

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

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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.

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.

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.

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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.*
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