

Burgos, Alexander N

From: Ascher, Seth M
Sent: Thursday, March 14, 2024 11:24 AM
To: Collins, Ryan; Brewington, Denyse
Cc: Wiggs, Travis C; Burgos, Alexander N
Subject: RFC for March SBE Temporary Rules
Attachments: SBE March Temp Rules RFC.docx

Good afternoon,

I'm the attorney who reviewed the Temporary Rules submitted by the State Board of Education for the March 2024 RRC meeting. The RRC will formally review these Rules at its meeting on Wednesday, March 27, 2024, at 10:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an invite should be sent to you as we get close to the meeting. If there are any other representatives from your agency who want to attend virtually, let me know prior to the meeting, and we will get invites out to them as well.

Attached is the Request for Changes Pursuant to G.S. 150B-21.10. Note that the document does not include rules where no changes are being requested. Please submit the revised Rules and forms to me via email, no later than 5 p.m. on March 22, 2024. I will be out of town on March 21 and 22, so please make sure to include Travis Wiggs, another RRC counsel, when you send responses and updates.

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

Seth Ascher

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REQUEST FOR WAIVER OF RRC RULE

I request a waiver of RRC Rule **26 NCAC 02C .0102(13)**

Agency Requesting Waiver: State Board of Education

Person Requesting Waiver: Ryan Collins, Rulemaking Coordinator (on behalf of the State Board of Education)

Reason for Waiver: The State Board of Education is adopting two new rules on Interscholastic Athletics and is asking to re-use the rule numbers for two expired rules that are on the same subject matter as the new rules.

Date: 1/4/2024

Factors to be used in determining whether RRC shall grant a waiver (26 NCAC 05 .0112):

- (1) the necessity for a waiver;
- (2) the amount of notice given to the Commission and its staff, the agency proposing the rule, and interested parties;
- (3) the applicant's responsibility for the conditions creating the need for a waiver;
- (4) the applicant's previous requests for a waiver;
- (5) the applicant's knowledge of or experience with the rulemaking process;
- (6) the precedential value of such a waiver;
- (7) the harm to the applicant if a waiver is not granted;
- (8) the harm to the agency if a waiver is granted when the agency is not the applicant.

List and explain the appropriate factors affecting your request and why the waiver should be granted: The State Board of Education (“SBE”) is requesting a waiver of 26 NCAC 02C .0102(13), as it applies to two proposed rules on interscholastic athletics that it has noticed for publication concurrently with this request for a waiver: 16 NCAC 06E .0201 and 16 NCAC 06E .0205. Specifically, the SBE is asking for a waiver of the prohibition against re-using a rule number. The previous version of 16 NCAC 06E .0201 was a “Definitions” rule for the Section, and it expired on June 1, 2022. The new proposed rule is also a “Definitions” rule that provides new definitions based on the other new and amended rules for the Section. Similarly, the previous version of 16 NCAC 06E .0205 was a rule on concussion safety requirements for interscholastic athletic competition, which expired on August 20, 2020. The new proposed rule is entitled “Student Health and Safety Requirements for Interscholastic Athletic

Competition,” but the content is nearly identical to the expired rule, save for some technical changes.

The applicant has considered the factors in 26 NCAC 05 .0112 and contends that they support this request.

- (1) The waiver is necessary for the efficient organization of the Administrative Code. Re-using 16 NCAC 06E .0201 ensures that the definitions rule for the Section remains at the beginning of the Section, and thus alerts readers of the Code to the meaning of terms used throughout the Section. In addition, since both new rules are on substantially the same subject matter as the expired rules, it would be efficient for the same rule numbers to be re-used.
- (2) The waiver is being submitted concurrently with the proposed text of the rules for publication. Accordingly, the Commission and its staff will have at least 30 business days to consider the waiver before the SBE adopts a final rule for submission to the Commission. I do not anticipate substantial public interest in the request to re-use the rule numbers for expired rules.
- (3) Although the SBE failed to re-adopt the expired rules prior to their expiration, the applicant believes that this failure should be a basis for denying the waiver in this case. The General Assembly has made significant changes in the past two years to laws governing interscholastic athletics and has required the SBE to adopt new rules to implement those laws. Given that these two rules are part of a much larger package that will substantially expand SBE rules on this topic, the SBE should be given the opportunity to organize those rules in an effective manner.
- (4) The applicant has not previously requested a waiver on this subject.
- (5) The SBE is relatively new to the rulemaking process, given that prior to 2018 the SBE operated primarily based on policy. The undersigned is also a relatively new rulemaking coordinator, having only joined the SBE staff in January 2023. The undersigned is working with the SBE to improve its rulemaking process to avoid the need for such waiver requests in the future.

- (6) The undersigned is given to believe that the Commission or the Codifier has granted waivers of 26 NCAC 02C .0102(13) in the past when a proposed new rule was on substantially the same subject matter as an old rule. The undersigned believes that this sets a valuable precedent in that it encourages the efficient management of the Administrative Code by re-using old rule numbers where it is appropriate to do so.
- (7) The SBE does not anticipate significant harm if the waiver is denied but contends that no harm will come in granting it.
- (8) N/A – agency is the applicant.

List on a separate sheet of paper any persons you have notified concerning this waiver request.



Signature: _____