

Burgos, Alexander N

Subject: FW: [External] 16 NCAC 06G .0204 Interscholastic Athletics

From: Liebman, Brian R <brian.liebman@oah.nc.gov>

Sent: Wednesday, March 8, 2023 5:00 PM

To: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>

Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: Re: [External] 16 NCAC 06G .0204 Interscholastic Athletics

Tom,

Our formatting rules can be tricky, and I've screwed them up myself, so no worries in the slightest. Check out this link, if I haven't already sent it. I think our publications staff did a great job explaining and showing examples. [Rule Format Examples | NC OAH](#)

Do you want me to send the final rule on to Dana and Alex?

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

Sent: Wednesday, March 8, 2023 4:24:17 PM

To: Liebman, Brian R <brian.liebman@oah.nc.gov>

Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] 16 NCAC 06G .0204 Interscholastic Athletics

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Brian,

Thank you for cleaning up the remaining format changes. I'll compare it to what I sent and make notes. We are going to have another permanent enactment of a

temporary rule coming up next month. It's much shorter and simpler. And there was no preexisting permanent rule. I'll see if I can do better with that one.

Thomas J. Ziko
Legal Specialist
Rules Coordinator
State Board of Education

Burgos, Alexander N

Subject: FW: [External] 16 NCAC 06G .0204 Interscholastic Athletics
Attachments: 16 NCAC 06E .0204 Permanent Rule - January 2023 FINAL OAH 005.docx

From: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Sent: Thursday, March 2, 2023 12:17 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>
Subject: [External] 16 NCAC 06G .0204 Interscholastic Athletics

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Brian,

After consultation, I can agree to make the following change in paragraph (k), line 18:

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

I have attached a revised copy of the rule with that change.

I believe this change addresses the requirement in G.S. 115C-470.55(3), (5), (6) and (7) that the delegation to the administering authority be “by rule.”

I believe this was the last correction that we needed to address. If you agree, I would like the rule to be on the agenda for the RRC March meeting. Please let me know if you will do that and recommend approval.

Thanks again for your help and patience.

Thomas J. Ziko
Legal Specialist
Rules Coordinator

State Board of Education

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“16 NCAC 06E .0204, as published in 37 NCR 02, 209, with changes, as follows::

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

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

- (1) "Administering organization" is defined in G.S. 115C-407.50(1).
- (2) "Participating school" is defined in G.S. 115C-407.50(7).
- (3) "Public school unit" (PSU) is defined in G.S. 115C-5(7a).

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

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

- (1) ~~The~~A student ~~shall meet the residence criteria of G.S. 115C-366(a), who attends a school supervised by a local board of education~~ The student shall only participate only at in the school to which the student is assigned by the LEA or, if under G.S. 115C-366. A student enrolled in a charter, regional, statewide public school, or school operated by the University of North Carolina, [must] shall meet all the enrollment criteria for that school and attend that school. If a student is over the age requirements, for the school the student attends, the student may participate at the school to which the student would be assigned or attend at the next higher grade level.
- (2) ~~The~~A student shall meet the age requirements at each grade level to participate. ~~The principal~~PSUs shall ~~have~~determine the age of participating students based on a preponderance of the evidence of the legal birth date of the student known to them. A student ~~who is~~ineligible to participate at one grade level due to age ~~is~~shall be eligible to participate at the next higher grade level only. ~~However, only, provided~~ no student ~~is~~shall be eligible to participate at the middle school level for a period lasting longer than six consecutive semesters, beginning with the student's entry into ~~sixth grade~~grade 6, and ~~Non~~no student shall be eligible to participate at the high school level for more than eight consecutive semesters, beginning with the student's first entry into grade ~~nine~~9 or participation on a high school team, whichever occurs first.
- (A) A student shall not participate on a ~~sixth, seventh, or eighth~~grade 6, 7, or 8 team if the student becomes 15 years of age on or before August 31 of that school year.

- (B) A student shall not participate on a ~~ninth~~ grade 9 through 12 ~~junior high school~~ team if the student becomes ~~16~~ 19 years of age on or before August 31 of that school year.
- (C) ~~A student is eligible to participate in high school athletic contests during a school year if the student does not reach his or her 19th birthday on or before August 31 of that school year.~~

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

~~(d)~~(e) ~~The~~ To be eligible to participate, a student shall receive a medical examination each year every 395 days by a licensed physician, nurse practitioner, or physician assistant, subject to the provisions of G.S. 90-990-9.1, G.S. 90-9.2, G.S. 90-9.3, G.S. 90-18.1, and G.S. 90-18.2.

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

- (1) ~~graduation;~~ graduation, except that the student may continue to participate in playoff and state championship contests in spring sports after graduation;
- (2) ~~becoming eligible to graduate;~~
- ~~(3)~~(2) signing a professional athletic ~~contact~~ contract, except that the student may continue to participate in any sport for which the student has not signed a professional contract;
- ~~(4)~~(3) receiving remuneration as a participant in an athletic ~~contest~~, or contest, except that the student may accept a gift, merchandise, trophy, or other thing of value, provided:
 - (A) the value does not exceed two hundred fifty dollars (\$250.00) per student per sports season;
 - (B) the item is totally consumable and nontransferable, or labeled in a permanent manner, for example, monogrammed or engraved items; and
 - (C) the item is approved by the student's principal and superintendent; or
- ~~(5)~~(4) participating on an all-star team or in an all-star game that is not sanctioned by the ~~association~~ administering organization of which the student's school is a member. ~~The member, provided the student is~~ shall be ineligible only for the specific sport involved.

~~(f)~~(g) Each PSU shall require the principal of a school that participates in interscholastic athletics ~~shall~~ to certify sign and date a list of eligible students for each sport. The PSU shall maintain copy of the most current list in the principal's office and the office of the superintendent.

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

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

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

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

(j) An administering organization that has entered into a memorandum of understanding with the State Board of Education for the purpose of administering interscholastic athletics under this Rule [must] shall apply and enforce all of the requirements of this Rule.

(k) The State Board of Education [may] shall 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 in a particular case that the rule requirement fails to [accomplish its purpose] promote academic progress, health, safety, and fair play, 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 or if a waiver is necessary to reasonably accommodate a student's disability, as required under the Americans with Disabilities Act, U.S.C. § 1201 et seq.;
- (2) adopt, apply, and enforce penalty rules as defined in G.S. 115C-407.55(3) that establish a system of demerits that includes reprimands, probations, suspensions, forfeitures of contests, forfeitures of titles, and disqualifications;
- (3) adopt, apply, and enforce administrative rules, as defined in G.S. 115C-407.55(5);
- (4) adopt, apply, and enforce gameplay rules, as defined in G.S. 115C-407.55(6); and
- (5) establish and collect from all its members a uniform membership fee of either:
 - (A) one thousand dollars (\$1,000) for each participating school, or
 - (B) one dollar (\$1.00) for each student enrolled in a participating school.

(l) An administering organization shall:

- (1) enter into a memorandum of understanding with the State Board of Education no later than March 15 prior to the academic year in which it is to begin administering interscholastic athletics and no later than the March 15 before the expiration of an existing memorandum of understanding;
- (2) [be audited by a reputable independent auditing firm and] submit the an audit report signed by an independent certified public accountant or accounting firm in good standing with the North Carolina State Board of Certified Public Accountant Examiners to the State Board of Education no later than March 15 each year;
- (3) 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 member of the public;

- (4) provide to the State Board of Education within 30 days any requested organizational records, such as, financial information, annual audit reports, and any matters related to or impacting participating schools;
- (5) enter into written agreements with PSUs that allow their eligible schools to participate in interscholastic sports, which agreements shall include an explanation of the fees to be charged, the obligations of the PSU and participating schools, penalties for the violation of this Rule at the high school level that may be imposed, and an explanation of the process to contest or appeal adverse decisions; and
- (6) publish the organization's rules through a link on the home page of its website.

(m) The State Board of Education will appoint an appeals board to hear and act upon appeals from final decisions of an administering organization, or from DPI if necessary pursuant to G.S. 115C-407.60(b), 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 the administering organization's final decision.

The final decision shall be mailed to the Superintendent or board of trustees of the PSU.

- (1) The administering organization's final decision 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:
 - A. be in writing;
 - B. include a description of the facts of the dispute;
 - C. include any evidence submitted to the administering organization; and
 - D. present an argument explaining why the PSU believes the administering organization's final decision was not based on substantial evidence as defined in G.S. 150B-2(8c) or is affected by an error of law.
- (3) The administering organization may file a response to the PSU's submissions within five days. The panel may shorten the time for filing the administering organization's response if the decision affects a student's or coach's eligibility to participate in an intervening athletic contest.
- (4) All documents filed in the appeal shall be simultaneously served on all parties in the manner prescribed in G.S. 1A-1, Rule 5 of the North Carolina Rules of Civil Procedure.
- (5) Any hearing shall be recorded.
- (6) No later than 30 days after the State Board of Education's receipt of the appeal, a panel of the appeals board shall 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 is affected by an error of law.
- (7) The panel's decision shall be final.

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

*History Note: Authority G.S. 115C-12(12); 115C-12(23); 115C-47(4); 115C-407.50, 115C-407.55; 115C-407.60; 115C-407.65; 116-235(b);
Emergency Adoption Eff. August 20, 2019;
Amended Eff. March 1, 2021;
Temporary Amendment Eff. July 1, 2022
Amended Eff. July 1, 2023.*

Burgos, Alexander N

Subject: FW: [External] 16 NCAC 06G .0204 Interscholastic Athletics

From: Liebman, Brian R
Sent: Wednesday, March 8, 2023 11:23 AM
To: 'Thomas Ziko' <Thomas.Ziko@dpi.nc.gov>
Cc: Schafer, Allison; Collins, Ryan; Martin, Lou
Subject: RE: [External] 16 NCAC 06G .0204 Interscholastic Athletics

Hi Tom,

I think the changes bring the Rule within the bounds of your statutory authority, and so satisfy my concerns. On that basis, I'll recommend approval at the meeting next week. I think there are a few formatting things that need clearing up – I am looking at it more closely for that now, but wanted to let you know I think the principal issue here has been resolved.

Best,
Brian

Brian Liebman
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(984)236-1948
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Burgos, Alexander N

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

From: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Sent: Wednesday, February 15, 2023 1:31 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] 16 NCAC 06E. 0204

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Good. We'll keep working.

Thomas J. Ziko
Legal Specialist
Rules Coordinator
State Board of Education

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Wednesday, February 15, 2023 1:31 PM
To: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Cc: Allison Schafer <Allison.Schafer@dpi.nc.gov>; Ryan Collins <Ryan.Collins@dpi.nc.gov>; Lou Martin <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] 16 NCAC 06E. 0204

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Hi Tom,

Thanks. As I said earlier, I'll recommend approval of the extension, and we'll look at whatever revised language you have for next month.

Best,
Brian

Brian Liebman
Counsel to the North Carolina Rules Review Commission

Office of Administrative Hearings

(984)236-1948

brian.liebman@oah.nc.gov

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ird parties, including law enforcement.

Burgos, Alexander N

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

From: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Sent: Wednesday, February 15, 2023 11:49 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] 16 NCAC 06E. 0204

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Thanks. I'll email you once we have new wording.

Thomas J. Ziko
Legal Specialist
Rules Coordinator
State Board of Education

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Wednesday, February 15, 2023 11:46 AM
To: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Cc: Allison Schafer <Allison.Schafer@dpi.nc.gov>; Ryan Collins <Ryan.Collins@dpi.nc.gov>; Lou Martin <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] 16 NCAC 06E. 0204

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Thanks for the clarification. I will pass along your request to the Commission, and recommend that they grant it.

Best,
Brian

Brian Liebman
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brian.liebman@oah.nc.gov

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From: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Sent: Wednesday, February 15, 2023 11:44 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] 16 NCAC 06E. 0204

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At present, I think we just need an extension. The temporary rule runs out March 28 so we don't have time to withdraw and republish. We can have this done by the March RRC meeting. I'm sure we can come up with acceptable wording but I need to examine unintended consequences. I do appreciate your help and analysis.

Thomas J. Ziko
Legal Specialist
Rules Coordinator
State Board of Education

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Wednesday, February 15, 2023 11:31 AM
To: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Cc: Allison Schafer <Allison.Schafer@dpi.nc.gov>; Ryan Collins <Ryan.Collins@dpi.nc.gov>; Lou Martin <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] 16 NCAC 06E. 0204

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Tom,

That's fine. Are you asking for an extension, or are you withdrawing the rule? An extension gives you another 70 days before RRC has to have an up or down vote on the rule. Withdrawing means you go back to square one – republishing, etc.

Brian

Brian Liebman
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Burgos, Alexander N

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

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Tuesday, February 14, 2023 6:08 PM
To: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>
Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] 16 NCAC 06E. 0204

Tom,

Thanks for the response. Because I need to draft a staff opinion and send it out to the Commission with some time for them to read it before the meeting, I am going to need to hear back from you no later than 11:00 AM. Hate to give you so little time, but we're right up against it.

From what you're saying, it sounds like you can edit the rule and "save" it, but you'll need to change "may" to "shall" and remove any authority that has not indeed been delegated from the Rule.

Thanks, and have a good night,
Brian

Brian Liebman
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From: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Sent: Tuesday, February 14, 2023 6:01 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] 16 NCAC 06E. 0204

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Brian,

Thanks for your insights. I agree with the edits and the need to change “must” to “shall.” Let me study the delegation issues in paragraph (k) and get back to you tomorrow, Wednesday. The current MOU’s delegate all the authorities in (k)(3), (5), (6) and part of the authority in (7). So, at present, it makes no difference whether the rule says “may” or “shall” delegate those powers because the MOUs are in place for the next four years. But, let me study the implications of the change and get back to you tomorrow.

Thomas J. Ziko
Legal Specialist
Rules Coordinator
State Board of Education

y result in monitoring and disclosure to third parties, including law enforcement.

Burgos, Alexander N

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

From: Liebman, Brian R <brian.liebman@oah.nc.gov>

Sent: Tuesday, February 14, 2023 3:54 PM

To: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>

Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

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

Hi Tom,

Thanks for the changes and the responses. I made a few changes to the rule you sent me to clean up formatting, just FYI. Highlighting, correcting the caption, things like that. Hope you don't mind.

In (g), line 30, how shall the principal "certify" the list? Signature, notarization, etc? I have substituted "sign and date" for "certify." To further clarify what was meant by "certify," I have specified that the PSU must maintain current copies of the signed and dated list on file in the principal's office and the office of the superintendent. This is consistent with practice under the old rule. Public records retention laws will cover all the prior lists.

Again, looks good, and thanks for making the change. However, on line 30, I think you meant to delete "to" which directly follows "shall." I believe with the changes the sentence reads, "Each PSU shall require the principal of a school that participates in interscholastic athletics to sign and date a list of eligible students for each sport." So, the "to" is necessary.

There was an extra "shall" in the sentence in the rule, so I struck through it for you and highlighted it. It now says what you wanted it to say above.

Also in the minor change department, in (j), p. 2, line 16, I missed a "must" that needs to be changed to "shall." If you wouldn't mind, please check the rest of the rule, and change all your "musts" to "shalls". Thanks.

In (k), p.3, line 15, the Rule states that the Board "may" delegate the following list of things to the administering organization. How is this delegation made? Is it in the MOU? Under what circumstances will the Board decide to delegate? The delegations are specified in the MOU's. G.S. 115C-407.55 gives the SBE discretion to delegate those powers. See the note to paragraph (m) below for a more detailed explanation of how the system works.

If the delegation will occur once an MOU is reached, I think it would be clearer to say that in the rule. If this doesn't change the intent of the Rule, I would suggest something along the lines of: "Upon reaching a memorandum of understanding with an administering organization, the State Board of Education shall delegate to that administering organization, pursuant to the terms of the memorandum of understanding, its authority over participating schools to:"

I think the present rule captures a potential degree of discretion that the SBE wants to maintain in relations with administering organizations.

A couple points that support the current language:

(1) 115C-407.50(1) defines an "administering organization" as "[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." In other words, the MOU that includes the delegations actually "defines" an administering organization. Consequently, the delegations listed in (k), and the negotiations that produce those delegations, are going to be concurrent with, not subsequent to, the execution of the MOU.

(2) At present, there are two administering organizations – North Carolina High School Athletic Association and the Carolina Athletic Association for Schools of Choice. Depending upon experience with those administering organization, it is possible that the SBE may delegate more or less of its authority to one or the other or, indeed, a third administering organization. A rule that compels the SBE to delegate all the authorities listed in (k) to every administering organization would limit the SBE's authority to distinguish between the demonstrated capabilities of administering organizations.

The current MOUs are for four years. I would rather not change this language in the rule until the SBE has more experience with administration under the new procedures.

The issue I am having here is that G.S. 115C-407.55(1)-(8), where it allows delegation, says that the State Board "may by rule delegate". So the delegation itself has to be in the Rule, not in the MOU. I was operating under the impression that you would be delegating each of the items in (k)(1)-(5) to the AO in the MOU you have already reached, and were not picking and choosing in the MOU. If you are intending to enforce this rule in a way that allows you to make the choice about delegation in the MOU, rather than the Rule, I need to recommend objection for lack of statutory authority.

Otherwise, I think the changes you made are good, and I really appreciate the time taken to answer my questions.

Thanks,
Brian

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e official.

Burgos, Alexander N

Subject: FW: [External] 16 NCAC 06E. 0204
Attachments: 02.2023 - SBOE 16 NCAC 06E .0204 with SBE Responses 003.docx; 16 NCAC 06E .0204 Permanent Rule - January 2023 FINAL OAH 003.docx

From: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Sent: Monday, February 13, 2023 10:59 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Schafer, Allison <allison.schafer@dpi.nc.gov>; Collins, Ryan <Ryan.Collins@dpi.nc.gov>; Martin, Lou <lou.martin@dpi.nc.gov>
Subject: [External] 16 NCAC 06E. 0204

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Brian,

I've attached responses to your most recent questions and a revised 16 NCAC 06E .0204. Thanks for your comments, they have helped improve the rule. I have responded to your questions around the MOU, AO enforcement, and the potential default to DPI. Please let me know if you continue to have issues.

Thomas J. Ziko
Legal Specialist
Rules Coordinator
State Board of Education

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.

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

“16 NCAC 06E .0204, as published in 37 NCR 02, 209, with changes, as follows::

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

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

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

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

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

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

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

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

(2) ~~The~~ A student shall meet the age requirements at each grade level to participate. ~~The principal~~ PSUs shall ~~have~~ determine the age of participating students based on a preponderance of the evidence of the legal birth date of the student known to them. A student ~~who is~~ ineligible to participate at one grade level due to age is shall be eligible to participate at the next higher grade level ~~only.~~ However, only, provided no student ~~is~~ shall be eligible to participate at the middle school level for a period lasting longer than six consecutive semesters, beginning with the student's entry into ~~sixth~~ grade-grade 6, and None student shall be eligible to participate at the high school level for more than eight consecutive semesters, beginning with the student's first entry into grade ~~nine~~ 9 or participation on a high school team, whichever occurs first.

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

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

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

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

~~(d)(e)~~ ~~The~~ To be eligible to participate, a student shall receive a medical examination ~~each year~~ every 395 days by a licensed physician, nurse practitioner, or physician assistant, subject to the provisions of G.S. ~~90-990-9.1~~, G.S. 90-9.2, G.S. 90-9.3, G.S. 90-18.1, and G.S 90-18.2.

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

- ~~(1)~~ graduation; graduation, except that the student may continue to participate in playoff and state championship contests in spring sports after graduation;
- ~~(2)~~ becoming eligible to graduate;
- ~~(3)(2)~~ signing a professional athletic contract;contract, except that the student may continue to participate in any sport for which the student has not signed a professional contract;
- ~~(4)(3)~~ receiving remuneration as a participant in an athletic contest, orcontest, except that the student may accept a gift, merchandise, trophy, or other thing of value, provided:
 - (A) the value does not exceed two hundred fifty dollars (\$250.00) per student per sports season;
 - (B) the item is totally consumable and nontransferable, or labeled in a permanent manner, for example, monogrammed or engraved items; and
 - (C) the item is approved by the student's principal and superintendent; or
- ~~(5)(4)~~ participating on an all-star team or in an all-star game that is not sanctioned by the associationadministering organization of which the student's school is a member. Themember, provided the student is shall be ineligible only for the specific sport involved.

~~(f)(g)~~ Each PSU shall require the principal of a school that participates in interscholastic athletics shall to certify sign and date a list of eligible students for each sport. The PSU shall maintain copy of the most current list in the principal's office and the office of the superintendent.

~~(g)(h)~~ ~~Any~~ A PSU shall impose at least the following penalties on a student, ~~student athlete,~~ coach, or school official in grades ~~6-126~~ through 12 who is ejected from ~~anyan interscholastic athletic contest-shall at least be penalized as follows:~~

- (1) for the first offense, the person shall be reprimanded and suspended ~~from participating in~~ for the next game at that level of play (varsity or junior varsity); ~~varsity~~) and for any intervening games at either level;
- (2) for a second offense, the person shall be placed on probation and suspended ~~from participating in~~ for the next two games at that level of play (varsity or junior varsity); ~~varsity~~) and for any intervening games at either level;
- (3) for a third offense, the person shall be suspended for one calendar year; and
- (4) a coach who is suspended ~~at any level of grades 6-12 (middle school, junior high or high school)~~ shall not coach any team for in any other grade level in grades 6-12 during the period of suspension.
- ~~(5)~~ Penalties are cumulative from sport to sport and from sport season to sport season. If no member of the school's coaching staff is present to assume an ejected coach's duties, the contest shall be terminated by a forfeit.
- ~~(h)~~ (i) LEAs PSUs may allow their schools to belong to the North Carolina High School Athletic Association (NCHSAA), which has established as a minimum the rules adopted by the SBE, an administering organization designated by the State Board of Education. The NCHSAA
- (j) An administering organization that has entered into a memorandum of understanding with the State Board of Education for the purpose of administering interscholastic athletics under this Rule must apply and enforce all of the requirements of this Rule.
- (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 in a particular case that the rule requirement fails to ~~[accomplish its purpose]~~ promote academic progress, health, safety, and fair play, 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 or if a waiver is necessary to reasonably accommodate a student's disability, as required under the Americans with Disabilities Act, U.S.C. § 1201 et seq.;
- (2) adopt, apply, and enforce penalty rules as defined in G.S. 115C-407.55(3) that establish a system of demerits that includes reprimands, probations, suspensions, forfeitures of contests, forfeitures of titles, and disqualifications;
- (3) adopt, apply, and enforce administrative rules, as defined in G.S. 115C-407.55(5);
- (4) adopt, apply, and enforce gameplay rules, as defined in G.S. 115C-407.55(6); and
- (5) establish and collect from all its members a uniform membership fee of either:
- (A) one thousand dollars (\$1,000) for each participating school, or
- (B) one dollar (\$1.00) for each student enrolled in a participating school.
- (l) An administering organization shall:

- (1) enter into a memorandum of understanding with the State Board of Education no later than March 15 prior to the academic year in which it is to begin administering interscholastic athletics and no later than the March 15 before the expiration of an existing memorandum of understanding;
 - (2) [~~be audited by a reputable independent auditing firm and~~ submit the an audit report signed by an independent certified public accountant or accounting firm in good standing with the North Carolina State Board of Certified Public Accountant Examiners to the State Board of Education no later than March 15 each year;
 - (3) 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 member of the public;
 - (4) provide to the State Board of Education within 30 days any requested organizational records, such as, financial information, annual audit reports, and any matters related to or impacting participating schools;
 - (5) enter into written agreements with PSUs that allow their eligible schools to participate in interscholastic sports, which agreements shall include an explanation of the fees to be charged, the obligations of the PSU and participating schools, penalties for the violation of this Rule at the high school level that may be imposed, and an explanation of the process to contest or appeal adverse decisions; and
 - (6) publish the organization's rules through a link on the home page of its website.
- (m) The State Board of Education will appoint an appeals board to hear and act upon appeals from final decisions of an administering organization, or from DPI if necessary pursuant to G.S. 115C-407.60(b), 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 the administering organization's final decision.
- The final decision shall be mailed to the Superintendent or board of trustees of the PSU.
- (1) The administering organization's final decision 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:
 - A. be in writing;
 - B. include a description of the facts of the dispute;

1 C. include any evidence submitted to the administering organization; and

2 D. present an argument explaining why the PSU believes the administering organization's
3 final decision was not based on substantial evidence as defined in G.S. 150B-2(8c) or is
4 affected by an error of law.

5 (3) The administering organization may file a response to the PSU's submissions within five days. The
6 panel may shorten the time for filing the administering organization's response if the decision affects
7 a student's or coach's eligibility to participate in an intervening athletic contest.

8 (4) All documents filed in the appeal shall be simultaneously served on all parties in the manner
9 prescribed in G.S. 1A-1, Rule 5 of the North Carolina Rules of Civil Procedure.

10 (5) Any hearing shall be recorded.

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

15 (7) The panel's decision shall be final.

16 ~~(i)(n) The LEAPSU that has jurisdiction over the high-a school may impose additional penalties-penalties in addition~~
17 ~~to those [imposed-] required by an administering organization. [If there is no administering organization governing a~~
18 ~~group of schools, a PSU LEAs or conferences may adopt and impose penalties at the middle and junior high school~~
19 ~~levels for schools under its jurisdiction.]~~

20
21 *History Note: Authority G.S. 115C-12(12); 115C-12(23); 115C-47(4); 115C-407.50, 115C-407.55; 115C-407.60;*
22 *115C-407.65; 116-235(b);*
23 *Emergency Adoption Eff. August 20, 2019;*
24 *Amended Eff. March 1, 2021;*
25 *Temporary Amendment Eff. July 1, 2022*
26 *Amended Eff. July 1, 2023.*
27

February 13, 2023

Before getting to the change requests, there are two overarching things. First, please highlight all the changes you've made in response to change requests, and remember to put any new language that you're deleting in brackets as well as striking through it. Second, in the introductory statement on line 1, it should say "16 NCAC 06E .0204, as published in [NC Reg citation], with changes, as follows:" Please see the templates on the OAH website for examples on how to format. **Done, I hope correctly. New comments below are highlighted in green.**

In (a)(3), line 8, I would move the parenthetical with the abbreviation for "public school unit" here, rather than down in (b), line 9. Done. Now that the abbreviation is established in (a)(3), I changed "Public School Units" in line 9 to "PSU's."

Looks good, thanks. Just take the apostrophe out of "PSU's". 😊 **Done.**

In (g), line 30, how shall the principal "certify" the list? Signature, notarization, etc? I have substituted "sign and date" for "certify." To further clarify what was meant by "certify," I have specified that the PSU must maintain current copies of the signed and dated list on file in the principal's office and the office of the superintendent. This is consistent with practice under the old rule. Public records retention laws will cover all the prior lists.

Again, looks good, and thanks for making the change. However, on line 30, I think you meant to delete "to" which directly follows "shall." **I believe with the changes the sentence reads, "Each PSU shall require the principal of a school that participates in interscholastic athletics to sign and date a list of eligible students for each sport." So, the "to" is necessary.**

In (h), p.2, with respect to the rules allowing a PSU to impose penalties upon students, coaches, and schools, do your rules otherwise provide for how notice is to be given of the infraction? Or how these penalties may be appealed? G.S. 115C-407.55(4) states that appeals rules "shall establish an appeals process for enforcement of rules that provides for... notice of the infraction...." I see in (m) that there are notice provisions for when an AO imposes penalties, but it doesn't seem that these apply to PSUs. Penalties imposed on students or school employees are outside the scope of these rules. The introduction of G.S. 115C-407.55 states: "The State Board of Education shall adopt rules governing high school interscholastic athletic activities conducted by public school units." The purpose of the penalty rules and the appeal rules in G.S. 115C-407.55(3) and (4) is to govern relationships between the administering organizations and their member PSU's, not relationships between the PSU's and their students, coaches or employees. The administering organization adjudicates complaints from member PSUs about other member PSU's, not students. PSU's have their own policies regarding student and teacher/coach discipline. Any notices of infractions or student or coach complaints or appeals of disciplinary actions imposed on a student or employee would be addressed under local PSU policies and G.S. 115C-45 or, in the case of charter schools, the terms of the charter, G.S. 115C-218.60, or employee contracts. The administering organization only reviews student penalties when they create disputes between PSU's. For example, there is nothing in these rules that permits a student who is ejected from an athletic contest and suspended under (h)(1) to appeal that suspension to the administering organization. Any review of that suspension would

be under the PSU's local policies. However, if a student who should have been suspended competes in a contest sanctioned by the administering organization, a competing PSU could complain to the administering organization that the PSU's decision to permit the student to compete violated the rule. Then the administering organization could exercise its delegated authority under (k)(2) to require the PSU that did not suspend the ejected student to forfeit any contest that the student should have been ineligible for. The student's PSU could then appeal that decision under (m). In short, this rule governs PSU's and PSU's govern their students and employees.

OK, I think I understand what you're getting at here. I think then my question is if the penalties in (h) aren't penalties as understood by G.S. 115C-407.55(3), then what is the statutory authority for this paragraph? Is it 115C-47(4)? That speaks about "local boards of education", which seems to be different than a PSU based on 115C-5(6) and (7a).

115C-407.55(3) is a broad authorization for a system of demerits covering PSUs, students and employees. The SBE has authority over local boards of education under both 115C-47(4) and 115C-407.55(1) and charter high schools under 115C-407.55(1). The SBE can use that authority to require PSUs participating in interscholastic sports to penalize student and employees for violation of rules. However, the local boards of education and charter high schools participating in interscholastic athletics are responsible for the administration of those penalties. The local administration and appeals of those penalties are covered by separate statutes, e.g., 115C-45 and 115C-218.60, and local board and charter school policies. The appeals in paragraph (m) are limited to appeals of the member PSUs, i.e., local boards and charters.

Your original question was whether penalties imposed on students and employees under (h) were appealable under 115C-407.55(4) and (m) and what notice and procedures would apply to those appeals. The penalties are required by this rule and whatever rules the AO may adopt, however, the PSUs are the entities that impose the penalties on the students and employees. The notice and appeals process for PSU disputes with students and employees arising from those penalties are beyond the scope of the notice and appeals process in (m). Finally, you are right, there is a difference between the SBE's jurisdiction in 115C-47(4) which covers all interscholastic athletics and 115C-407.55 which is limited to high school athletics. That means that this rule does not cover charter middle schools. But that does not come into play in (k) because it applies to delegations to AOs and AOs only cover high school athletics.

In (k), p.3, line 15, the Rule states that the Board "may" delegate the following list of things to the administering organization. How is this delegation made? Is it in the MOU? Under what circumstances will the Board decide to delegate? The delegations are specified in the MOU's. G.S. 115C-407.55 gives the SBE discretion to delegate those powers. See the note to paragraph (m) below for a more detailed explanation of how the system works.

If the delegation *will* occur once an MOU is reached, I think it would be clearer to say that in the rule. If this doesn't change the intent of the Rule, I would suggest something along the lines of: "Upon reaching a memorandum of understanding with an administering organization, the State Board of Education shall delegate to that administering organization, pursuant to the terms of the memorandum of understanding, its authority over participating schools to:"

I think the present rule captures a potential degree of discretion that the SBE wants to maintain in relations with administering organizations.

A couple points that support the current language:

(1) 115C-407.50(1) defines an “administering organization” as “[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.” In other words, the MOU that includes the delegations actually “defines” an administering organization. Consequently, the delegations listed in (k), and the negotiations that produce those delegations, are going to be concurrent with, not subsequent to, the execution of the MOU.

(2) At present, there are two administering organizations – North Carolina High School Athletic Association and the Carolina Athletic Association for Schools of Choice. Depending upon experience with those administering organization, it is possible that the SBE may delegate more or less of its authority to one or the other or, indeed, a third administering organization. A rule that compels the SBE to delegate all the authorities listed in (k) to every administering organization would limit the SBE’s authority to distinguish between the demonstrated capabilities of administering organizations.

The current MOUs are for four years. I would rather not change this language in the rule until the SBE has more experience with administration under the new procedures.

In (k)(1), line 18, what are the “purpose[s]” of the student eligibility requirements? I don’t see them identified in this Rule, or in any statute. How can the administering organization make the determination that the requirement is not accomplishing its purpose when those purposes have not been identified? The authority to waive eligibility requirements if they do not accomplish their “purpose” has been in the rule since at least 2000. The rule has attendance, academic achievement, age, and health eligibility requirements. The purposes of those eligibility requirements are to promote student education, health/safety and fair play. The purposes are understood by the community and public. We do not believe it is necessary to attach an explicit purpose to each rule.

I don’t understand why you can’t include the purposes you articulate above in the rule. I’m not sure I exactly understand what you mean by “promot[ing] student education”, but “health and safety” and “fair play” are certainly more definite terms. I think if you work to articulate clear terms along the lines of what you identified here, it would vastly improve the clarity of the rule, and satisfy my concern.

You are right. I have added language to specify the “purposes” of the participation requirements. The participation requirements in (c), (d), (e) and (f) are related to grade level achievement, student age, health, and amateurism. The purposes of those requirements are to promote academic progress, identify students who are at risk of injury, protect students from older and bigger opponents, and keep an equitable and level playing field. I think “academic progress, health and safety, and fair play” capture all those purposes. I have also added language to clarify that the “waivers” are for “particular cases,” as opposed to blanket exceptions.

Are the penalties referenced in (k)(2) different from those referenced in (h)? If not, then how is it decided which set of rules are enforced? As noted above, (h)(1) pertains to penalties that a PSU imposes on its students; (k)(2) pertains to penalties that the administering organization imposes on member PSU’s.

I think if I’m confused about this, other people may also be (not that I’m particularly bright or anything but I’ve seen this rule twice and read the law behind it 😊). I think it would aid clarity if you would explicitly say that these are penalties only as against a PSU. To be clear,

when you're talking about "probations, suspensions" you're referring to the whole team then, rather than a player on the team? I think that's where I got confused.

115C-407.55(3) does not limit the system of "demerits" to PSUs. The system of "demerits" may include PSUs, schools, teams, students or coaches. But, the administering organization can only enforce that system against its member PSUs.

I think the key to understanding the system of penalties is to understand the entities involved. PSUs are separate legal entities, either local school administrative units or nonprofit corporations operating charter schools. An administering organization is legal entity composed of PSUs and has authority over its member PSUs. Schools and teams are not legal entities. Schools and teams are just associations of PSU students and employees. Students and employees are legal entities, but their relationship is with their PSUs, not the administering organization. The schools and teams, which are just manifestations of PSUs, have no independent standing within the administering organization. The administering organization may adopt rules that penalize schools, teams, or students, or coaches but the administering organization can only enforce those penalties through its member PSUs. For example, the administering organizations "gameplay rules" may require a student to be ejected from a game for unsportsmanlike conduct but the administering organization has no authority over the individual student; it is the PSU, through its employee/coach, that enforces the rule by prohibiting the student from continuing to play after the infraction. Consequently, the system of demerits may encompass PSUs, schools, teams, students and coaches but the administering organization only enforces the system through its authority over the PSU. The comments regarding (m) and (n) below offer further explanations how the penalty system works.

In (l)(2), line 34, define or delete "reputable". G.S. 115C-407.55(8)b requires an audit from a "reputable" accounting firm. We believe it is necessary to satisfy the statutory mandate. Attempts to further define "reputable" are not likely to promote clarity. Unfortunately while the GA is allowed to be vague, agencies are not; the APA requires rules be unambiguous and clear. I think you need to add some meat to the bones here and give your regulated public some idea of what "reputable" means. Alternatively delete the term and rephrase with a reference to the statute. I have modified the requirement to clarify that the audit report must be signed by an independent certified public accountant or accounting firm in good standing with the North Carolina State Board of Certified Public Accountant Examiners. I deleted the reference to doing the audit as redundant; an audit report cannot exist without an audit.

In (m), 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 has entered into a MOU with an AO, but the MOU is for a definite term (4 years, per Section 1.(c) of SL 2021-184 and G.S. 115C-407.60(a)), and G.S. 115C-407.60(b) does provide that if an MOU is not in place, the administration of HS athletics goes to DPI. Should the Rule not also provide for appeals from DPI, in the event the existing MOU is not renewed? Otherwise, in 4 years if for some reason you are unable to reach agreement on a renewed MOU, your Rule will need to be amended. Also see my note on (n) regarding

schools not subject to an AO. The SBE has delegated to the administering organizations the authority to establish a system of penalties, administrative rules and gameplay rules. Appeals will involve complaints from member PSU's about the enforcement of those rules. If there is no MOU, there will be no administering organization; no penalty, administrative or gameplay rules to enforce; and, therefore, no appeals. Theoretically, high school athletic contests would be come less formal, e.g., high schools would have to arrange for contests on their own terms and there would be no sanctioned state championships. However, if the SBE were to adopt and enforce statewide game rules, then any disputes would involve application of the rules of a State agency and would become contested cases under Chapter 150B. The great advantage of the APA is individual State agencies do not need to develop appeals processes. G.S. 150B-22 simply requires a settlement discussion before the aggrieved person files a contested case that proceeds in accordance with Chapter 150B, Article 3. Thereafter, the appeal would follow standard OAH procedures.

I'm not sure I agree here. The law says "The State Board of Education shall adopt rules governing high school interscholastic athletic activities...." If there's no AO, then the SBE "shall assign the administration of high school interscholastic athletic activities" to DPI. The choice is between DPI doing it and an AO doing it, not between an AO doing it and nobody doing it. I assume in that situation the appeal would be from DPI to SBE, and then on to OAH. All that said, I don't think it's a big change to say "...appeals from final decisions of an AO or from DPI pursuant to G.S. 115C-407.60(b)..." **Done.**

In (n), line 6, against whom is the PSU imposing penalties? The school? The principal? The coach? The student athlete? Would these penalties be appealable under the provisions of (m)? As noted above, the administering organization has authority over its member PSU's; PSU's have authority over their own students and employees. Any PSU penalties would be limited to their own students and employees, e.g., coaches. The penalties described in (n) are not penalties against a member PSU and are not appealable under this rule. Paragraph (n) is simply meant to clarify that this rule does not preempt PSU authority over its students and employees. The judicial functions of local school administrative units and appeals from those entities are governed by G.S. 115C-45. Charter schools are operated by private nonprofit corporations. The corporation's relations with its student and employee are governed by the terms of their charter, statutes, and private contracts. In either case, the penalties that local school administrative units or charter schools impose on their students or employees are not appealable under paragraph (m).

As I said above, it really isn't clear that the AO can sanction the PSU and not the individual student or coach. Consider making that clear here or earlier in the Rule. I hope my explanation above clarifies how the sanctions work.

*In (n), lines 7-9, you state that if there is no AO governing a group of schools, the PSU may impose penalties. If the AO doesn't govern, then who adopts and enforces the rules that have been delegated to the AO in (k)? Moreover, because (m) limits jurisdiction of the appeals board to "hear and act upon appeals **from final decisions of an administering organization**" would schools not part of an AO have no right to an appeal? As noted above, the administering organization governs the PSU members. While we typically think of schools as competing in athletic*

contests, schools are not corporate bodies; they are administrative units of a PSU subject to the authority of a local board of education or charter board of trustees. Paragraph (n) is meant to clarify that this rule does not preempt PSU or charter board control over athletic activities, i.e., students and employees, in schools under their jurisdiction.

I think this dovetails with my comments on (m). If there's no MOU or AO, your rules are going to need amending, and I don't think failure to enter into a MOU would be something that would justify temporary rulemaking (that's just my off the cuff impression—I'm not giving you RRC's position here). Additionally, the way this is worded, it sounds like there's a possibility that some schools would not be subject to the AO. ("If there is no administering organization governing a group of schools...") Is that correct?

I agree that the language confuses the role of the AO in student sanctions. I have made changes in this section to simplify the language and clarify that it is limited to the authorizing PSUs to impose additional penalties, i.e., the SBE's and AO's rules do not preempt the field. I appreciate that there is a legal possibility that the SBE might not have an MOU with a nonprofit organization and under G.S. 115C-407.60(b) DPI would be responsible for administering high school interscholastic athletic activities. At this point, there are MOUs in place for four years, so we have some time to contemplate what to do if that occurs. In any case, I do not believe the absence of rules particular to DPI affects the legitimacy of this rule governing AOs.

Feel free to reach out with any questions. If you can respond by Friday at 5, I'd appreciate it. Let me know if that's not workable.

Burgos, Alexander N

Subject: FW: [External] RE: 16 NCAC 06E .0204 - Request for Changes February 2022 RRC

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Thursday, February 9, 2023 3:30 PM
To: Ziko, Thomas <Thomas.Ziko@dpi.nc.gov>
Cc: Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: 16 NCAC 06E .0204 - Request for Changes February 2022 RRC

Hi Tom,

Thanks for the timely and well thought out responses. I have a few more comments/suggestions below. I've copied in my change requests and your response below, with my reply in bold.

Before getting to the change requests, there are two overarching things. First, please highlight all the changes you've made in response to change requests, and remember to put any new language that you're deleting in brackets as well as striking through it. Second, in the introductory statement on line 1, it should say "16 NCAC 06E .0204, as published in [NC Reg citation], with changes, as follows:" Please see the templates on the OAH website for examples on how to format.

In (a)(3), line 8, I would move the parenthetical with the abbreviation for "public school unit" here, rather than down in (b), line 9. Done. Now that the abbreviation is established in (a)(3), I changed "Public School Units" in line 9 to "PSU's."

Looks good, thanks. Just take the apostrophe out of "PSU's". 😊

In (g), line 30, how shall the principal "certify" the list? Signature, notarization, etc? I have substituted "sign and date" for "certify." To further clarify what was meant by "certify," I have specified that the PSU must maintain current copies of the signed and dated list on file in the principal's office and the office of the superintendent. This is consistent with practice under the old rule. Public records retention laws will cover all the prior lists.

Again, looks good, and thanks for making the change. However, on line 30, I think you meant to delete "to" which directly follows "shall."

In (h), p.2, with respect to the rules allowing a PSU to impose penalties upon students, coaches, and schools, do your rules otherwise provide for how notice is to be given of the infraction? Or how these penalties may be appealed? G.S. 115C-407.55(4) states that appeals rules "shall establish an appeals process for enforcement of rules that provides for... notice of the infraction...." I see in (m) that there are notice provisions for when an AO imposes penalties, but it doesn't seem that these apply to PSUs. Penalties imposed on students or school employees are outside the scope of these rules. The introduction of G.S. 115C-407.55 states: "The State Board of Education shall adopt rules governing high school interscholastic athletic activities conducted by public school units." The purpose of the penalty rules and the appeal rules in G.S. 115C-407.55(3) and (4) is to govern relationships between the administering organizations and their member PSU's, not relationships between the PSU's and their students, coaches or employees. The administering organization adjudicates complaints from member PSUs about other member PSU's, not students. PSU's have their own policies regarding student and teacher/coach discipline. Any notices of infractions or student or coach complaints or appeals of disciplinary actions imposed on a student or employee would be addressed under local PSU policies and G.S. 115C-45 or, in the case of charter schools, the terms of the charter, G.S. 115C-

218.60, or employee contracts. The administering organization only reviews student penalties when they create disputes between PSU's. For example, there is nothing in these rules that permits a student who is ejected from an athletic contest and suspended under (h)(1) to appeal that suspension to the administering organization. Any review of that suspension would be under the PSU's local policies. However, if a student who should have been suspended competes in a contest sanctioned by the administering organization, a competing PSU could complain to the administering organization that the PSU's decision to permit the student to compete violated the rule. Then the administering organization could exercise its delegated authority under (k)(2) to require the PSU that did not suspend the ejected student to forfeit any contest that the student should have been ineligible for. The student's PSU could then appeal that decision under (m). In short, this rule governs PSU's and PSU's govern their students and employees.

OK, I think I understand what you're getting at here. I think then my question is if the penalties in (h) aren't penalties as understood by G.S. 115C-407.55(3), then what is the statutory authority for this paragraph? Is it 115C-47(4)? That speaks about "local boards of education", which seems to be different than a PSU based on 115C-5(6) and (7a).

In (k), p.3, line 15, the Rule states that the Board "may" delegate the following list of things to the administering organization. How is this delegation made? Is it in the MOU? Under what circumstances will the Board decide to delegate? The delegations are specified in the MOU's. G.S. 115C-407.55 gives the SBE discretion to delegate those powers. See the note to paragraph (m) below for a more detailed explanation of how the system works.

If the delegation will occur once an MOU is reached, I think it would be clearer to say that in the rule. If this doesn't change the intent of the Rule, I would suggest something along the lines of: "Upon reaching a memorandum of understanding with an administering organization, the State Board of Education shall delegate to that administering organization, pursuant to the terms of the memorandum of understanding, its authority over participating schools to:"

In (k)(1), line 18, what are the "purpose[s]" of the student eligibility requirements? I don't see them identified in this Rule, or in any statute. How can the administering organization make the determination that the requirement is not accomplishing its purpose when those purposes have not been identified? The authority to waive eligibility requirements if they do not accomplish their "purpose" has been in the rule since at least 2000. The rule has attendance, academic achievement, age, and health eligibility requirements. The purposes of those eligibility requirements are to promote student education, health/safety and fair play. The purposes are understood by the community and public. We do not believe it is necessary to attach an explicit purpose to each rule. I don't understand why you can't include the purposes you articulate above in the rule. I'm not sure I exactly understand what you mean by "promot[ing] student education", but "health and safety" and "fair play" are certainly more definite terms. I think if you work to articulate clear terms along the lines of what you identified here, it would vastly improve the clarity of the rule, and satisfy my concern.

Are the penalties referenced in (k)(2) different from those referenced in (h)? If not, then how is it decided which set of rules are enforced? As noted above, (h)(1) pertains to penalties that a PSU imposes on its students; (k)(2) pertains to penalties that the administering organization imposes on member PSU's.

I think if I'm confused about this, other people may also be (not that I'm particularly bright or anything but I've seen this rule twice and read the law behind it 😊). I think it would aid clarity if you would explicitly say that these are penalties only as against a PSU. To be clear, when you're talking about "probations, suspensions" you're referring to the whole team then, rather than a player on the team? I think that's where I got confused.

In (l)(2), line 34, define or delete "reputable". G.S. 115C-407.55(8)b requires an audit from a "reputable" accounting firm. We believe it is necessary to satisfy the statutory mandate. Attempts to further define "reputable" are not likely to promote clarity.

Unfortunately while the GA is allowed to be vague, agencies are not; the APA requires rules be unambiguous and clear. I think you need to add some meat to the bones here and give your regulated public some idea of what “reputable” means. Alternatively delete the term and rephrase with a reference to the statute.

In (m), 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 has entered into a MOU with an AO, but the MOU is for a definite term (4 years, per Section 1.(c) of SL 2021-184 and G.S. 115C-407.60(a)), and G.S. 115C-407.60(b) does provide that if an MOU is not in place, the administration of HS athletics goes to DPI. Should the Rule not also provide for appeals from DPI, in the event the existing MOU is not renewed? Otherwise, in 4 years if for some reason you are unable to reach agreement on a renewed MOU, your Rule will need to be amended. Also see my note on (n) regarding schools not subject to an AO. The SBE has delegated to the administering organizations the authority to establish a system of penalties, administrative rules and gameplay rules. Appeals will involve complaints from member PSU’s about the enforcement of those rules. If there is no MOU, there will be no administering organization; no penalty, administrative or gameplay rules to enforce; and, therefore, no appeals. Theoretically, high school athletic contests would be come less formal, e.g., high schools would have to arrange for contests on their own terms and there would be no sanctioned state championships. However, if the SBE were to adopt and enforce statewide game rules, then any disputes would involve application of the rules of a State agency and would become contested cases under Chapter 150B. The great advantage of the APA is individual State agencies do not need to develop appeals processes. G.S. 150B-22 simply requires a settlement discussion before the aggrieved person files a contested case that proceeds in accordance with Chapter 150B, Article 3. Thereafter, the appeal would follow standard OAH procedures.

I’m not sure I agree here. The law says “The State Board of Education shall adopt rules governing high school interscholastic athletic activities....” If there’s no AO, then the SBE “shall assign the administration of high school interscholastic athletic activities” to DPI. The choice is between DPI doing it and an AO doing it, not between an AO doing it and nobody doing it. I assume in that situation the appeal would be from DPI to SBE, and then on to OAH. All that said, I don’t think it’s a big change to say “...appeals from final decisions of an AO or from DPI pursuant to G.S. 115C-407.60(b)...”

In (n), line 6, against whom is the PSU imposing penalties? The school? The principal? The coach? The student athlete? Would these penalties be appealable under the provisions of (m)? As noted above, the administering organization has authority over its member PSU’s; PSU’s have authority over their own students and employees. Any PSU penalties would be limited to their own students and employees, e.g., coaches. The penalties described in (n) are not penalties against a member PSU and are not appealable under this rule. Paragraph (n) is simply meant to clarify that this rule does not preempt PSU authority over its students and employees. The judicial functions of local school administrative units and appeals from those entities are governed by G.S. 115C-45. Charter schools are operated by private nonprofit corporations. The corporation’s relations with its student and employee are governed by the terms of their charter, statutes, and private contracts. In either case, the penalties that local school administrative units or charter schools impose on their students or employees are not appealable under paragraph (m).

As I said above, it really isn’t clear that the AO can sanction the PSU and not the individual student or coach. Consider making that clear here or earlier in the Rule.

In (n), lines 7-9, you state that if there is no AO governing a group of schools, the PSU may impose penalties. If the AO doesn’t govern, then who adopts and enforces the rules that have been delegated to the AO in (k)? Moreover, because (m) limits jurisdiction of the appeals board to “hear and act upon appeals from final decisions of an administering organization” would schools not part of an AO have no right to an appeal? As noted above, the administering organization governs the PSU members. While we typically think of schools as competing in athletic contests, schools are not

corporate bodies; they are administrative units of a PSU subject to the authority of a local board of education or charter board of trustees. Paragraph (n) is meant to clarify that this rule does not preempt PSU or charter board control over athletic activities, i.e., students and employees, in schools under their jurisdiction.

I think this dovetails with my comments on (m). If there's no MOU or AO, your rules are going to need amending, and I don't think failure to enter into a MOU would be something that would justify temporary rulemaking (that's just my off the cuff impression—I'm not giving you RRC's position here). Additionally, the way this is worded, it sounds like there's a possibility that some schools would not be subject to the AO. ("If there is no administering organization governing a group of schools...") Is that correct?

Feel free to reach out with any questions. If you can respond by Friday at 5, I'd appreciate it. Let me know if that's not workable.

Brian

Brian Liebman
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Office of Administrative Hearings
(984)236-1948
brian.liebman@oah.nc.gov

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

Burgos, Alexander N

Subject: FW: [External] RE: 16 NCAC 06E .0204 - Request for Changes February 2022 RRC
Attachments: 02.2023 - SBOE 16 NCAC 06E .0204 with SBE Responses 002.docx; 16 NCAC 06E .0204 Permanent Rule - January 2023 FINAL OAH 002.docx

From: Thomas Ziko <Thomas.Ziko@dpi.nc.gov>
Sent: Wednesday, February 8, 2023 11:56 AM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Martin, Lou <lou.martin@dpi.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: [External] RE: 16 NCAC 06E .0204 - Request for Changes February 2022 RRC

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to [Report Spam](#).

Brian,

I have attached the State Board of Education's responses to your requests for changes. The responses are in **red**. I have also attached a revised copy of 16 NCAC 06E .0204 that incorporates the changes noted in the responses. I hope that with these changes you can recommend approval of this rule. Note for the reasons stated in the responses, I have not attempted to introduce definitions for "undue hardship" or "purposes of the rule" or "reputable." Please let me know as soon as possible if the omission of those definitions present an insurmountable obstacle to approval of this rule.

As always, I appreciate your keen eye and insights.

Thomas J. Ziko
Legal Specialist
Rules Coordinator
State Board of Education

e to third parties, including law enforcement.

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

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06E .0204

DEADLINE FOR RECEIPT: Thursday, February 9, 2023.

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 (a)(3), line 8, I would move the parenthetical with the abbreviation for “public school unit” here, rather than down in (b), line 9. Done. Now that the abbreviation is established in (a)(3), I changed “Public School Units” in line 9 to “PSU’s.”

In (d), p.2, line 11, please identify which Paragraph the requirement being referenced is in. I think you mean “this Paragraph”, but I’m not entirely sure. Done. You are correct.

In (e), line 13, the reference to G.S. 90-9 is incorrect, as 90-9 was repealed in 2007. Please correct. Done. The General Assembly repealed G.S. 90.9 was and replaced it with 90-9.1 (licensure for physicians), 90-9.2 (licensure for graduates of international medical schools), and 90-9.3 (licensure for physician assistants). I have updated the citations. I have also added “G.S.” to the citations to conform with the Style Guide.

In (g), line 30, how shall the principal “certify” the list? Signature, notarization, etc? I have substituted “sign and date” for “certify.” To further clarify what was meant by “certify,” I have specified that the PSU must maintain current copies of the signed and dated list on file in the principal’s office and the office of the superintendent. This is consistent with practice under the old rule. Public records retention laws will cover all the prior lists.

In (h), p.2, with respect to the rules allowing a PSU to impose penalties upon students, coaches, and schools, do your rules otherwise provide for how notice is to be given of the infraction? Or how these penalties may be appealed? G.S. 115C-407.55(4) states that appeals rules “shall establish an appeals process for enforcement of rules that provides for... notice of the infraction....” I see in (m) that there are notice provisions for when an AO imposes penalties, but it doesn’t seem that these apply to PSUs. Penalties imposed on students or school employees are outside the scope of these rules. The introduction of G.S. 115C-407.55 states: “The State Board of Education shall adopt rules governing high school interscholastic athletic activities conducted by public school units.” The purpose of the penalty rules and the appeal rules in G.S.

Brian Liebman
Commission Counsel

Date submitted to agency: January 26, 2023

115C-407.55(3) and (4) is to govern relationships between the administering organizations and their member PSU's, not relationships between the PSU's and their students, coaches or employees. The administering organization adjudicates complaints from member PSUs about other member PSU's, not students. PSU's have their own policies regarding student and teacher/coach discipline. Any notices of infractions or student or coach complaints or appeals of disciplinary actions imposed on a student or employee would be addressed under local PSU policies and G.S. 115C-45 or, in the case of charter schools, the terms of the charter, G.S. 115C-218.60, or employee contracts. The administering organization only reviews student penalties when they create disputes between PSU's. For example, there is nothing in these rules that permits a student who is ejected from an athletic contest and suspended under (h)(1) to appeal that suspension to the administering organization. Any review of that suspension would be under the PSU's local policies. However, if a student who should have been suspended competes in a contest sanctioned by the administering organization, a competing PSU could complain to the administering organization that the PSU's decision to permit the student to compete violated the rule. Then the administering organization could exercise its delegated authority under (k)(2) to require the PSU that did not suspend the ejected student to forfeit any contest that the student should have been ineligible for. The student's PSU could then appeal that decision under (m). In short, this rule governs PSU's and PSU's govern their students and employees.

Do these rules provide a route for appeals for anyone other than a PSU from a decision made by an AO? **No.** See note above.

In (k), p.3, line 15, the Rule states that the Board "may" delegate the following list of things to the administering organization. How is this delegation made? Is it in the MOU? Under what circumstances will the Board decide to delegate? **The delegations are specified in the MOU's. G.S. 115C-407.55 gives the SBE discretion to delegate those powers. See the note to paragraph (m) below for a more detailed explanation of how the system works.**

In (k)(1), line 18, what are the "purpose[s]" of the student eligibility requirements? I don't see them identified in this Rule, or in any statute. How can the administering organization make the determination that the requirement is not accomplishing its purpose when those purposes have not been identified? **The authority to waive eligibility requirements if they do not accomplish their "purpose" has been in the rule since at least 2000. The rule has attendance, academic achievement, age, and health eligibility requirements. The purposes of those eligibility requirements are to promote student education, health/safety and fair play. The purposes are understood by the community and public. We do not believe it is necessary to attach an explicit purpose to each rule.**

In (k)(1), line 18, please define "undue hardship". "Undue hardship" will vary depending on the facts of each case. The phrase is included in G.S. 115C-407(55)(1) and innumerable other statutes. An attempt to define "undue hardship" in the context of children's education, health and safety will add words, but not clarity, to rule.

In (k)(2), line 23, consider adding a cross reference to G.S. 115C-407.55(3), as you made a similar cross reference in (k)(2) and (3). Done.

Are the penalties referenced in (k)(2) different from those referenced in (h)? If not, then how is it decided which set of rules are enforced? As noted above, (h)(1) pertains to penalties that a PSU imposes on its students; (k)(2) pertains to penalties that the administering organization imposes on member PSU's.

In (l)(1), am I correct in understanding that the MOU has to be renewed no later than March 15 every 4 years? Yes. I have added the date to the renewal time before expiration of an existing MOU.

In (l)(2), line 34, define or delete "reputable". G.S. 115C-407.55(8)b requires an audit from a "reputable" accounting firm. We believe it is necessary to satisfy the statutory mandate. Attempts to further define "reputable" are not likely to promote clarity.

In (l)(4), p.4, line 2, please consider "such as" rather than "including." Done

In (l)(6), line 9, what do you mean by "the first page" of a website? We have changed it to "home page." The idea is that the link to the rules would be on the webpage that first appears when you go to the organization's website. For example, when you go to <https://www.nchsaa.org/> there are a number of links. The rule requires that a link to the organizational rules be on that page. The reference to "home page" clarifies that.

In (m), 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 has entered into a MOU with an AO, but the MOU is for a definite term (4 years, per Section 1.(c) of SL 2021-184 and G.S. 115C-407.60(a)), and G.S. 115C-407.60(b) does provide that if an MOU is not in place, the administration of HS athletics goes to DPI. Should the Rule not also provide for appeals from DPI, in the event the existing MOU is not renewed? Otherwise, in 4 years if for some reason you are unable to reach agreement on a renewed MOU, your Rule will need to be amended. Also see my note on (n) regarding schools not subject to an AO. The SBE has delegated to the administering organizations the authority to establish a system of penalties, administrative rules and gameplay rules. Appeals will involve complaints from member PSU's about the enforcement of those rules. If there is no MOU, there will be no administering organization; no penalty, administrative or gameplay rules to enforce; and, therefore, no appeals. Theoretically, high school athletic contests would be come less formal, e.g., high schools would have to arrange for contests on their own terms and there would be no sanctioned state championships. However, if the SBE were to adopt and enforce statewide game rules, then any disputes would involve application of the rules of a State agency and would become contested cases under Chapter 150B. The great advantage of the APA is individual State agencies do not need to develop appeals processes. G.S. 150B-22 simply requires a settlement discussion before the aggrieved person files a contested

case that proceeds in accordance with Chapter 150B, Article 3. Thereafter, the appeal would follow standard OAH procedures.

In (m)(1), what is the “administering organization’s notice”? It seems like this is notice from the AO to the PSU of the imposition of a penalty, but this is out of context, given that (m) governs appeals. The “notice” was intended to be the “notice of final decision” of the dispute before the administering organization which triggers the right to appeal. We have substituted “final decision” to make the terminology consistent throughout (m).

In (m)(2)D., line 29, please delete the first instance of “believe”. Done.

Also in (m)(2)D., line 30, and in (m)(6), p. 5, lines 3-4, delete or define “substantial” in “substantial evidence”. To clarify the standard, we have defined “substantial evidence” consistent with G.S. 150B-2(8c).

Similarly, on in (m)(2)D., line 30, and (m)(6), p.5, line 4, what does it mean for the decision to be “affected” by an error of law? It means that administering organization’s decision was the result of a misinterpretation or misapplication of a regulation as opposed to a misunderstanding of the facts. “Affected by error of law” and “unsupported by substantial evidence” are two of the bases for reversing an administrative decision in G.S. 150B-51(b). In fact, all of the bases for reversing an administrative decision listed in G.S. 150B-51(b) can be subsumed under these those two reasons.

In (m)(3), line 33, delete “to” between “time” and “for”. Done.

In (n), line 6, against whom is the PSU imposing penalties? The school? The principal? The coach? The student athlete? Would these penalties be appealable under the provisions of (m)? As noted above, the administering organization has authority over its member PSU’s; PSU’s have authority over their own students and employees. Any PSU penalties would be limited to their own students and employees, e.g., coaches. The penalties described in (n) are not penalties against a member PSU and are not appealable under this rule. Paragraph (n) is simply meant to clarify that this rule does not preempt PSU authority over its students and employees. The judicial functions of local school administrative units and appeals from those entities are governed by G.S. 115C-45. Charter schools are operated by private nonprofit corporations. The corporation’s relations with its student and employee are governed by the terms of their charter, statutes, and private contracts. In either case, the penalties that local school administrative units or charter schools impose on their students or employees are not appealable under paragraph (m).

*In (n), lines 7-9, you state that if there is no AO governing a group of schools, the PSU may impose penalties. If the AO doesn’t govern, then who adopts and enforces the rules that have been delegated to the AO in (k)? Moreover, because (m) limits jurisdiction of the appeals board to “hear and act upon appeals **from final decisions of an administering organization**” would schools not part of an AO have no right to an appeal? As noted above, the administering organization governs the PSU members.*

While we typically think of schools as competing in athletic contests, schools are not corporate bodies; they are administrative units of a PSU subject to the authority of a local board of education or charter board of trustees. Paragraph (n) is meant to clarify that this rule does not preempt PSU or charter board control over athletic activities, i.e., students and employees, in schools under their jurisdiction.

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

16 NCAC 06E .0204 is proposed for amendment as follows:

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

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

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

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

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

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

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

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

(2) ~~The~~ A student shall meet the age requirements at each grade level to participate. The principal PSUs shall have determine the age of participating students based on a preponderance of the evidence of the legal birth date of the student known to them. A student who is ineligible to participate at one grade level due to age is shall be eligible to participate at the next higher grade level only. However, only, provided no student is shall be eligible to participate at the middle school level for a period lasting longer than six consecutive semesters, beginning with the student's entry into sixth grade-grade 6, and No no student shall be eligible to participate at the high school level for more than eight consecutive semesters, beginning with the student's first entry into grade nine9 or participation on a high school team, whichever occurs first.

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

(B) ~~A student shall not participate on a ninth~~ grade 9 through 12 junior high school team if the student becomes 1619 years of age on or before August 31 of that school year.

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

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

~~(d)(e)~~ ~~The~~ To be eligible to participate, a student shall receive a medical examination ~~each year~~ every 395 days by a licensed physician, nurse practitioner, or physician assistant, subject to the provisions of G.S. ~~90-990-9.1~~, G.S. 90-9.2, G.S. 90-9.3, G.S. 90-18.1, and G.S 90-18.2.

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

- ~~(1)~~ graduation; graduation, except that the student may continue to participate in playoff and state championship contests in spring sports after graduation;
- ~~(2)~~ becoming eligible to graduate;
- ~~(3)(2)~~ signing a professional athletic contract;contract, except that the student may continue to participate in any sport for which the student has not signed a professional contract;
- ~~(4)(3)~~ receiving remuneration as a participant in an athletic contest, orcontest, except that the student may accept a gift, merchandise, trophy, or other thing of value, provided:
 - (A) the value does not exceed two hundred fifty dollars (\$250.00) per student per sports season;
 - (B) the item is totally consumable and nontransferable, or labeled in a permanent manner, for example, monogrammed or engraved items; and
 - (C) the item is approved by the student's principal and superintendent; or
- ~~(5)(4)~~ participating on an all-star team or in an all-star game that is not sanctioned by the associationadministering organization of which the student's school is a member. Themember, provided the student is shall be ineligible only for the specific sport involved.

~~(f)(g)~~ Each PSU shall require the principal of a school that participates in interscholastic athletics shall to certify sign and date a list of eligible students for each sport. The PSU shall maintain copy of the most current list in the principal's office and the office of the superintendent.

~~(g)(h)~~ ~~Any~~ A PSU shall impose at least the following penalties on a student, ~~student athlete,~~ coach, or school official in grades ~~6-126~~ through 12 who is ejected from ~~anyan interscholastic athletic contest-shall at least be penalized as follows:~~

- (1) for the first offense, the person shall be reprimanded and suspended ~~from participating in~~ for the next game at that level of play (varsity or junior varsity); ~~varsity) and for any intervening games at either level;~~
- (2) for a second offense, the person shall be placed on probation and suspended ~~from participating in~~ for the next two games at that level of play (varsity or junior varsity); ~~varsity) and for any intervening games at either level;~~
- (3) for a third offense, the person shall be suspended for one calendar year; and
- (4) a coach who is suspended ~~at any level of grades 6-12 (middle school, junior high or high school)~~ shall not coach any team for in any other grade level in grades 6-12 during the period of suspension.
- ~~(5)~~ Penalties are cumulative from sport to sport and from sport season to sport season. If no member of the school's coaching staff is present to assume an ejected coach's duties, the contest shall be terminated by a forfeit.
- ~~(h)~~ (i) LEAs PSUs may allow their schools to belong to the North Carolina High School Athletic Association (NCHSAA), which has established as a minimum the rules adopted by the SBE, an administering organization designated by the State Board of Education. The NCHSAA
- (j) An administering organization that has entered into a memorandum of understanding with the State Board of Education for the purpose of administering interscholastic athletics under this Rule must apply and enforce all of the requirements of this Rule.
- (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 or if a waiver is necessary to reasonably accommodate a student's disability, as required under the Americans with Disabilities Act, U.S.C. § 1201 et seq.;
- (2) adopt, apply, and enforce penalty rules as defined in G.S. 115C-407.55(3) that establish a system of demerits that includes reprimands, probations, suspensions, forfeitures of contests, forfeitures of titles, and disqualifications;
- (3) adopt, apply, and enforce administrative rules, as defined in G.S. 115C-407.55(5);
- (4) adopt, apply, and enforce gameplay rules, as defined in G.S. 115C-407.55(6); and
- (5) establish and collect from all its members a uniform membership fee of either:
- (A) one thousand dollars (\$1,000) for each participating school, or
- (B) one dollar (\$1.00) for each student enrolled in a participating school.
- (l) An administering organization shall:
- (1) enter into a memorandum of understanding with the State Board of Education no later than March 15 prior to the academic year in which it is to begin administering interscholastic athletics and no later than the March 15 before the expiration of an existing memorandum of understanding;

- (2) be audited by a reputable independent auditing firm and submit the audit to the State Board of Education no later than March 15 each year;
- (3) 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 member of the public;
- (4) provide to the State Board of Education within 30 days any requested organizational records, such as, financial information, annual audit reports, and any matters related to or impacting participating schools;
- (5) enter into written agreements with PSUs that allow their eligible schools to participate in interscholastic sports, which agreements shall include an explanation of the fees to be charged, the obligations of the PSU and participating schools, penalties for the violation of this Rule at the high school level that may be imposed, and an explanation of the process to contest or appeal adverse decisions; and
- (6) publish the organization's rules through a link on the home page of its website.
- (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 the administering organization's final decision. The final decision shall be mailed to the Superintendent or board of trustees of the PSU.
- (1) The administering organization's final decision 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:
- A. be in writing;
- B. include a description of the facts of the dispute;
- C. include any evidence submitted to the administering organization; and
- D. present an argument explaining why the PSU believes the administering organization's final decision was not based on substantial evidence as defined in G.S. 150B-2(8c) or is affected by an error of law.

1 (3) The administering organization may file a response to the PSU's submissions within five days. The
2 panel may shorten the time for filing the administering organization's response if the decision affects
3 a student's or coach's eligibility to participate in an intervening athletic contest.

4 (4) All documents filed in the appeal shall be simultaneously served on all parties in the manner
5 prescribed in G.S. 1A-1, Rule 5 of the North Carolina Rules of Civil Procedure.

6 (5) Any hearing shall be recorded.

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

11 (7) The panel's decision shall be final.

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

16
17 *History Note: Authority G.S. 115C-12(12); 115C-12(23); 115C-47(4); 115C-407.50, 115C-407.55; 115C-407.60;*
18 *115C-407.65; 116-235(b);*
19 *Emergency Adoption Eff. August 20, 2019;*
20 *Amended Eff. March 1, 2021;*
21 *Temporary Amendment Eff. July 1, 2022*
22 *Amended Eff. July 1, 2023.*
23

Burgos, Alexander N

From: Liebman, Brian R
Sent: Thursday, January 26, 2023 11:52 AM
To: Ziko, Thomas
Cc: Martin, Lou; Burgos, Alexander N
Subject: 16 NCAC 06E .0204 - Request for Changes February 2022 RRC
Attachments: 02.2023 - SBOE 16 NCAC 06E .0204.docx

Good afternoon,

I'm the attorney who reviewed the Rule submitted by the Board for the February 2023 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, February 16, 2023, 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 Rules and forms to me via email, no later than 5 p.m. on Thursday, February 9, 2023.

In the meantime, please do not hesitate to reach out via email with any questions or concerns.

Thanks,

Brian

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

E-mail correspondence to and from this address may be subject to the North Carolina Public Records Law N.C.G.S. Chapter 132 and may be disclosed to third parties.

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