

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
RULES REVIEW COMMISSION**

**IN THE MATTER OF:**

**16 NCAC 06G .0601**

**STATE BOARD OF  
EDUCATION'S  
REQUEST FOR WAIVER  
OF 210-DAY LIMIT ON  
TEMPORARY RULES  
(G.S. § 150B-21.1(a2))**

**INTRODUCTION**

**PURSUANT** to G.S. § 150B-21.1(a2), the State Board of Education (SBE) requests that the Rules Review Commission (RRC) waive the 210-day requirement for temporary rules. In support of this request, the SBE shows the RRC that, despite the fact that the SBE had control over the circumstances that require this request, the waiver is justified because: the adoption of the temporary rule with a May 1, 2023, effective date would have substantial benefits for students, parents, and school districts; the SBE has given the public timely notice of the proposed temporary rule; the SBE received only one public comment on the proposed rule; the SBE has submitted a reasoned response to the comment; the waiver is necessary for the rule to be in effect for the

beginning of the 2023-24 school year; the SBE not made any prior requests for waivers; and the circumstances that produced this request are unlikely to be repeated.

## I. PROCEDURAL HISTORY

G.S. § 115C-84.3(c) previously prohibited public school units from using remote instruction to satisfy the required number of instructional days or hours for the school calendar. S.L. 2022-59 Part I, Sec. 1.(a) amended G.S. § 115C-84.3(c) to authorize the SBE to approve local school administrative units' operation of "remote academies" which may use remote instruction to meet the required number of instructional days. S.L. 2022-59, Part II, Sec. 2(d) directed the SBE to approve remote academies for 2023-24 school year which begins on or about August 26, 2023. G.S. § 115C-84.2(d). S.L. 2022-59 Part II, Sec. 2.(a) goes on to create Article 16 of Chapter 115C, G.S. §§ 115C-234 through 234.25, which establish the standards for approval and operation of those remote academies.

G.S. § 115C-234.10 states, in pertinent part:

(b) A remote academy shall provide all of the following to enrolled students:

(1) Any hardware and software needed to participate in the remote academy. Students may not be charged rental fees

but may be charged damage fees for abuse or loss of hardware or software under rules adopted by the State Board of Education. (Emphasis added.)

Administration of the statute, therefore, requires the SBE to adopt rules that distinguish between prohibited “rental fees” and permissible “damage fees.”

Consistent with that legislative directive, on February 2, 2023, the SBE approved the text of this proposed temporary rule.

16 NCAC 06G .0601 REMOTE ACADEMIES HARDWARE AND SOFTWARE FEES

(a) Definitions:

(1) "Damage fee" means "any mandatory payments that a local school administrative unit charges a student enrolled in a remote academy for injury to, abuse of, or loss of hardware or software that the local school administrative unit has provided to the student other than degradation arising from normal use, wear and tear, provided the payments cannot exceed the actual cost of repair or fair market value of the hardware or software, whichever is less."

(2) "Rental fee" means "any mandatory payments that a local school administrative unit requires students enrolled in remote academies to make before the local school administrative unit will give a student access to or possession of any hardware and software needed to participate in the remote academy."

(b) Local administrative units shall not charge students enrolled in remote academies rental fees for use of hardware or software needed to participate in the remote academy but may charge them damage fees.

The SBE's proposed temporary 16 NCAC 06G .0601 accomplishes several important objectives: (1) the rule permits districts to charge fees only for hardware and software that the district has already provided, i.e., no prepossession fees; (2) the damage charges must be related to injury or loss of the hardware or software, i.e., events within the control of the student after he or she takes possession of the device and software; (3) the rule precludes schools from charging "damage fees" for normal wear and tear which would function as rental or amortization fees for replacing devices and software necessary for participation in remote academies; and (4) the "damage fees" cannot exceed the actual cost to the school district, i.e., districts cannot charge excess repair or replacement fees which could be used to cover for other operating costs.

On February 2, 2023, the SBE submitted the text of the proposed temporary rule to the Codifier. On February 8, 2023, the Office of Administrative Hearings Rules Division posted the text of the temporary rule on OAH website. Thereafter, consistent with its obligations under G.S. § 150B-21.1(a3), the SBE notified interested parties, held a public hearing, and accepted public comments for at least 15 business days. On April 6, 2023, at its first regularly scheduled

meeting 30 business days after notice to the public, the SBE adopted the temporary rule. The SBE adopted the temporary rule with the hoped that the rule would be effective by May 1, 2023, so that local school boards considering opening remote academies and parents considering applying for enrollment in remote academies would know what rules applied to “damage fees” for abuse or loss of computers and software necessary to participate in remote academies.

S.L. 2022-59 was effective on July 8, 2022. Two-hundred-ten days after July 8, 2023, is February 3, 2023. The SBE submitted the proposed text of the temporary rule to the Codifier within the 210 days of July 8, 2023, but, due to administrative errors totally within its control, it did not complete the entire temporary rulemaking process and submit the adopted temporary rule to the RRC within the 210-day period specified in G.S. § 150B-21.1(a2). The SBE is now taking the actions necessary to adopt a permanent rule to achieve the objectives of the temporary rule. However, the earliest effective date for a permanent rule will be October 1, 2023, approximately five weeks after the beginning of the new school year.

Therefore, the SBE requests that the RRC exercise its discretion and waive the 210-day limit to permit temporary 16 NCAC 06G .0601 to go into effect May 1, 2023. This will assure that students, parents, and local school administrative units will all operate under the same rule for the entire 2023-24 school year.

## **II. THE SBE AGENCY HAD CONTROL OVER THE CIRCUMSTANCES THAT REQUIRE THE REQUEST FOR WAIVER.**

While more than one error led to the failure to file the proposed temporary rule within the 210-day period, undersigned rules coordinator admits that he was operating under the assumption that filing the proposed rule with the Codifier under G.S. § 150B-21.1(a3)(1) satisfied the obligation under G.S. § 150B-21.1(a2) to file a temporary rule with the RRC within 210 days of the effective date of new legislation. If the rules coordinator had known that the SBE had to complete the entire temporary rule process and file the adopted temporary rule with the RRC before the deadline expired on February 3, 2023, then it would have been possible for the SBE to take the administrative actions necessary to meet the deadline for a temporary

rule. Consequently, the SBE cannot claim that the request for waive is based on circumstances beyond its control.

### **III. THE DEGREE OF PUBLIC BENEFIT RESULTING FROM A WAIVER OF THE DEADLINE WOULD BE SUBSTANTIAL.**

Enrolling their students in remote academies is a new option for parents for the 2023-24 school year. If the temporary rule is in place by May 1, 2023, it will clarify the obligations and risks that parents assume for their students' damage to devices and software and give parents more time to make informed decisions about whether to enroll their students in remote academies for the 2023-24 school year.

At this time, the earliest effective date for a permanent rule is October 1, 2023, approximately five weeks after the beginning of the school year. If the RRC permits the SBE to adopt the temporary rule, the rule will be effective on May 1, 2023, before the beginning of the 2023-24 school year. The temporary rule will create a consistent rule for the entire school year and avoid the potential for inconsistent administration of the remote academies.

Even though G.S. § 115C-234.10(b)(1) calls the assessment at issue a “damage fee,” the money is not, in fact, a fee. Under G.S. § 12-

3.1(a) a “fee” is a “charge for the rendering of any service or fulfilling of any duty to the public.” As defined in proposed 16 NCAC 06G .0601, the “damage fee” for abuse or loss of computer hardware or software actually describes the money that a local school board can recovery for a student’s damage to state property.

It is certainly in the public interest to permit local school boards to recover the actual expenses schools incur for loss of or damage to state property. See, G.S. § 115C-523, “parents or legal guardians of any minor are liable for any gross negligence or willful damage or destruction of school property by that minor to the extent of five thousand dollars (\$5,000).” If the temporary rule is effective on May 1, 2023, before the beginning of the school year, schools can inform students and parents of their obligations while they are making decisions on whether to enroll in a remote academy. Information about student obligations for damage to devices and software is also likely to prompt students to take proper care of devices and software. Proper care of the property will reduce damage to devices and software which, in turn, will reduce the disruptions in instruction which would inevitably result from that damage.



Therefore, the SBE believes that a May 1, 2023, effective date will yield substantial benefits to students, parents, and schools.

#### **IV. THE SBE HAS GIVEN THE PUBLIC NOTICE OF THE RULE AND THERE IS LITTLE OPPOSITION.**

Consistent with its obligations under G.S. § 150B-21.1(a3), the SBE has already provided public notice of the proposed temporary rule, held a public hearing, and accepted public comment on the proposed temporary rule for more than 15 business days. During that period, one person filed a comment. It is unlikely that a longer period of public comment would generate any more public concerns or opposition.

The one comment raised concerns that failure to pay a damage fee might result in a student being suspended from school. That concern is not well founded. While local school boards are not legally prohibited from suspending students for failure to pay fees, schools do not suspend students for merely failing to pay fees or restitution for damage to school property and it is extremely unlikely that a student would be suspended for failing to pay for damage to hardware or software required to attend a remote academy. Furthermore, discipline of students and protection of school property are matters vested in the sound discretion of local school boards. It is not judicious for the SBE to

interfere in the exercise of that discretion. If the RRC has any concerns about that issue, the SBE has included a more detailed response to the public comment in the materials it submitted with the temporary rule. See, April 10, 2023, Letter from SBE to RRC.

**V. THE SBE DOES NOT HAVE A HISTORY OF REQUESTING WAIVERS.**

Undersigned rules coordinator is not aware that the SBE has requested any prior waivers for temporary rules. As noted, the failure to file the temporary rule within the deadline was due, in part, to a misunderstanding over the what the SBE was required to do before the 210-day deadline in G.S. § 150B-21.1(a2). SBE and Department of Public Instruction staff have been apprised that G.S. § 150B-21.1(a2) requires staff to complete the entire temporary rulemaking process within 210 days of the effective date of new legislation. In light of these events, it is extremely unlikely that the SBE will need to request future waivers.

**CONCLUSION**

The SBE concedes that it is responsible for failing to meet the 210-day deadline for submission of temporary rules. However, the record also shows that granting the waiver and permitting the temporary rule

to go into effect on May 1, 2023, will have substantial public benefit.

The SBE has conducted a public hearing and solicited public comment on the temporary rule. During the 30-day public comment period, only one person raised concerns about the rule and those concerns are not well grounded. Finally, the SBE does not have a history of requesting waivers of the 210-day limit and future requests are unlikely.

Therefore, the SBE believes that consideration of all the statutory factors justify waiving the 210-day limit on temporary rules and respectfully requests that the RRC grant this request for a waiver.

Respectfully submitted, this the 18<sup>th</sup> day of April 2023.

State Board of Education  
/s/Thomas J. Ziko

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