

Burgos, Alexander N

Subject: FW: [External] RE: 21 NCAC 42D .0102 objection letter

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Monday, November 27, 2023 11:39 AM

To: Johnny Loper <jloper@loper-law.com>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>

Subject: RE: [External] RE: 21 NCAC 42D .0102 objection letter

Thank you for your email.

The staff opinion dated October 13, 2023 erroneously “checks” the “unnecessary” box; however, it is clear by the language of the opinion that the objection is pursuant to G.S. 150B-21.9(a)(2). The opinion states, “It is unclear who is regulated and under what circumstances. Accordingly, staff recommends objection pursuant to G.S. 150B-21.9(a)(2) for lack of clarity and ambiguity.”

My job is to review rules for my client and advise them. I do not have the time, currently, to pre-review revisions prior to filing or to discuss language.

Clear and unambiguous language in a rule cannot be resolved outside of the rules. If you feel that rule language is clear contextually, perhaps citing the other rules or statutes in the rule would bring clarity.

To quickly address some other issues raised, I do not believe any member of the Commission were “confused.” The opinions which they adopted are clear, succinct, and well-reasoned.

Regarding the averment that some language previously approved by the RRC on March 1, 2023, I do not find this averment compelling, nor do I believe my client will. Other agencies have made this argument without success.

The Board must now either submit revisions to the rule which satisfy the objections, or ask for the return of the rule. In the later event, the rule will be removed from the code. If the Board satisfies the objections by adopting language which differs substantially from the proposed rule pursuant to G.S. 150B-21.2(g), the rule will need to be re-published pursuant to G.S. 150b-21.12(C).

That having been stated, if you would like to meet, I will not be available before the December RRC meeting. I have availability on December 19th.

William W. Peaslee
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1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

Burgos, Alexander N

Subject: FW: [External] RE: 21 NCAC 42D .0102 objection letter

From: Johnny Loper <jloper@loper-law.com>

Sent: Monday, November 27, 2023 10:40 AM

To: Peaslee, William W <bill.peaslee@oah.nc.gov>

Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>

Subject: [External] RE: 21 NCAC 42D .0102 objection letter

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Re-sent to correct references to “Board” rather than “Commission” in paragraphs 3 and 4 below. My apologies.

Mr. Peaslee:

The Optometry Board would like to work with you pursuant to G.S. 150B-21.12(a)(1) to see if we can reach agreement on the Board’s desire to amend its rule 42D .0102. The proposed amendment is needed to respond to an issue the Board is seeing with some increasing frequency: optometrists who are conducting remote/virtual patient exams have missed conditions in patients due to the limitations of technology. Such situations endanger the health of North Carolina citizens. Requiring that a highly-trained optometric technician be in the room with the patient will reduce the frequency of such “misses.” That is the focus of our amendment.

I recall you previously stated you disfavored phone calls or face-to-face meetings for the purpose of resolving issues. However, given the amount of time devoted to this matter during the submission/comment stage and at the last meeting and the confusion on the part of some members of the Commission, I wonder if you’d be willing to depart from your preference and have such a discussion with me? I’d be happy to meet with you (and any other Staff you might want present) for that purpose.

Here are a few of the issues that are unclear or confusing to us:

1. The Staff Opinion Recommended Action has “checked” the following: “Object, based on: Unnecessary,” but the Comment contains notes that ambiguous terms and subjective standards are used, and that the certification process is unclear. If the objection is that the proposed rule is unnecessary, does this mean that the Board already is free to require highly-trained techs to be present when “remote” exams are being done? Or is the objection really to perceived ambiguous terms and subjective standards?
2. With regard to the certification issue, let me be clear: the Board would require that techs and assistants who wish to be certified complete the respective certification programs offered by the American Optometric Association. There would be no separate Board certification process – once a tech is certified via completion of the AOA course/program, that person would be considered “certified” for

the purposes of this rule. Perhaps switching the order of proposed amended paragraphs (b) and (c) would be a good start, and then clarifying that certification means AOA certification?

3. If the objection is that the language in paragraph (a) of the proposed rule contains ambiguous, unclear, and subjective terms, I'd point out that the language in paragraphs (a) and (b) of the rule as it currently exists was the product of a previous amendment that was effective on March 1, 2023. Current subsections (a) and (b) were all "new language" adopted via that amendment. It seems to me that some or much of the language objected to as ambiguous or unclear or which provides no standard is language which was approved by the Commission in the version of the rule that became effective on March 1.
4. The same seems to be true for an objection that the functions to be performed by paraoptometric personnel are unclear. Subsection (b) of the current rule was approved by the Commission back in March, and in fact was the exact language suggested by one of your colleagues as being appropriate. Are we now being told that the language approved six months ago is objectionable?

These and other issues would in my opinion benefit from some real-time discussion rather than a long series of emails. I'd appreciate your considering a meeting with me at your office, or at least a phone call to see if we can reach an understanding and, hopefully, agreement.

Thanks for considering.

Johnny

Johnny M. Loper
Loper Law, PLLC
1212 Briar Patch Lane
Raleigh, NC 27615

919-390-7749 (DD)
919-390-3342 (F)
jloper@loper-law.com

Burgos, Alexander N

Subject: FW: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

From: Johnny Loper <jloper@loper-law.com>
Sent: Wednesday, November 15, 2023 5:36 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

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OK. I'll argue that interpretation tomorrow. Won't make a big deal out of it.

Thanks.

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Wednesday, November 15, 2023 5:35 PM
To: Johnny Loper <jloper@loper-law.com>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

Yes, Rule 107(a)(2) cannot be evaded simply by filing a revision after a staff opinion has been issued. Rule 107(a)(2) would become meaningless.

William W. Peaslee
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From: Johnny Loper <jloper@loper-law.com>
Sent: Wednesday, November 15, 2023 5:32 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>

Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

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So if we withdraw the Nov. 1 revision, does the Commission then consider the Oct. 11 filing, even though it was supplanted by the Nov. 1 filing?

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Wednesday, November 15, 2023 5:30 PM

To: Johnny Loper <jloper@loper-law.com>

Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

I'm sorry if I was not clear. You can withdraw the November 1, 2023 revision but not the October 11, 2023 filing which is subject to a staff opinion concerning exiting language.

William W. Peaslee
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From: Johnny Loper <jloper@loper-law.com>

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To: Peaslee, William W <bill.peaslee@oah.nc.gov>

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So now I'm confused: below you say "...it can be withdrawn" and "the Board cannot withdraw its rule."

Are you saying we cannot withdraw the Nov. 1 proposed rule because of language the previous submission, which is not the version before the Board for consideration, contained?

If that is your position, I would plan to argue my point before the Board tomorrow. It would be helpful if you could clarify for me before then.

Johnny

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Wednesday, November 15, 2023 5:20 PM

To: Johnny Loper <jloper@loper-law.com>

Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

Thank you for your email.

I would concur that Rule 107(a)(2) is applicable. I agree with you that the revision to rule .0102 filed November 1, 2023 strikes all existing language and the staff opinion would not be on existing rule language. Accordingly, it can be withdrawn.

However, the previous rule submission filed October 4, 2023, which was also subject to a staff recommendation, contained language in the exiting rule. As did the original rule filing. In my opinion, both the Board cannot now withdraw its rule. To allow it to withdraw the rule would thwart the intention if not the letter of 26 NCAC 05 .0107(a)(2).

However, you can argue to the contrary before the RRC tomorrow.

Please let me know if you would like to argue this point before the RRC ASAP.

Thank you.

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Rules Review Commission Counsel / Legislative Liaison

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From: Johnny Loper <jloper@loper-law.com>

Sent: Tuesday, November 14, 2023 5:33 PM

To: Peaslee, William W <bill.peaslee@oah.nc.gov>

Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

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Thanks for this. For clarification: it seems that the applicable section of Rule 107 would be (a)(2), correct, since this is an amendment and not a readoption?

If yes, don't the objections apply to the requested/proposed new language, rather than "existing language"...or am I reading the rule incorrectly?

If we indeed cannot withdraw and we still want to seek amendment, would we need to start the process over from the start (publication, etc.)?

Thanks.

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Tuesday, November 14, 2023 4:51 PM

To: Johnny Loper <jloper@loper-law.com>

Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

Thank you for your email.

I do not believe that the rule can be withdrawn at this point. Please see [Rule 107](#).

Please let me know if you intend on making that request to the Commission.

Thank you.

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Burgos, Alexander N

Subject: FW: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

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Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

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From: Johnny Loper <jloper@loper-law.com>
Sent: Tuesday, November 14, 2023 11:11 AM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

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Mr. Peaslee:

Given your recommendation, would we be able to withdraw this proposed rule from consideration at the Commission's November 16 meeting, and then work to re-submit an acceptable proposed rule within the 70 day extension period?

Thanks.

Johnny

Johnny M. Loper
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1212 Briar Patch Lane
Raleigh, NC 27615

919-390-7749 (DD)
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jloper@loper-law.com

Burgos, Alexander N

Subject: FW: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

From: Johnny Loper <jloper@loper-law.com>

Sent: Tuesday, November 14, 2023 11:11 AM

To: Peaslee, William W <bill.peaslee@oah.nc.gov>

Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

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Thanks.

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jloper@loper-law.com

Burgos, Alexander N

Subject: FW: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102
Attachments: 10.2023 Staff Opinion 21 NCAC 42D.0102 112023.doc

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Wednesday, November 1, 2023 4:52 PM
To: Johnny Loper <jloper@loper-law.com>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

Mr. Loper:

Thank you for your email.

Attached please find the staff opinion on the above captioned revised rule which will be considered at the November RRC meeting.

As always if you have any questions please feel free to contact me.

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Burgos, Alexander N

Subject: FW: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102
Attachments: 21 NCAC 42D .0102.docx

From: Johnny Loper <jloper@loper-law.com>
Sent: Wednesday, November 1, 2023 1:08 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>
Subject: [External] North Carolina State Board of Examiners in Optometry: proposed amendment of 21 NCAC 42D .0102

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Mr. Peaslee:

Thanks again for your willingness to allow the Board additional time to work on the proposed amendment to 42D .0102. I've attached the proposed revisions to this email. I'd like to provide a little background that I hope will be helpful to you and may provide answers or explanation to some of your previous comments and questions.

First, this amendment is intended to address issues that recently have arisen relating to telemedicine/remote optometric exams. Unlike traditional telemedicine practices where a doctor located in his or her office conducts a virtual visit with a patient in the patient's home, optometrists are having patients come to a fully equipped office with the optometrist being in a remote location. In such situations, the optometrist relies on a staff person, often inadequately trained, to conduct a significant portion of the examination. These are comprehensive eye examinations, not problem-focused examinations. Issues have arisen where certain things can (and have been) missed. The Board feels a good way to minimize such "misses" is to require that the staff person assisting the optometrist be a well-trained optometric technician. The Board believes that an optometric technician certified by the American Optometric Association will fit that requirement.

The revised rule as submitted provides that "optometric assistants" and "optometric technicians" are [by definition] persons who have successfully completed their respective American Optometric Association courses and testing and have become Certified Paraoptometric Assistants and Certified Paraoptometric Technicians. There is no separate "certification" process by the Board. The revised rule requires that an optometric technician be present when the patient is seen by a "remote" optometrist.

We have attempted to further clarify this issue and otherwise address your previous comments through language indicating that optometric assistants and optometric technicians may be assigned duties that are within the scope of their education, training, experience and their AOA certification, so long as (per GS 90-115.1) such acts are appropriately supervised by a licensed optometrist. Like for other medical extenders and paraprofessionals, it would be impossible to provide a definitive [non-subjective] list of tasks that such persons are qualified to perform—and that list likely would be out of date by the time it went to print given the changes in the profession and technology.

The optometrist, through his/her work with the optometric assistant or optometric technician and with his/her knowledge of what the AOA certification courses provide, surely deserves the discretion to determine what such persons are skilled and experienced enough to do. Likewise, the optometric assistants and optometric technicians themselves know their education, training, and experience, and I would submit that they don't need the guidance of a list of tasks the supervising OD believes they are qualified to do.

Thanks for considering my "argument." Again, I provide this explanation in the hope that it will make our aims clear and therefore make your job easier. If I have misunderstood your thoughts and positions, I apologize. I'm happy to discuss any of this with you over the phone, if that would be of assistance.

Many thanks.

For the Board,

Johnny M. Loper
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jloper@loper-law.com

1 21 NCAC 42D .0102 is adopted with changes as published in 37:22 NCR 2129-2130 as follows:

2
3 **21 NCAC 42D .0102 ~~FUNCTION~~ OPTOMETRIC ASSISTANT; OPTOMETRIC TECHNICIAN**

4 (a) ~~For the purposes of this Rule, "paraoptometric personnel" means an optometric assistant, optometric technician,~~
5 ~~or similarly titled position who qualifies by training and experience to perform duties of an administrative, technical,~~
6 ~~or clinical nature and is directed and supervised by a licensed optometrist. Optometric assistants and optometric~~
7 ~~technicians are employees of an optometric practice or where optometry is practiced who have successfully completed~~
8 ~~the testing and certification process for Certified Paraoptometric Assistant and Certified Paraoptometric Technician~~
9 ~~respectively by the American Optometric Association.~~

10 (b) ~~Paraoptometric personnel shall perform his or her functions within the scope of his or her training, as directed by~~
11 ~~and assigned by an optometrist, so long as those functions are at the specific direction and under the supervision of~~
12 ~~the licensee. Optometric assistants and optometric technicians may be delegated duties and responsibilities of an~~
13 ~~administrative, technical, or clinical nature so long as such are within the scope of their education, training, experience,~~
14 ~~and certification, and so long as such activities are directed and appropriately supervised by a licensed optometrist.~~
15 ~~The supervising optometrist is responsible for all activities undertaken by the optometric assistant and optometric~~
16 ~~technician.~~

17 (c) ~~In practices or situations where there is no on-site optometrist present, an optometric technician must be present~~
18 ~~during all patient interactions with the remote optometrist.~~

19
20 *History Note: Authority G.S. 90-115.1(6); 90-117.5;*

21 *Eff. February 1, 1976;*

22 *Readopted Eff. May 30, 1978;*

23 *Amended Eff. June 1, 1989; September 30, 1981;*

24 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23,*
25 *2015;*

26 *Amended Eff. March 1, 2023.*

27 *Amended Eff. December 1, 2023*

Burgos, Alexander N

From: Johnny Loper <jloper@loper-law.com>
Sent: Monday, October 23, 2023 2:32 PM
To: Peaslee, William W
Cc: Burgos, Alexander N
Subject: [External] Re: 21 NCAC 42D .0102 extension

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Received, and thanks.

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From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Monday, October 23, 2023 2:10:49 PM
To: Johnny Loper <jloper@loper-law.com>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: 21 NCAC 42D .0102 extension

Good afternoon,

Attached please find the extension letter for the above captioned rule. If you would like the revision considered at the November RRC meeting please send me the revision no later than COB November 2 otherwise it will be considered at the December RRC meeting.

As always if you have any questions please feel free to contact me.

Thank you.

William W. Peaslee
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Bill.Peaslee@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Tuesday, October 17, 2023 11:26 AM

To: Johnny Loper <jloper@loper-law.com>

Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

Good morning,

Thank you for email.

I would strongly prefer email communication in the interests of transparency. I would recommend revisions to the rule which address the concerns expressed in the staff opinion. Thereafter we can have a telephone conversation if necessary.

Thank you.

William W. Peaslee

Rules Review Commission Counsel / Legislative Liaison

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Burgos, Alexander N

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From: Johnny Loper <jloper@loper-law.com>

Sent: Tuesday, October 17, 2023 11:14 AM

To: Peaslee, William W <bill.peaslee@oah.nc.gov>

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William:

Thanks for your consideration in not opposing an extension of time for us to try to get you some amendments to 42D. 0102 that you/RRC can approve. We also would like to take you up on your offer to discuss the rule.

I know you have the RRC meeting this week, but would you have a few minutes next week so that we can have a phone call? We'd like to explain why we are trying to revise this rule (there is a public safety issue behind our effort) and discuss possible options that would not lead to objections on your part.

Many thanks.

Johnny

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Burgos, Alexander N

Subject: FW: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

From: Johnny Loper <jloper@loper-law.com>
Sent: Friday, October 13, 2023 5:05 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

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Again, thanks.

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Friday, October 13, 2023 5:04 PM
To: Johnny Loper <jloper@loper-law.com>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

No.

Have a good weekend.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

From: Johnny Loper <jloper@loper-law.com>
Sent: Friday, October 13, 2023 5:03 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

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Yes, we request the extension. Thanks. Do you need anything more formal than this email?

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Friday, October 13, 2023 5:02 PM
To: Johnny Loper <jloper@loper-law.com>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

Thank you for your email.

Yes. You can request an extension and the RRC would consider the request at its meeting. I would neither support nor oppose the request at this point.

If granted you would have 70 days to work on the rule. If not and the RRC objects, 30 days.

Please let me know if you would like an extension.

Thank you.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
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Bill.Peaslee@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

From: Johnny Loper <jloper@loper-law.com>

Sent: Friday, October 13, 2023 4:54 PM

To: Peaslee, William W <bill.peaslee@oah.nc.gov>

Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

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We have quickly reviewed your response below and the staff opinion. We appreciate your taking the time to review our response after our delay in getting this to you.

Would we be able to avoid the staff recommendation on 42D. 0102 being acted on next week by getting an extension, and then having further discussions with you on how to cure your objections?

Many thanks.

Johnny
P

Burgos, Alexander N

Subject: FW: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102
Attachments: 10.2023 Staff Opinion 21 NCAC 42D.0102.doc

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Friday, October 13, 2023 3:28 PM
To: Johnny Loper <jloper@loper-law.com>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

Good afternoon

Attached please find the staff opinion regarding 21 NCAC 42D .0102 which will be considered at the October 19th RRC meeting.

It is my intention to recommend approval of 21 NCAC 42B .0201 as revised

If you have any questions or concerns, please do not hesitate to contact me.

William W. Peaslee
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(984) 236-1939
Bill.Peaslee@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102
Attachments: 21 NCAC 42B .0201.docx; 21 NCAC 42D .0102.docx

From: Johnny Loper <jloper@loper-law.com>
Sent: Wednesday, October 11, 2023 8:00 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>
Cc: exdir@ncoptometry.org; Janice Peterson <janice@ncoptometry.org>
Subject: [External] Request for Changes 21 NCAC 42B .0201 and 42D .0102

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Good evening, Mr. Peaslee.

We appreciate your checking back with us regarding our proposed rule amendments, and we apologize again for the delay and any inconvenience we may have caused you.

We have read and reviewed your comments and questions, and hope that the attached revised rules appropriately address those comments and questions. In addition, below are our responses to the specific questions you asked. We are happy to provide these responses in another format if needed, but we wanted to get this to you as soon as possible.

Again, thank you for your assistance. We are available to discuss this further at your convenience.

For the Board,

Johnny M. Loper
Loper Law, PLLC
1212 Briar Patch Lane
Raleigh, NC 27615

919-390-7749 (DD)
919-390-3342 (F)
jloper@loper-law.com

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10 AGENCY: Board of Examiners in Optometry
RULE CITATION: 21 NCAC 42D .0102

Lines 4-5: As written, if personnel “qualifies” but is not supervised, the personnel are not “paraoptometric personnel” as defined and the balance of the rule would be inapplicable. Is that correct?

As we understand the question, the answer is “yes”. For someone to be classified as “paraoptometric personnel”, he or she must be appropriately qualified and be supervised by a licensed optometrist. Someone who is qualified but not supervised, or someone who is not qualified but is supervised, does not qualify as “paraoptometric personnel”.

Line 5: What is the test or criteria by which one would “qualify by training and experience”? Who makes this determination?

The optometrist, based on his or her evaluation of the person’s training and experience as observed by that optometrist, makes this determination in his or her discretion and based on the needs and requirements of his or her practice. We’ve added this clarification on line 5.

Lines 6-7: Under what circumstances would paraoptometric personnel “need” or be required to be certified?
When the optometrist is not on-site and supervision is remote (lines 12-13)

Lines 6-8: Is it just paraoptometric personnel that wish or need to become assistants or technicians that must be certified by the AOA? Or is AOA certification a prerequisite to anyone becoming an assistant or technician?
There is no assistant or technician other than a certified optometric assistant or certified optometric technician, and the AOA is the body that certifies them.

What rule covers the certification process or requirements for non-paraoptometric personnel?
Not applicable because only paraoptometric personnel can be so certified.

Line 9: What does the Board mean by “within the scope” of training? What training is required?

We have attempted to clarify this in our edits on lines 7-8, .but generally the training is the same as referred to in lines 5-6

Line 10: What is the difference between direction and specific direction?

We understand your point; and, have struck the word “specific”.

Line 9-11: What does this sentence do that is not covered by G.S. 90-115.1(6)? Why is it necessary?

This amendment is meant to clarify the types of acts that are authorized and permitted within the meaning of 90-115.1 (6)

Lines 11-12: Under what circumstances “may” the Board require “certification”? Or change “may” to “shall”.

We understand your point and have changed it to “shall”.

Lines 11-12: Certified by whom and pursuant to what procedure?

Certification is through the Paraoptometric Examination Process of the American Optometric Association. The Process is outlined in the Candidate Handbook provided to applicants for certification.

Lines 11-12: “environments where supervision is limited” is ambiguous. What is the standard of required supervision?

We agree with your assessment that limited supervision is ambiguous and have changed the language to provide that certification is required when paraoptometric personnel are performing their functions when the optometrist is not physically present in the practice.

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1 21 NCAC 42B .0201 is proposed for adoption as follows:

2

3 **21 NCAC 42B .0201 BEGINNING PRACTICE; RELOCATING PRACTICE**

4 ~~Within 10 days of~~ Prior to beginning practice, a licensee shall notify the Board in writing as to the full and complete
5 mailing address, including the street address, of his or her office and the telephone number of such office. ~~If at any~~
6 ~~time any office is relocated,~~ Prior to relocating an office, the licensee involved shall notify the Board in writing of his
7 or her new office address and telephone number. The address so identified shall constitute his or her primary practice
8 address and the address to which all information pertaining to his or her licensure shall be addressed.

9

10 *History Note: Authority G.S. 90-117.5;*

11 *Eff. February 1, 1976;*

12 *Readopted Eff. May 30, 1978;*

13 *Amended Eff. April 1, 1993; June 1, 1989; September 30, 1981;*

14 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23,*
15 *2015.*

16 *Amended Eff. November 1, 2023*

17

1 21 NCAC 42D .0102 is adopted with changes as published in 37:22 NCR 2129-2130 as follows:

2

3 **21 NCAC 42D .0102 FUNCTION PARAOPTOMETRIC PERSONNEL**

4 (a) For the purposes of this Rule, "paraoptometric personnel" means ~~an optometric assistant, optometric technician,~~
5 ~~or similarly titled position personnel~~ who, in the discretion of the supervising optometrist, qualifies by training
6 and experience to perform duties of an administrative, technical, or clinical nature and is directed and supervised by a
7 licensed optometrist. Paraoptometric personnel shall perform his or her functions ~~within the scope of his or her~~
8 ~~training, as directed by and assigned by an optometrist, so long as those functions are~~ at the specific direction and
9 under the supervision of the licensee.

10 **(b)** Paraoptometric personnel who wish or need to become certified as optometric assistants or optometric technicians
11 must be certified by the American Optometric Association and maintain such certification.

12 ~~(b)~~ **(c)** The Board may shall require that paraoptometric personnel be certified in environments where there is no on-
13 site optometrist presence and optometric supervision is remote. supervision is limited.

14

15 *History Note: Authority G.S. 90-115.1(6); 90-117.5;*

16 *Eff. February 1, 1976;*

17 *Readopted Eff. May 30, 1978;*

18 *Amended Eff. June 1, 1989; September 30, 1981;*

19 *Pursuant to G.S. 150B-21.3A, rule is necessary without substantive public interest Eff. May 23,*
20 *2015;*

21 *Amended Eff. November 1, 2023.*

22

23

Burgos, Alexander N

Subject: FW: [External] Re: FW: Request for Changes 21 NCAC 42B .0201 and 42D .0102

From: Johnny Loper <jloper@loper-law.com>
Sent: Wednesday, October 11, 2023 4:52 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>; exdir@ncoptometry.org
Cc: Janice Peterson <janice@ncoptometry.org>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] Re: FW: Request for Changes 21 NCAC 42B .0201 and 42D .0102

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Bill:

Many thanks. We will not get this to you by 5:00, but plan on getting it to you later tonight.

Johnny

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Wednesday, October 11, 2023 2:04 PM
To: exdir@ncoptometry.org
Cc: Janice Peterson <janice@ncoptometry.org>; Johnny Loper <jloper@loper-law.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] Re: FW: Request for Changes 21 NCAC 42B .0201 and 42D .0102

I'll do my best to review any revisions before the October meeting when I receive them.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
Office of Administrative Hearings
1711 New Hope Church Road
Raleigh NC, 27609
(984) 236-1939
Bill.Peaslee@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] Re: FW: Request for Changes 21 NCAC 42B .0201 and 42D .0102

From: Peaslee, William W <bill.peaslee@oah.nc.gov>

Sent: Wednesday, October 11, 2023 2:04 PM

To: exdir@ncoptometry.org

Cc: Janice Peterson <janice@ncoptometry.org>; jloper@loper-law.com; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: RE: [External] Re: FW: Request for Changes 21 NCAC 42B .0201 and 42D .0102

I'll do my best to review any revisions before the October meeting when I receive them.

William W. Peaslee

Rules Review Commission Counsel / Legislative Liaison

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(984) 236-1939

Bill.Peaslee@oah.nc.gov

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Burgos, Alexander N

Subject: FW: [External] Re: FW: Request for Changes 21 NCAC 42B .0201 and 42D .0102

From: NCSBEO-W. Rafferty <exdir@ncoptometry.org>

Sent: Wednesday, October 11, 2023 2:01 PM

To: Peaslee, William W <bill.peaslee@oah.nc.gov>

Cc: Janice Peterson <janice@ncoptometry.org>; jloper@loper-law.com; Burgos, Alexander N <alexander.burgos@oah.nc.gov>

Subject: [External] Re: FW: Request for Changes 21 NCAC 42B .0201 and 42D .0102

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Mr. Peaslee,

I am the Executive Director for the Optometry Board. I am reaching out to ask you if we get our response back to you by today would you allow it to be on the October agenda. That may be a big ask but I am making the request because we originally submitted the Rule September 5, 2023 and I planned a webinar with the updated Rule information starting November 1, 2023.

We have been waiting to hear back from RRC but your notes only went to our attorney. We can regroup if this is not possible but I wanted to reach out to you and make the request.

Thank you for considering,
Bill

William B. Rafferty, O.D.
Executive Director
North Carolina State Board of Optometry
521 Yopp Rd.
Suite 214 #444
Jacksonville, NC 28540
(910) 285-3160 or (800) 426-4457: Option #3
Fax: (910) 285-4546
Cell: (336) 816-3459
exdir@ncoptometry.org

Burgos, Alexander N

From: Peaslee, William W
Sent: Wednesday, October 11, 2023 1:42 PM
To: Johnny Loper; Janice Peterson; exdir@ncoptometry.org
Cc: Burgos, Alexander N
Subject: RE: [External] RE: Request for Changes 21 NCAC 42B .0201 and 42D .0102

If you have the revised rules back within 10 days you can be on the November agenda.

William W. Peaslee
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(984) 236-1939
Bill.Peaslee@oah.nc.gov

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From: Johnny Loper <jloper@loper-law.com>
Sent: Wednesday, October 11, 2023 1:40 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>; Janice Peterson <janice@ncoptometry.org>; exdir@ncoptometry.org
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: Request for Changes 21 NCAC 42B .0201 and 42D .0102

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Thanks. Will be back to you later today.

Can you tell me how long an extension we could get that would only kick us to the next meeting?

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Wednesday, October 11, 2023 1:32 PM
To: Johnny Loper <jloper@loper-law.com>; Janice Peterson <janice@ncoptometry.org>; exdir@ncoptometry.org
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: Request for Changes 21 NCAC 42B .0201 and 42D .0102

Yes and extension would be for up to 70 days.

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From: Johnny Loper <jloper@loper-law.com>
Sent: Wednesday, October 11, 2023 1:27 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>; Janice Peterson <janice@ncoptometry.org>; exdir@ncoptometry.org
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: Request for Changes 21 NCAC 42B .0201 and 42D .0102

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Thanks. Will check with Bill and Jan, and one of us will respond re an extension.

Will the extension kick us to another date before the RRC?

Johnny

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Wednesday, October 11, 2023 1:26 PM
To: Johnny Loper <jloper@loper-law.com>; Janice Peterson <janice@ncoptometry.org>; exdir@ncoptometry.org
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: [External] RE: Request for Changes 21 NCAC 42B .0201 and 42D .0102

It happens. If you need an extension, please send a request.

Thank you.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison
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(984) 236-1939
Bill.Peaslee@oah.nc.gov

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From: Johnny Loper <jloper@loper-law.com>
Sent: Wednesday, October 11, 2023 1:22 PM
To: Peaslee, William W <bill.peaslee@oah.nc.gov>; Janice Peterson <janice@ncoptometry.org>; exdir@ncoptometry.org
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: [External] RE: Request for Changes 21 NCAC 42B .0201 and 42D .0102

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Mr. Peasley:

My apologies. I returned from a trip out of state on late on September 24; September 25 was my birthday, and apparently I did not notice that Janice Peterson at the Board, who works with me and Dr. Rafferty on these Rules issue, was not copied on your email, and I did not forward it to her. My mistake, no excuse.

We'll work to respond to you as soon as possible, hopefully no later than tomorrow.

Johnny

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Wednesday, October 11, 2023 12:09 PM
To: Janice Peterson <janice@ncoptometry.org>; exdir@ncoptometry.org
Cc: Johnny Loper <jloper@loper-law.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: FW: Request for Changes 21 NCAC 42B .0201 and 42D .0102

Good morning,

Please see the following email sent on September 25. I have no reason to believe that it was not received. I have not received a reply.

Thank you.

William W. Peaslee
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Bill.Peaslee@oah.nc.gov

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From: Peaslee, William W
Sent: Monday, September 25, 2023 2:52 PM
To: jloper@loper-law.com
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: Request for Changes 21 NCAC 42B .0201 and 42D .0102

Good afternoon,

I am the attorney assigned to review the above captioned rules. Attached please find request for changes. Please reply no later than October 10, 2025.

Please note that where there are questions in the Request for Changes this frequently implies there is ambiguity in the language of the rule. Generally, providing an explanation without changing the language of the rule fails to resolve the ambiguity. Please consider editing the rule to resolve the ambiguity.

As always, if you have any questions please do not hesitate to email me.

Thank you.

William W. Peaslee
Rules Review Commission Counsel / Legislative Liaison

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Bill.Peaslee@oah.nc.gov

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