

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 06D .0211

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - X Unnecessary
 - X Failure to comply with the APA
- Extend the period of review

COMMENT:

Staff recommends objection for failure to comply with the APA, ambiguity, and lack of necessity. The Rule refers to an "Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina." In Item (1), the Rule states the Invitation provides "the required procedures for submission, evaluation, and adoption of textbooks and a schedule for the process." The Invitation also includes the "criteria used to evaluate textbooks presented for adoption for their conformity to the North Carolina Standard Course of Study." These contents meet the definition of a "rule" in G.S. 150B-2(8a). Referring to the Invitation rather than stating its contents in rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this allows the agency to amend the Invitation outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide these procedural requirements in Rule also makes the process for submitting and evaluating textbooks unclear. Therefore, staff recommends objection for failure to comply with the APA and ambiguity.

Staff also recommends objection to Item (2) for lack of necessity. Item (2) directs the General Counsel of the State Board to "review and approve" the Invitation. This statement concerns only the internal management of the agency and is therefore unnecessary. G.S. 150B-2(8a)(a).

Ashley Snyder
Commission Counsel

1 16 NCAC 06D .0211 is proposed for adoption as follows:

2 **16 NCAC 06D .0211 TEXTBOOK EVALUATION CRITERIA AND INVITATION TO SUBMIT**

3 The North Carolina Department of Public Instruction shall develop the criteria used to evaluate textbooks presented
4 for adoption for their conformity to the North Carolina Standard Course of Study.

5 (1) The criteria shall be included in the Invitation to Submit Textbooks for Evaluation and Adoption in
6 North Carolina. The Invitation, also developed by the Department, shall provide the required
7 procedures for submission, evaluation, and adoption of textbooks and a schedule for the process.

8 (2) General Counsel to the State Board of Education shall review and approve the Invitation prior to its
9 being submitted to the State Board of Education for review and adoption.

10 (3) The State Board-approved and adopted Invitation to Submit Textbooks for Evaluation and Adoption
11 in North Carolina that includes the criteria shall be sent to the publishers on the NC Publishers
12 Registry requesting the submission of textbooks for evaluation and adoption. Only publishers on the
13 NC Publishers Registry will be sent the invitation and can submit textbooks for evaluation and
14 adoption.

15

16 History Note: Authority G.S. 115C-12; 115C-89;

17 Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);

18 Emergency Rule Eff. August 20, 2019.

19

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AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0212

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
 - Extend the period of review

COMMENT:

Staff recommends objection for failure to comply with the APA, ambiguity, and lack of necessity. The Rule refers to an "Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina." In Paragraph (b) the Rule states "Publishers are required to follow the procedures set forth in the invitation. Failure to comply with all procedure, including stated deadlines, may result in disqualification." Subparagraph (d)(3) states the Invitation includes the "procedure for reconsideration." These procedures meet the definition of a "rule" in G.S. 150B-2(8a). Referring to the Invitation rather than stating its contents in rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this allows the agency to amend the Invitation outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide these procedural requirements in Rule also makes the process for submitting and evaluating textbooks unclear. Therefore, staff recommends objection for failure to comply with the APA and ambiguity.

Staff also recommends objection to Paragraph (a) for lack of necessity because it repeats the requirements of G.S. 115C-94.

§ 115C-94. Publishers to register.

Any publisher who submits books for adoption shall register in the office of the Superintendent of Public Instruction the names of all agents or other employees authorized to represent that company in the State, and this registration list shall be open to the public for inspection.

Ashley Snyder
Commission Counsel

1 16 NCAC 06D .0212 is proposed for adoption as follows:

2 **16 NCAC 06D .0212 TEXTBOOK PUBLISHERS REGISTRY**

3 (a) In accordance with G.S. 115C-94, the State Superintendent of Public Instruction or designee shall maintain a
4 register of all publishers who submit textbooks for adoption by the State Board of Education. The State Superintendent
5 shall prescribe the information required for registration.

6 (b) Publishers shall be registered on the NC Publishers Registry in order to receive the State Board of Education-
7 approved Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina, which shall provide the
8 required procedures for submission, evaluation, and adoption of textbooks. Publishers are required to follow the
9 procedures set forth in the invitation. Failure to comply with all procedures, including stated deadlines, may result in
10 disqualification. Only publishers on the NC Publishers Registry will be sent the invitation and can submit textbooks
11 for evaluation and adoption.

12 (c) Each publishing company piloting textbook materials being submitted for consideration in the current adoption
13 year shall notify the Textbook Commission, in writing, which materials are being piloted and in which local education
14 agencies materials are being piloted. The Textbook Commission shall notify all local superintendents involved in
15 piloting textbook materials prior to the end of the textbook selection process that the materials they are piloting may
16 or may not be accepted by the Commission.

17 (d) Contact with the State Board of Education, the Textbook Commission, advisors, and the Department must be
18 limited.

19 (1) The Commission may meet publicly with representatives of publishers to discuss the Commission's
20 plans and procedures for adoption of textbooks.

21 (2) At no time during the adoption process (from the time the State Board approves the invitation until
22 the State Board adopts the list of textbooks) may the publishers or any of their representatives meet
23 privately with members of the Textbook Commission, the State Board of Education, evaluation
24 advisors, or the Department staff involved in submission, evaluation, or adoption process.

25 (3) A period of time shall be set aside for the Textbook Commission to meet and deliberate before a list
26 of textbook recommendations is taken to the State Board of Education for adoption. Publishers will
27 have time to present additional information to the Commission if their title(s) have been excluded
28 from the list of recommendations. The procedure for reconsideration shall be described in the
29 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina.

30 (e) Publishers may not exercise undue pressure.

31 (1) For purposes of restrictions, "undue pressure" means personal contact, whether in person, by
32 telephone, or in written form, that attempts to advocate for the selection of a particular book or series
33 of books. "Undue pressure" does not include social contact or presentations to the Textbook
34 Commission as a whole, and does not include written communication with Textbook Commission
35 members or agency officials following acceptance or rejection of a submission in an effort to seek
36 clarification or reconsideration.

1 (2) The State Superintendent shall remove from the NC Publishers Registry any publisher whose
2 representatives attempt to exercise undue pressure of any kind to adopt its books upon a member of
3 the Textbook Commission, the advisors, or the Department.

4 (3) The State Board of Education shall direct the State Superintendent of Public Instruction to remove
5 from the NC Publishers Registry any publisher whose representatives attempt to exercise undue
6 pressure of any form upon a member of the State Board of Education to adopt its books.

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8 *History Note: Authority G.S. 115C-12; 115C-89;*

9 *Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);*

10 *Emergency Rule Eff. August 20, 2019.*

11

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AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0307

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - X Unclear or ambiguous
 - X Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Staff recommends objection to this Rule for lack of necessity, clarity, and statutory authority. The proposed Rule is unnecessary because it repeats portions of 16 NCAC 06D .0302, an existing permanent rule last amended in 2001. The existing permanent Rule is attached with annotations detailing repetitive provisions.

Staff recommends objection to (f) for lack of statutory authority. The proposed Rule requires LEAs to report scores on districtwide and statewide standardized tests "within thirty (30) days from generation of the score at the LEA level or receipt of the score and interpretive documentation from the NCDPI." However, G.S. 115C-174.15 requires scores for local tests be provided within 30 days of administration.

§ 115C-174.15. (For applicability, see editor's note) Report student performance on local standardized tests.

(a) A local board of education shall provide a student's results on standardized tests required by the local board, as reported pursuant to G.S. 115C-174.12(d), to the following persons and according to the following time lines:

- (1) To the student's teachers no later than one week after the standardized test is administered.
- (2) To the student's parents no later than 30 days after the standardized test is administered.

Ashley Snyder
Commission Counsel

(b) If the superintendent of the local school administrative unit determines in writing that extenuating circumstances exist and reports those circumstances to the local board of education, the local board may extend the above time lines in the discretion of the local board of education. (2017-57, s. 7.28A(c).)

Staff also recommends objection for lack of clarity due to unclear or undefined terms including "secure tests," "improper administration," and other unclear terms as set forth in the requests for technical changes.

Staff notes the agency did not provide a revised rule or responses to the requests for technical changes.

Annotated version of existing permanent Rule 16 NCAC 06D .0306. Staff notes in red refer to paragraphs in the proposed Rule.

16 NCAC 06D .0302 TEST ADMINISTRATION

- (a) Employees of the LEA shall administer tests to students who are required or permitted to participate.
- (b) The department shall supply the tests to the LEAs. **Repeats (a)(1).**
- (c) LEAs shall: **Repeats (a)(2).**
 - (1) account to the department for all tests received;
 - (2) provide a locked storage area for all tests received;
 - (3) prohibit the reproduction of all or any part of the test; and
 - (4) prohibit their employees from disclosing the content of, or specific items contained in, the test to persons other than authorized employees of the LEA.
- (d) LEAs must monitor test administration procedures. If school officials discover any instance of improper administration and determine that the validity of the test results has been affected, they must notify the local board of education and order the affected students to be retested. **Repeats part of (b).**
- (e) The Superintendent of Public Instruction may conduct audits of LEAs if he receives written complaints which allege improper test administration, and he may require the retesting of students. **Repeats (c).**
- (f) The department shall provide the mechanism for the scoring of all North Carolina mandated tests. In addition the department shall provide score interpretation services to the LEA. **Compare to (d).**
- (g) LEAs shall, at the beginning of each school year, provide information to students and parents or guardians advising them of the district-wide and state-mandated tests that students will be required to take during that school year. In addition, LEAs shall provide information to the students and parents or guardians to advise them of the dates the tests will be administered and how the results from the tests will be used and the consequences thereof. Also, information provided to parents about tests shall include whether the SBE or the local board of education requires the test. **Repeats (e).**
- (h) LEAs shall report scores resulting from the administration of district-wide and state-mandated tests to students and parents or guardians along with available score interpretation information within 30 days from generation of the score at the LEA level or from the receipt of the score and interpretive documentation from the department. **Repeats (f).**
- (i) At the time the scores are reported for tests required for graduation such as the high school competency tests, the computer skills tests, and the high school exit exam, the LEA shall provide the information to students and parents or guardians to advise whether or not the student has met the standard for the test. If a student fails to meet the standard for the test, the student and parents or guardians shall be informed at the time of reporting, the date(s) when focused remedial instruction will be available and the date of the next testing opportunity. **Not contained in proposed Rule.**
- (j) In order to ensure adequate representation and the generalizability of the data used to develop tests and to conduct evaluation studies, selected LEAs and schools, determined by the department through random stratified samples, shall participate in field testing and other sample testing such as the National Assessment of Educational Progress (NAEP) and other national or international assessments as designated by the department or the SBE. **Repeats (g).**

History Note: Authority G.S. 115C-12(9)c.;
Eff. July 1, 1986;
Amended Eff. May 1, 2001; August 1, 1999; June 1, 1996.

1 16 NCAC 06D .0307 is proposed for adoption as follows:

2 **16 NCAC 06D .0307 TEST ADMINISTRATION IN PUBLIC SCHOOLS**

3 (a) Test Administration -- Only persons who are employed by the school system, either permanently or contractually,
4 and have professional training in education and the state testing program shall administer secure tests to students.

5 (1) The North Carolina Department of Public Instruction (NCDPI) shall supply the tests to the local
6 education agencies (LEAs).

7 (2) LEAs shall:

8 (A) account to the NCDPI for all tests received;

9 (B) provide a secure, locked storage facility for all tests received;

10 (C) prohibit the reproduction of any or all parts of the test; and

11 (D) prohibit its employees from disclosing the content of the tests or specific items contained
12 in the tests to persons other than authorized employees of the LEA.

13 (b) LEAs must monitor test administration procedures. If school officials discover any instance of improper
14 administration and determine that the validity of the test results has been affected, they must notify the local board of
15 education, declare a misadministration, and order the affected students to be re-tested. Only the superintendent and
16 the LEA test coordinator have the authority to declare a test misadministration at the local level.

17 (c) The Superintendent of Public Instruction may conduct audits of LEAs if he/she receives written complaints that
18 allege improper test administration, and he/she may require the re-testing of students.

19 (d) The NCDPI shall score or have scored all tests in the North Carolina Testing Program. In addition, the department
20 shall provide score interpretative services to the LEAs.

21 (e) LEAs shall, at the beginning of each school year, provide information to students and parents or guardians advising
22 them of the districtwide and state-mandated tests that students will be required to take during that school year. In
23 addition, LEAs shall advise students and parents or guardians of the dates the tests will be administered and how the
24 results from the tests will be used. Information LEAs provide to parents shall include whether the State Board of
25 Education or the local board of education requires the test(s).

26 (f) LEAs shall report scores resulting from the administration of districtwide and state-mandated tests to students and
27 parents or guardians along with available score interpretation information within thirty (30) days from generation of
28 the score at the LEA level or receipt of the score and interpretive documentation from the NCDPI.

29 (g) In order to ensure adequate representation and the generalizability of the data used to develop tests and to conduct
30 evaluation studies, selected LEAs and schools, determined through stratified random samples, shall participate in field
31 testing and other sample testing such as the National Assessment of Educational Progress (NAEP) and other national
32 or international assessments as designated by the department or the SBE.

33
34 *History Note: Authority G.S. 115C-12(9); 115C-174.11; 115C-174.12;*

35 *Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);*

36 *Emergency Rule Eff. August 20, 2019.*

37

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AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0308

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - X Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Staff recommends objection to this Rule for lack of necessity and clarity. The proposed Rule is unnecessary because it repeats 16 NCAC 06D .0303, an existing permanent rule last amended in 1999. An annotated version of .0303 is attached.

The proposed rule is also unclear due to ambiguous or undefined terms including "accountability measures," "North Carolina Testing Program," "proper," and "appropriate."

Staff notes the agency did not provide a revised rule or responses to the requests for technical changes.

Ashley Snyder
Commission Counsel

Annotated version of existing permanent Rule 16 NCAC 06D .0303. Staff notes in red refer to paragraphs in the proposed Rule.

16 NCAC 06D .0303 ACCOUNTABILITY COORDINATOR

- (a) The local superintendent shall designate one or more persons to serve as the local testing coordinator and accountability coordinator to assist in the local administration, reporting, and interpretation of tests and other accountability measures. **Repeats (a), but without reference to a local LEA or the NC Testing Program.**
- (b) Coordinators must attend training sessions provided by the Department on the subject of proper test administration, scanning and scoring answer sheets and required processing of test materials. They must then conduct similar sessions within the LEA to provide this instruction to school-based test administrators and proctors. Coordinators shall arrange for the scanning, scoring, and reporting of results from tests adopted by the SBE. **Repeats (b). Proposed Rule adds test security and “appropriate” use of accommodations to list of training requirements. Proposed Rule also adds requirement that training be conducted in-person.**

History Note: Authority G.S. 115C-12(9)c.;
Eff. July 1, 1986;
Amended Eff. August 1, 1999; November 1, 1997.

1 16 NCAC 06D .0308 is proposed for adoption as follows:

2 **16 NCAC 06D .0308 ROLE OF THE TESTING COORDINATOR**

3 (a) The local superintendent in a local education agency (LEA) shall act as or appoint a school system testing and
4 accountability coordinator to assist in the local administration, reporting, and interpretation of test results and other
5 accountability measures in the North Carolina Testing Program.

6 (b) LEA testing and accountability coordinators shall attend training sessions provided by the North Carolina
7 Department of Public Instruction regarding proper test administration, test security, appropriate use of
8 accommodations, scanning and scoring answer sheets, and preparation of test materials for scoring at a central site.
9 LEA test coordinators shall conduct in-person training for the school test coordinators in their LEAs for the purpose
10 of providing instruction to local test administrators and proctors. LEA testing and accountability coordinators shall
11 arrange for the scanning, scoring, and reporting of results from tests adopted by the State Board of Education.

12
13 History Note: Authority G.S. 115C-12(9); 115C-174.11; 115C-174.12;

14 Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);

15 Emergency Rule Eff. August 20, 2019.

16

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AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0309

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Staff recommends objection to this Rule for lack of necessity, clarity, and statutory authority. The proposed Rule is unnecessary and unclear because it repeats or conflicts with 16 NCAC 06D .0303, an existing permanent rule last amended in 1999. The existing permanent Rule is attached with annotations detailing repetitive and conflicting provisions.

Staff further recommends objection for lack of clarity due to unclear terms including "eligible students," "alternative assessments," "Occupational Course of Study," "immediately," and other unclear or undefined terms as detailed in the requests for technical changes.

In requests for technical changes, staff asked the agency to provide statutory authority for Paragraphs (d), (j), and (k). The agency has not provided, and staff has not been able to locate statutory authority for these Paragraphs. Therefore, staff recommends objection to Paragraphs (d), (j), and (k) for lack of statutory authority.

Staff notes the agency did not provide a revised rule or responses to the requests for technical changes.

Ashley Snyder
Commission Counsel

Annotated version of existing permanent Rule 16 NCAC 06D .0303. Staff notes in red refer to paragraphs in the proposed Rule. Highlighted portions Conflict with the proposed Rule.

16 NCAC 06D .0305 END-OF-COURSE ASSESSMENTS

- (a) The LEA shall include each student's end-of-course assessment results in the student's permanent records and high school transcript. **Repeats (b).**
- (b) The LEA shall give each end-of-course assessment within the final five days of the course on a block schedule and the final 10 days of the course on a traditional schedule. **Repeats first sentence of (d).**
- (c) LEAs shall use results from all operational end-of-course assessments as at least 25% of the student's final grade for each respective course. LEAs shall adopt policies regarding the use of end-of-course assessment results in assigning final grades. **Paragraph (d) sets minimum at 20%.**
- (d) Students who are enrolled for credit in courses in which end-of-course assessments are required shall take the appropriate end-of-course assessment. **Repeats (e).**
- (e) Students who are exempt from final exams by local board of education policy shall not be exempt from end-of-course assessments. **Repeats (f).**
- (f) Each student shall take the appropriate end-of-course assessment the first time the student takes the course even if the course is an honors or advanced placement course. **Repeats (g).**
- (g) Students shall take the appropriate end-of-course assessment at the end of the course or an alternate assessment regardless of the grade level in which the course is offered. **Repeats (h), but (h) removes mention of "alternate assessments."**
- (h) Students who are identified as failing a course for which an end-of-course assessment is required shall take the appropriate end-of-course assessment. **Repeats (i).**
- (i) Students may drop a course with an end-of-course assessment within the first 10 days of a block schedule or within the first 20 days of a traditional schedule. **Repeats first sentence of (j).**
- (j) Students who are enrolled in the Integrated Math sequence shall take the Algebra I, Geometry, and Algebra II end-of-course assessments. The LEA shall administer these assessments as follows: **Contents of this Paragraph not contained in proposed Rule.**
- (1) The Algebra I end-of-course assessment shall be administered during the final five days of the Integrated Math II course if taken on a block schedule or the final 10 days if taken on a traditional schedule.
 - (2) The Geometry end-of-course assessment shall be administered during the Integrated Math III course on a locally established test date.
 - (3) The Algebra II end-of-course assessment shall be administered during the final five days of the Integrated Math III course if taken on a block schedule or the final 10 days if taken on a traditional schedule.

History Note: Authority G.S. 115C-12(9)c.; 115C-81(b)(4);
Eff. November 1, 1997;
Amended Eff. October 1, 2006; January 2, 2006; April 1, 2002; September 1, 2001; August 1, 2000;
August 1, 1999.

1 16 NCAC 06D .0309 is proposed for adoption as follows:

2 **16 NCAC 06D .0309 REQUIREMENTS REGARDING END-OF-COURSE ASSESSMENTS**

3 (a) All eligible students shall participate in the administration of end-of-course assessments (standard administrations
4 with or without accommodations or an alternate assessment). This rule shall apply to all public schools, including
5 traditional, charter, and regional schools.

6 (b) Public schools shall include each student's end-of-course (EOC) assessment results in the student's permanent
7 records and high school transcript.

8 (c) Public schools shall administer EOC assessments within the North Carolina Department of Public Instruction's
9 designated testing window.

10 (d) Public schools shall use results from all operational EOC assessments as a minimum of twenty percent (20%) of
11 the student's final grade for each respective course with the exception of:

12 (1) students following the Occupational Course of Study Pathway; English Learner (EL) students in
13 their first year in a U.S. school; and

14 (2) effective with the 2018–19 school year and beyond, all students enrolled in a course during the
15 initial implementation year of the new assessment for that course where scores are not immediately
16 available due to standard setting.

17 (3) For these exceptions, public schools shall adopt policies regarding the use of EOC assessment results
18 in assigning final grades.

19 (e) Public school students who are enrolled for credit in courses in which EOC assessments are required shall take the
20 appropriate EOC assessment at the completion of the course.

21 (f) Public school students who are exempt from final exams by local board of education policy shall not be exempt
22 from EOC assessments.

23 (g) Public school students shall take the appropriate EOC assessment the first time the student takes the course
24 requiring the assessment.

25 (h) Public school students shall take the appropriate EOC assessment at the end of the course regardless of the grade
26 level in which the course is offered.

27 (i) Public school students who are identified as failing a course for which an EOC assessment is required shall take
28 the appropriate EOC assessment.

29 (j) Public school students may drop a course with a required EOC assessment within the first 10 days of enrollment
30 in a semester block schedule or within the first 20 days of enrollment in a yearlong traditional schedule. Students who
31 are enrolled for credit after the 10/20 days, regardless of course delivery (e.g., traditional classroom, NC Virtual Public
32 School, vendor-based online) shall not drop a course with a required EOC assessment and shall participate in the
33 appropriate EOC assessment at the completion of the course.

34 (k) Public school students enrolled in courses requiring the administration of the EOC assessment who previously
35 obtained a proficient score on the appropriate EOC assessment may use the proficient score as a minimum of 20% of
36 their final course grade or they may elect to retake the appropriate EOC assessment at the completion of the course
37 and use the most recent score for the final grade calculation.

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History Note: Authority G.S. 115C-12(9); 115C-174.11; 115C-174.12;
Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);
Emergency Rule Eff. August 20, 2019.

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AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0310

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Staff recommends objection for lack of clarity. As written, it is unclear what purposes are "approved by the Division of Accountability Services and the State Board of Education" for use of State tests.

*Ashley Snyder
Commission Counsel*

1 16 NCAC 06D .0310 is proposed for adoption with changes as published in 34:13 NCAC 1230 as follows:

2

3 **16 NCAC 06D .0310 APPROPRIATE USE OF STATE TESTS**

4

5 ~~Secure tests~~ Tests developed by the State of North Carolina ~~may~~shall not be used for purposes other than those
6 approved by the Division of Accountability Services and the State Board of Education.

7

8 *History Note: Authority G.S. 115C-12(9); N.C. Constitution, Article IX, Sec. 5;*

9 ~~*Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b).*~~

10 ~~*Emergency Rule Eff. August 20, 2019*~~*October 1, 2020.*

11

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 06D .0311

RECOMMENDED ACTION:

- Approve, but note staff's comment
- Object, based on:
 - Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
 - Extend the period of review

COMMENT:

Staff recommends objection to this Rule for lack of necessity, clarity, and compliance with the APA. The proposed Rule is unnecessary because it repeats portions of 16 NCAC 06D .0306, an existing permanent rule last amended in 2000. The existing permanent Rule is attached with annotations detailing repetitive provisions.

Staff recommends objection to Paragraph (k) for lack of clarity and failure to comply with the APA. The Rule requires teachers to provide instruction that "meets or exceeds the state-adopted curriculum standards." Staff notes the curriculum standards appear to be part of the "Standard Course of Study governed by G.S. 115C-81.5:

§ 115C-81.5. Standard course of study.

(a) All children can learn. It is the intent of the General Assembly that the mission of the public school community is to challenge with high expectations each child to learn, to achieve, and to fulfill his or her potential. With that mission as its guide, the State Board of Education shall adopt a plan of education and a standard course of study as provided in G.S. 115C-12(9c) for the public schools of the State. It is the intent of the General Assembly that the focus of State educational funding shall be to ensure that each student receives a sound basic education. It is further a goal of the General Assembly to provide supplemental funds to low-wealth counties to allow those counties to enhance the instructional program and student achievement. Instruction shall be offered in the areas of arts, communication skills, physical education and personal health and safety, mathematics, media and computer skills, science, second languages, social studies, and career and technical education. In addition, instruction shall be offered in all of the areas provided in this Part.

(b) The standard course of study shall provide all of the following:

Ashley Snyder
Commission Counsel

- (1) A core curriculum for all students that takes into account the special needs of children.
- (2) A set of competencies, by grade level, for each curriculum area.
- (3) A list of textbooks for use in providing the curriculum.
- (4) Standards for student performance and promotion based on the mastery of competencies, including standards for graduation, that take into account children with disabilities and, in particular, include appropriate modifications.
- (5) A program of remedial education.
- (6) Required support programs.
- (7) A definition of the instructional day.
- (8) Class size recommendations and requirements.
- (9) Prescribed staffing allotment ratios.
- (10) Material and equipment allotment ratios.
- (11) Facilities guidelines that reflect educational program appropriateness, long-term cost efficiency, and safety considerations.
- (12) Any other information the Board considers appropriate and necessary.

Staff is not aware of any authority for the Board to adopt curriculum standards outside the rulemaking process. Without the curriculum standards set in rule, the agency can amend the standards outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide these requirements in Rule also makes the requirement for teachers to “provide instruction that meets or exceeds the state-adopted curriculum standards” unclear as written. Therefore, staff recommends objection to (k) for failure to comply with the APA and lack of clarity.

Staff also recommends objection for lack of clarity because it is unclear to staff under what circumstances this Rule applies. This Rule sets forth a “testing code of ethics,” but it is unclear whether the requirements of this Rule apply to all standardized tests, final exams, EOCs, or all tests. Staff further recommends objection for lack of clarity due to unclear terms including “secure,” “immediately,” “proper,” “eligible students,” “fairly,” and other unclear or undefined terms as detailed in the requests for technical changes.

Annotated version of existing permanent Rule 16 NCAC 06D .0306. Staff notes in red refer to paragraphs in the proposed Rule.

16 NCAC 06D .0306 TESTING CODE OF ETHICS

(a) This Rule shall apply to all public school employees who are involved in the state testing program. **Repeats (a), but does not specifically mention charter and regional school employees.**

(b) The superintendent or superintendent's designee shall develop local policies and procedures to ensure maximum test security in coordination with the policies and procedures developed by the test publisher. The principal shall ensure test security within the school building. **Repeats (b).**

(1) The principal shall store test materials in a secure, locked area. The principal shall allow test materials to be distributed immediately prior to the test administration. Before each test administration, the building level test coordinator shall accurately count and distribute test materials. Immediately after each test administration, the building level test coordinator shall collect, count, and return all test materials to the secure, locked storage area. **Repeats (e), (i)(1), and (i)(2).**

(2) "Access" to test materials by school personnel means handling the materials but does not include reviewing tests or analyzing test items. The superintendent or superintendent's designee shall designate the personnel who are authorized to have access to test materials. **Repeats (d).**

(3) Persons who have access to secure test materials shall not use those materials for personal gain. **Repeats (d)(1).**

(4) No person may copy, reproduce, or paraphrase in any manner or for any reason the test materials without the express written consent of the test publisher. **Repeats (d)(2).**

(5) The superintendent or superintendent's designee shall instruct personnel who are responsible for the testing program in testing administration procedures. This instruction shall include test administrations that require procedural modifications and shall emphasize the need to follow the directions outlined by the test publisher. **Repeats (c).**

(6) Any person who learns of any breach of security, loss of materials, failure to account for materials, or any other deviation from required security procedures shall immediately report that information to the principal, building level test coordinator, school system test coordinator, and state level test coordinator. **Repeats (f).**

(c) Preparation for testing.

(1) The superintendent shall ensure that school system test coordinators: **Repeats (g)(1)-(4).**

(A) secure necessary materials;

(B) plan and implement training for building level test coordinators, test administrators, and proctors;

(C) ensure that each building level test coordinator and test administrator is trained in the implementation of procedural modifications used during test administrations; and

(D) in conjunction with program administrators, ensure that the need for test modifications is documented and that modifications are limited to the specific need.

(2) The principal shall ensure that building level test coordinators: **Repeats (i)(1), (3), and (4).**

(A) maintain test material security and accountability of test materials;

(B) identify and train personnel, proctors, and backup personnel for test administrations; and

(C) encourage a positive atmosphere for testing.

(3) Test administrators shall be school personnel who have professional training in education and the state testing program. **Repeats (j).**

(4) Teachers shall provide instruction that meets or exceeds the standard course of study to meet the needs of the specific students in the class. Teachers may help students improve test-taking skills by: **Repeats (k).**

(A) helping students become familiar with test formats using curricular content;

(B) teaching students test-taking strategies and providing practice sessions;

(C) helping students learn ways of preparing to take tests; and

(D) using resource materials such as test questions from test item banks, testlets and linking documents in instruction and test preparation.

(d) Test administration.

(1) The superintendent or superintendent's designee shall: **Repeats (l).**

(A) assure that each school establishes procedures to ensure that all test administrators comply with test publisher guidelines;

- (B) inform the local board of education of any breach of this code of ethics; and
- (C) inform building level administrators of their responsibilities.
- (2) The principal shall: **Repeats duties of “school test coordinator” in (m). It is unclear to staff whether the “school test coordinator” role is assigned to a school principal.**
 - (A) assure that school personnel know the content of state and local testing policies;
 - (B) implement the school system's testing policies and procedures and establish any needed school policies and procedures to assure that all eligible students are tested fairly;
 - (C) assign trained proctors to test administrations; and
 - (D) report all testing irregularities to the school system test coordinator.
- (3) Test administrators and proctors shall: **Repeats (n).**
 - (A) administer tests according to the directions in the administration manual and any subsequent updates developed by the test publisher;
 - (B) administer tests to all eligible students;
 - (C) report all testing irregularities to the school system test coordinator; and
 - (D) provide a positive test-taking climate.
- (4) Proctors shall serve as additional monitors to help the test administrator assure that testing occurs fairly. **Repeats (o).**
- (e) Scoring. The school system test coordinator shall: **Repeats (p).**
 - (1) ensure that each test is scored according to the procedures and guidelines defined for the test by the test publisher;
 - (2) maintain quality control during the entire scoring process, which consists of handling and editing documents, scanning answer documents, and producing electronic files and reports. Quality control shall address at a minimum accuracy and scoring consistency;
 - (3) maintain security of tests and data files at all times, including:
 - (A) protecting the confidentiality of students at all times when publicizing test results; and
 - (B) maintaining test security of answer keys and item-specific scoring rubrics.
- (f) Analysis and reporting. Educators shall use test scores appropriately. This means that the educator recognizes that a test score is only one piece of information and must be interpreted together with other scores and indicators. Test data help educators understand educational patterns and practices. The superintendent shall ensure that school personnel analyze and report test data ethically and within the limitations described in this Paragraph. **Repeats (q).**
 - (1) Educators shall release test scores to students, parents, legal guardians, teachers, and the media with interpretive materials as needed.
 - (2) Staff development relating to testing must enable personnel to respond knowledgeably to questions related to testing, including the tests, scores, scoring procedures, and other interpretive materials.
 - (3) Items and associated materials on a secure test shall not be in the public domain. Only items that are within the public domain may be used for item analysis.
 - (4) Educators shall maintain the confidentiality of individual students. Publicizing test scores that contain the names of individual students is unethical. **Compare to (q)(1). Proposed Rule adds additional language.**
 - (5) Data analysis of test scores for decision-making purposes shall be based upon:
 - (A) disaggregation of data based upon student demographics and other collected variables;
 - (B) examination of grading practices in relation to test scores; and
 - (C) examination of growth trends and goal summary reports for state-mandated tests.
- (g) Unethical testing practices include, but are not limited to, the following practices: **Repeats (r).**
 - (1) encouraging students to be absent the day of testing;
 - (2) encouraging students not to do their best because of the purpose of the test;
 - (3) using secure test items or modified secure test items for instruction;
 - (4) changing student responses at any time;
 - (5) interpreting, explaining, or paraphrasing the test directions or the test items;
 - (6) reclassifying students solely for the purpose of avoiding state testing;
 - (7) not testing all eligible students;
 - (8) failing to provide needed modifications during testing, if available;
 - (9) modifying scoring programs including answer keys, equating files, and lookup tables;
 - (10) modifying student records solely for the purpose of raising test scores;
 - (11) using a single test score to make individual decisions; and
 - (12) misleading the public concerning the results and interpretations of test data.

(h) In the event of a violation of this Rule, the SBE may, in accordance with the contested case provisions of G.S. 150B, impose any one or more of the following sanctions: **Repeats (s)**.

- (1) withhold ABCs incentive awards from individuals or from all eligible staff in a school;
- (2) file a civil action against the person or persons responsible for the violation for copyright infringement or for any other available cause of action;
- (3) seek criminal prosecution of the person or persons responsible for the violation; and
- (4) in accordance with the provisions of 16 NCAC 6C .0312, suspend or revoke the professional license of the person or persons responsible for the violation.

History Note: Authority G.S. 115C-12(9)c.; 115C-81(b)(4);
Eff. November 1, 1997;
Amended Eff. July 1, 2000.

1 16 NCAC 06D.0311 is proposed for adoption as follows:

2 **16 NCAC 06D .0311 TESTING CODE OF ETHICS**

3 (a) This Rule sets out the administrative testing procedures and testing code of ethics and shall apply to all public
4 school employees, including charter school and regional school employees, who are involved in the state testing
5 program.

6 (b) The superintendent/charter school director or superintendent's/charter school director's designee shall develop
7 local policies and procedures to ensure maximum test security in coordination with the policies and procedures
8 developed by the test publisher.

9 (c) The superintendent/charter school director or superintendent's/charter school director's designee shall instruct
10 personnel who are responsible for the testing program in testing administration procedures. This instruction shall
11 include test administrations that require testing accommodations and shall emphasize the need to follow the directions
12 outlined by the test publisher.

13 (d) The superintendent/charter school director or superintendent's/charter school director's designee shall designate
14 the personnel who are authorized to have access to secure test materials. "Access" to test materials by school personnel
15 means handling the materials but does not include reviewing tests or analyzing test items.

16 (1) Persons who have access to secure test materials shall not use those materials for personal gain.

17 (2) No person may copy, reproduce, or paraphrase in any manner or for any reason the test materials
18 without the express written consent of the test publisher.

19 (e) The principal shall ensure test security within the school building. The principal shall store test materials in a
20 secure, locked facility. The principal shall allow test materials to be distributed immediately before the test
21 administration.

22 (f) Any breach of security, loss of materials, failure to account for materials, or any other deviation from required
23 security procedures shall be reported immediately to the principal, school test coordinator, school system (LEA) test
24 coordinator, superintendent/charter school director, and regional accountability coordinator.

25 (g) Preparation for testing. The superintendent/charter school director shall ensure that school system (LEA) test
26 coordinators:

27 (1) secure necessary materials;

28 (2) plan and implement training for school test coordinators, test administrators, and proctors;

29 (3) ensure each school test coordinator and test administrator is trained before each test administration
30 on the policies and procedures for conducting a proper test administration and for processing and
31 returning test materials; and

32 (4) in conjunction with program administrators, ensure the need for test accommodations is documented
33 and that accommodations are limited to the specific need.

34 (h) The principal or the principal's designee shall serve as school test coordinator.

35 (i) The principal shall ensure the school test coordinator maintains test security and accountability of test materials,
36 including taking the following actions:

1 (1) before each test administration, the school test coordinator shall accurately count and distribute test
2 materials, and

3 (2) immediately after each test administration, the school test coordinator shall collect, count, and return
4 all test materials to the secure, locked storage facility establishes any needed school policies and
5 procedures to assure all eligible students are tested fairly;

6 (3) identifies and trains personnel, proctors, and backup personnel for test administrations; and

7 (4) encourages a positive atmosphere for testing.

8 (j) Test administrators shall be school personnel who have professional training in education and the state-testing
9 program.

10 (k) Teachers shall provide instruction that meets or exceeds the state-adopted curriculum standards to meet the needs
11 of the specific students in the class.

12 (1) Teachers may help students improve test-taking skills by:

13 (2) helping students become familiar with test formats using curricular content;

14 (3) teaching students test-taking strategies and providing practice sessions;

15 (4) helping students learn ways of preparing to take tests; and

16 (5) using resource materials such as test questions from test item banks and linking documents in
17 instruction and test preparation.

18 (l) With respect to test administration, the superintendent/charter school director or superintendent's/charter school
19 director's designee shall:

20 (1) assure each school establishes procedures to ensure all test administrators comply with test publisher
21 guidelines;

22 (2) inform the local board of education of any breach of this code of ethics; and

23 (3) inform school system (LEA) test coordinators and principals of their responsibilities.

24 (m) The school test coordinator shall:

25 (1) assure school personnel know the content of state and local testing policies;

26 (2) implement the school system and local testing policies and procedures to assure all eligible students
27 are tested fairly;

28 (3) ensure trained proctors are assigned to test administrations by the principal; and

29 (4) ensure all testing irregularities are reported to the school system (LEA) test coordinator.

30 (n) Test administrators shall:

31 (1) administer tests according to the directions in the assessment guide and any subsequent updates
32 developed by the test publisher;

33 (2) administer tests to all eligible students;

34 (3) report all testing irregularities to the school test coordinator; and

35 (4) provide a positive test-taking environment.

36 (o) Proctors shall serve as additional monitors to help the test administrator assure that testing occurs fairly.

37 (p) Scoring. The school system test coordinator shall:

1 (1) ensure each test is scored according to the procedures and guidelines defined for the test by the test
2 publisher;

3 (2) maintain quality control during the entire scoring process, which consists of handling and editing
4 documents, scanning answer documents, and producing electronic files and reports. Quality control
5 shall address at a minimum accuracy and scoring consistency.

6 (3) maintain security of tests and data files at all times, including;

7 (A) protecting the confidentiality of students at all times when publicizing test results; and

8 (B) maintaining test security of answer keys and item-specific scoring rubrics.

9 (q) Analysis and reporting. Educators shall use test scores appropriately. This means that the educator recognizes that
10 a test score is only one piece of information and must be interpreted together with other scores and indicators. Test
11 data help educators understand educational patterns and practices. The superintendent shall ensure that school
12 personnel analyze and report test data ethically and within the limitations described in this paragraph.

13 (1) Educators shall maintain the confidentiality of individual students. Publicizing test scores or any
14 written material containing personally identifiable information from the student's educational
15 records shall not be disseminated or otherwise made available to the public by a member of the State
16 Board of Education, any employee of the State Board of Education, the State Superintendent of
17 Public Instruction, any employee of the North Carolina Department of Public Instruction, any
18 member of a local board of education, any employee of a local board of education, or any other
19 person, except as permitted under the provisions of the Family Educational Rights and Privacy Act
20 of 1974, 20 U.S.C. §1232g.

21 (2) Educators shall release test scores to students, parents, legal guardians, teachers, and the media with
22 interpretive materials as needed.

23 (3) Staff development relating to testing must enable school personnel to respond knowledgeably to
24 questions related to testing, including the tests, scores, scoring procedures, and other interpretive
25 materials.

26 (4) Items and associated materials on a secure test shall not be in the public domain. Only items that are
27 within the public domain may be used for item analysis.

28 (5) Data analysis of test scores for decision-making purposes shall be based upon:

29 (A) disaggregation of data based upon student demographics and other collected variables;

30 (B) examination of grading practices in relation to test scores; and

31 (C) examination of growth trends and goal summary reports for state-mandated tests.

32 (r) Unethical testing practices include, but are not limited to, the following practices:

33 (1) encouraging students to be absent the day of testing;

34 (2) encouraging students not to do their best;

35 (3) using secure test items or modified secure test items for instruction;

36 (4) changing student responses at any time;

37 (5) interpreting, explaining, or paraphrasing the test directions or the test items;

1 (6) classifying students solely for the purpose of avoiding state testing;

2 (7) not testing all eligible students;

3 (8) failing to provide required accommodations during testing;

4 (9) modifying scoring programs including answer keys, equating files, and lookup tables;

5 (10) modifying student records solely for the purpose of raising test scores;

6 (11) using a single test score to make individual decisions; and

7 (12) misleading the public concerning the results and interpretations of test data.

8 (s) In the event of a violation of this Rule, the State Board of Education may, in accordance with the contested case
9 provisions of Chapter 150B of the General Statutes, impose any one or more of the following sanctions:

10 (1) withhold any applicable monetary incentive awards;

11 (2) file a civil action against the person or persons responsible for the violation for copyright
12 infringement or for any other available cause of action;

13 (3) seek criminal prosecution of the person or persons responsible for the violation; and

14 (4) in accordance with the provisions of 16 NCAC 6C .0312, suspend or revoke the professional license
15 of the person or persons responsible for the violation.

16 History Note: Authority G.S. 115C-12(9); 115C-174.11; 115C-174.12;

17 Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);

18 Emergency Rule Eff. August 20, 2019.

19