participating in interscholastic athletic activities. The CAASC shall inform its membership of opportunities to purchase such insurance
8. **Vendors, sponsors, brands, and products.** The CAASC may provide participating schools information on available opportunities from vendors and sponsors of the CAASC. However, the CAASC shall not require participating schools to use designated vendors, sponsors, brands, or products other than for state tournament games when necessary to ensure consistency and fair play.
9. **Game attendance.** The CAASC shall work with participating schools to make reasonable efforts to establish mechanisms for parents and participating school personnel to view athletic competitions when emergency or catastrophic conditions limit in-person attendance at competitions.
10. **FERPA.** The CAASC shall apply the standards established by the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, to all student records containing personally identifiable information in the possession of the CAASC. The CAASC may publish student information provided by a participating school as directory information unless the participating school indicates that a parent has opted out of disclosure of that information.

III. SCHOLARSHIPS, GRANTS, AND PROGRAMS

The CAASC and the State Board recognize that interscholastic athletic activities play a valuable role in high school education. Grants and scholarships may broaden access to interscholastic athletic competition for participating schools and student-athletes. In furtherance of its mission to support education through interscholastic athletic activities, the CAASC may, (i) provide need-based grants to participating schools; (ii) provide scholarships to student-athletes to attend institutions of higher learning; and (iii) provide funding for leadership development opportunities and special programs that support the CAASC's mission. The CAASC agrees to allow the State Board access to information about the decision-making process for awarding grants, scholarships, and funding for programs.

IV. ACCESS AND REPORTING

The Parties agree that communication and transparency will facilitate cooperation between them in furtherance of the common goal of supporting education through interscholastic athletic activities. The Parties therefore agree as follows:

A. **Annual audit.** The CAASC shall submit to an annual audit by the North Carolina Office of the State Auditor ("State Auditor"), or an independent external auditor. The NCHSAA shall make a copy of the most recent annual audit report publicly available at no cost on its website.

B. **State Auditor.** The CAASC agrees that the State Auditor shall have the authority to audit the CAASC pursuant to Article 5A of Chapter 147 of the General Statutes.

C. **Annual report.** No later than December 1 of each calendar year, the CAASC shall report to the State Board and the Joint Legislative Education Oversight Committee on the following:

1. Activities during the prior school year and recommendations and findings regarding improvement of high school interscholastic athletics;
2. A copy of the most recent audit conducted under Section IV.A of this MOU;

3. A schedule of current fees charged by the CAASC to participating schools;
4. The current balance of funds held by the CAASC; and
5. From the prior fiscal year:
 - a. The total of the CAASC's expenses, including the percentage of that total expended on personnel costs;
 - b. The amount of fees and gate receipts collected;
 - c. The amount of grants and scholarships provided to participating schools and student-athletes, by school;
 - d. The amount of disbursements to participating schools, by school; and
 - e. The identity of sponsors and monetary amount received from each sponsorship

D. **Access to meetings and records.** The CAASC shall provide notice of, and access to, all meetings of its membership to all participating schools. The CAASC also shall broadcast the meetings of its membership and board of directors in a manner that is announced on its website and which may be viewed electronically by any members of the public; provided, however, that:

1. The CAASC shall maintain personnel information in confidence and shall not record such information in its publicly available meeting minutes or records;
2. The CAASC shall maintain information protected by FERPA in confidence and shall not record such information in its publicly available meeting minutes or records; and
3. The CAASC shall maintain attorney-client privileged information in confidence as necessary to protect the privilege

and shall not record such information in its publicly available meeting minutes or records.

V. TERM

A. Term. This MOU shall continue in effect for four (4) years from the Effective Date, unless sooner terminated according to this Section V.

B. Renewal. This MOU is renewable for successive terms of four (4) years by agreement of the Parties. If either of the Parties does not intend to renew this MOU, that party shall give written notice to the other party at least twelve (12) months prior to the expiration of the term of the MOU then in effect.

C. Termination. If the State Board determines that the CAASC has failed to comply with the requirements of this MOU, the State Board may terminate the MOU upon written notice to the CAASC and an opportunity to respond. In the written notice, the State Board shall identify all provisions of the MOU with which the State Board believes the CAASC has failed to comply and shall state the facts and circumstances giving rise to each such failure. The State Board shall notify the CAASC that it has an opportunity to respond to the written notice, and to cure all identified failures within thirty (30) days of receiving the written notice; provided, however, that in the case of a failure that cannot reasonably be cured within thirty (30) days, the State Board shall notify the CAASC that it must make reasonable, good faith efforts to cure the failure and must report to the State Board on those efforts within thirty (30) days of receiving the written notice. If the CAASC timely cures such identified failures, or as to failures that cannot reasonably be cured within thirty (30) days, the CAASC demonstrates that it is engaged in reasonable, good faith efforts to cure, the State Board shall not terminate the MOU. If the CAASC does not cure or make reasonable good faith efforts to cure within thirty (30) days, the State Board shall then have cause to terminate the MOU. Any termination shall not be effective for ninety (90) days from the date on which cause for termination arises. In the event of termination of the MOU during the academic year, the CAASC shall return to each participating school a prorated portion of the funds paid by that school for the year as provided by the participating school's contract with the CAASC.

VI. NOTICES

Any notice required to be given by one of the Parties to the other party under this MOU shall be sufficient if given in writing, by electronic mail addressed as follows:

A. If to the State Board:

Allison Schafer
General Counsel
State Board of Education
301 N. Wilmington Street
Raleigh, NC 27601
Email: Allison.Schafer@dpi.nc.gov

B. If to the CAASC:

Mark Kozlowski
Executive Director
Carolina Athletic Association for Schools of Choice
2591 Mid Salem Drive
Winston-Salem, NC 27103
Email: caa4sc@gmail.com

VII. SIGNATURES

Approved this 11th day of March,

CAROLINA ATHLETIC ASSOCIATION FOR SCHOOLS OF CHOICE



By: Mark Kozlowski
Executive Director

NORTH CAROLINA STATE BOARD OF EDUCATION



By: Eric Davis
Chairman

ATTEST:

OFFICE OF THE NORTH CAROLINA STATE SUPERINTENDENT



By: Catherine Truitt
State Superintendent of Public Instruction

STATE OF NORTH CAROLINA

COUNTY OF WAKE

**MEMORANDUM OF UNDERSTANDING BETWEEN THE NORTH
CAROLINA STATE BOARD OF EDUCATION AND THE CAROLINA
ATHLETIC ASSOCIATION FOR SCHOOLS OF CHOICE REGARDING
THE CONDUCT OF HIGH SCHOOL INTERSCHOLASTIC ATHLETICS**

This Memorandum of Understanding (“MOU”) is hereby entered into by and between the North Carolina State Board of Education (“State Board”) and the Carolina Athletic Association For Schools Of Choice, Inc. (“CAASC”). The State Board and the NCHSAA are collectively referred to herein as the “Parties.”

WHEREAS, the State Board is a Constitutional Body, created by Article IX, Section 4 of the North Carolina Constitution; and

WHEREAS, the North Carolina Constitution further provides, in Article IX, Section 5, that the State Board “shall supervise and administer the free public school system and the educational funds provided for its support, . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly”; and is vested with the general supervision and administration of the free public school system; and

WHEREAS, the State Board is authorized and required by N.C. Gen. Stat. § 115C-12(23) and Article 29E of Chapter 115C of the North Carolina General Statutes to adopt rules governing interscholastic athletic activities, including eligibility for student participation, and;

WHEREAS, the State Board, pursuant to N.C. Gen. Stat. § 115C-12(23) and Article 29E of Chapter 115C of the North Carolina General Statutes also may authorize a designated organization to apply and enforce the State Board’s Rules governing participation in interscholastic athletic activities at the high school level; and

WHEREAS, the State Board has adopted Rules governing interscholastic athletic activities, including those regulating the eligibility of students to participate in interscholastic athletic activities conducted by participating schools; and

WHEREAS, the CAASC is a nonprofit corporation organized and existing under North Carolina law, formed for the educational purpose of coordinating athletic activities among high schools in North Carolina; and

WHEREAS, the State Board and the CAASC desire to enter into an agreement for the administration of interscholastic high school athletic activities;

NOW, THEREFORE, the Parties hereby agree as follows:

I. **INTERSCHOLASTIC ATHLETIC ACTIVITIES**

A. **Oversight of athletic activities.** The CAASC shall administer and enforce all Rules adopted by the State Board (“Rules”) to govern interscholastic athletics at the high school level. The CAASC shall oversee the conduct of interscholastic athletic activities among its member high schools (“participating schools”). The CAASC shall take all actions necessary to facilitate the oversight of interscholastic athletic activities; provided, however, that the CAASC’s actions shall be consistent with all State Board Rules and the terms of this MOU.

B. **Regulations.** The CAASC shall adopt, apply, and enforce regulations as set forth below. For the 2021-2022 school year, the regulations set forth in the CAASC’s Bylaws and Handbook shall apply. Beginning with the first full school year after the Effective Date of this MOU, the CAASC shall not adopt a regulation until the proposed regulation has been published on the CAASC’s website and the CAASC has allowed a reasonable opportunity to the public for notice and comment on the regulation. All regulations established by the CAASC must be consistent with State Board Rules. The State Board may, by majority vote, deem any regulation adopted by the CAASC invalid and unenforceable.

1. **Student participation regulations.** The CAASC shall establish any regulations necessary to enforce all State Board Rules governing student eligibility to participate in interscholastic athletic activities (“student participation regulations”). The CAASC shall make the student participation State Board Rules and CAASC regulations publicly available at no cost on the CAASC’s website.

2. **Administrative regulations.** The CAASC shall adopt, apply, and enforce regulations governing the classifications of schools into divisions and conferences, administration of games, and requirements for coaching, officiating, sportsmanship, and scheduling of seasons. The CAASC shall make the administrative regulations publicly available at no cost on the CAASC's website.
3. **Gameplay regulations.** The CAASC shall adopt, apply, and enforce regulations for the conduct of athletic competition in accordance with the requirements of the administering organization, including the requirements of the National Federation of State High School Associations, for each sport. The CAASC shall make information about how to access the gameplay regulations publicly available at no cost on the CAASC's website.
4. **Penalty regulations.** The CAASC shall adopt, apply, and enforce regulations governing the penalties for infractions of student participation, gameplay, and administrative regulations. The penalty rules shall establish a system of demerits for infractions of student participation rules and gameplay rules; such infractions may result in reprimands, probations, suspensions, forfeitures of contests, forfeitures of titles, and disqualifications. The CAASC shall make the penalty rules publicly available at no cost on the CAASC's website.

C. **Classification.** The CAASC shall establish classifications of participating schools in a fair, impartial, and transparent manner, based primarily on average daily membership.

D. **Conferences.** The CAASC shall align participating schools into conferences in a fair, impartial, and transparent manner, based primarily on geographic location of the schools, division classification, and average daily membership.

E. **Appeals.** The CAASC shall coordinate and administer the appeals process as established by the State Board and in accordance with the following requirements:

1. **Levels of appeal.**

- a. **Initial ruling.** Any dispute, inquiry, or report about a suspected violation of the student participation rules, administrative rules, or gameplay rules shall first be directed to the Executive Director of the CAASC. The Executive Director, or the Executive Director's designee, shall provide a ruling on any such issue, including, if applicable, the imposition of a penalty allowed by the penalty rules. If this ruling is given orally then, as soon as is reasonably possible thereafter, this ruling, and the basis for the decision, shall be reduced to writing and immediately provided to the participating school(s) affected by the ruling. The CAASC shall require the school to notify all impacted students. Written notification of the ruling shall constitute notification of the ruling for purposes of determining the time to appeal.
- b. **Independent Appeal.** The State Board of Education will appoint an Appeals Board to hear and act upon appeals from final decisions of administering organizations regarding student eligibility, penalties, fees imposed, retaliation, discrimination. Panels of no less than three members of the appeals board may hear and decide matters on behalf of the Board. A PSU aggrieved by a final decision of the administering organization may file an appeal with the State Board of Education's Office of General Counsel within 5 days after receipt of the administering organization's final decision. The PSU's appeal shall:
- (1) be in writing;
 - (2) include a description of the facts of the dispute;
 - (3) include any evidence submitted to the administering organization;
 - (4) present an argument explaining why the PSU believe the administering organization's final decision was not based on substantial evidence or the applicable law, policy, regulation, or Rule of

the State Board of Education or administering organization.

- (5) The administering organization must respond to the PSU's submissions within 5 days.
- (6) No later than thirty days after the State Board of Education's receipt of the appeal, a panel of the Appeals Board shall review the appeal, and any response by the PSU and issue its decision. The panel shall affirm the administering organization's final decision unless a majority of the panel determines that the final decision is not supported by substantial evidence or an applicable law, policy, regulation, or Rule of the State Board of Education or administering organization.
- (7) The timeline for hearing and responding to appeals may be shortened and the written document submissions may be waived by the Appeal Board panel appointed to hear the matter as necessary to make timely decisions that impact the ability of a student or coach to participate in an athletic contest.
- (8) A decision of a panel of the appeals board will be final.

2. **Independent Appeals Board.**

- a. The Independent Appeals Board shall be composed of professional educators, who have experience overseeing or implementing high school interscholastic athletic programs. Current members of the CAASC's Board of Directors are not eligible for membership on the Committee. However, past CAASC Board members who can serve as fair and impartial members of the committee will be encouraged to serve.
- b. The members of the Appeals Panel will receive training, conducted jointly by the State Board, the CAASC, and any other administering organization with an MOU with

the State Board, as to their duties and responsibilities, including the obligation to avoid conflicts of interest, to remain independent and impartial and to recuse themselves from considering a matter if they believe that they cannot be impartial or have a conflict of interest. The Appeals Board will also receive training on the application of State Board Rules and administering organizations' regulations.

c. The CAASC agrees that its representatives, employees or agents will not communicate with the Appeals Panel members about the substance of an appeal or lobby for a specific conclusion to the appeal prior to an independent appeals hearing.

3. Procedures for appeal. The CAASC shall make available on its website the procedures, including deadlines and other requirements, for appeals.

F. Complaints and Non-retaliation. The CAASC shall not retaliate against any participating school, the employees or students of those schools, or any other person for reporting, in good faith, to the CAASC, State Board, or any government entity any concerns about the conduct of or decisions about the high school interscholastic program it administers, including the following: suspected violations of laws or rules; circumstances giving rise to a substantial and specific danger to student or school personnel health and safety; fraud; misappropriation of resources; or gross mismanagement or abuse of authority. The Department of Public Instruction shall designate an individual or division within the Department to receive such complaints and process them. The CAASC will be given an opportunity to respond and/or address concerns or complaints. The application of penalties not challenged on appeal, or upheld upon review under the appeals process, shall not be considered retaliation.

II. MEMBERSHIP AND GOVERNANCE

A. Board of Director's Ethics The CAASC must have an Ethics Policy that requires its board members to avoid conflicts of interest and the appearance of impropriety. All members of the Board of Directors must agree to the organization's Ethics Policy

B. Membership. PSUs with high schools are eligible to allow their high schools to become members of the CAASC.

1. CAASC Handbook. For each school year, the CAASC shall adopt a handbook for participating schools ("CAASC Handbook"). The CAASC shall make its current Handbook publicly available at no cost on the CAASC's website.
2. Membership dues. The CAASC shall charge its members dues of \$1,000 for each participating school.
3. Gate receipts. The CAASC shall retain no amount of gate receipts or ticket sales for any games except for state tournament games. The CAASC shall annually establish the percentage of net proceeds from state tournament games, by sport, that it will retain. "Net proceeds" is defined as the amount remaining after all reasonable expenses incurred have been reimbursed to the participating schools and the CAASC. The State Board of Education reserves the right to reject the CAASC's annual determination of the net proceeds from gate receipts that it may retain if finds the monies being retained are unnecessary or excessive in light of the financial needs of the CAASC. As used in this MOU, "state tournament games" shall mean any playoff contest in a bracketed team sport and any regional or state event in an individual sport.
4. Other receipts. The CAASC shall not retain any portion of receipts collected from concessions or sale of merchandise by a participating school.

5. **Intellectual property.** The CAASC shall not regulate or control the intellectual property of PSUs whose schools participate in CAASC activities, including team logos, mascots, and audio or video of any game other than state tournament games.
6. **Non-commercial recordings.** The CAASC shall not restrict the recording of audio or video for personal, non-commercial use at any game, including state tournament games, by any parent of a student participating in the game or any employee of the school participating in the game.
7. **Insurance.** Under G.S. Section 58-31A-60, the Commissioner of Insurance has the duty to offer catastrophic insurance for covered students or school personnel participating in interscholastic athletic activities. The CAASC shall inform its membership of opportunities to purchase such insurance
8. **Vendors, sponsors, brands, and products.** The CAASC may provide participating schools information on available opportunities from vendors and sponsors of the CAASC. However, the CAASC shall not require participating schools to use designated vendors, sponsors, brands, or products other than for state tournament games when necessary to ensure consistency and fair play.
9. **Game attendance.** The CAASC shall work with participating schools to make reasonable efforts to establish mechanisms for parents and participating school personnel to view athletic competitions when emergency or catastrophic conditions limit in-person attendance at competitions.
10. **FERPA.** The CAASC shall apply the standards established by the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, to all student records containing personally identifiable information in the possession of the CAASC. The CAASC may publish student information provided by a participating school as directory information unless the participating school indicates that a parent has opted out of disclosure of that information.

III. SCHOLARSHIPS, GRANTS, AND PROGRAMS

The CAASC and the State Board recognize that interscholastic athletic activities play a valuable role in high school education. Grants and scholarships may broaden access to interscholastic athletic competition for participating schools and student-athletes. In furtherance of its mission to support education through interscholastic athletic activities, the CAASC may, (i) provide need-based grants to participating schools; (ii) provide scholarships to student-athletes to attend institutions of higher learning; and (iii) provide funding for leadership development opportunities and special programs that support the CAASC's mission. The CAASC agrees to allow the State Board access to information about the decision-making process for awarding grants, scholarships, and funding for programs.

IV. ACCESS AND REPORTING

The Parties agree that communication and transparency will facilitate cooperation between them in furtherance of the common goal of supporting education through interscholastic athletic activities. The Parties therefore agree as follows:

A. **Annual audit.** The CAASC shall submit to an annual audit by the North Carolina Office of the State Auditor ("State Auditor"), or an independent external auditor. The NCHSAA shall make a copy of the most recent annual audit report publicly available at no cost on its website.

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Allison Schafer
General Counsel
State Board of Education
301 N. Wilmington Street
Raleigh, NC 27601
Email: Allison.Schafer@dpi.nc.gov

B. If to the CAASC:

Mark Kozlowski
Executive Director
Carolina Athletic Association for Schools of Choice
2591 Mid Salem Drive
Winston-Salem, NC 27103
Email: caa4sc@gmail.com

VII. SIGNATURES

Approved this 11th day of March,

CAROLINA ATHLETIC ASSOCIATION FOR SCHOOLS OF CHOICE



By: Mark Kozlowski
Executive Director

NORTH CAROLINA STATE BOARD OF EDUCATION



By: Eric Davis
Chairman

ATTEST:

OFFICE OF THE NORTH CAROLINA STATE SUPERINTENDENT



By: Catherine Truitt
State Superintendent of Public Instruction