

## **Burgos, Alexander N**

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**From:** Ascher, Seth M  
**Sent:** Friday, October 13, 2023 10:23 AM  
**To:** Collins, Ryan; eric.davis  
**Cc:** Burgos, Alexander N  
**Subject:** RFC SBE Rule 16 NCAC 06C .0408  
**Attachments:** RFC 16 NCAC 06C .0408.docx

Good afternoon,

I'm the attorney who reviewed the Temporary Rule submitted by the State Board of Education for the October 2023 RRC meeting. The RRC will formally review these Rules at its meeting on Thursday, October 19, 2023, at 9:00 a.m. The meeting will be a hybrid of in-person and WebEx attendance, and an invite should be sent to you as we get close to the meeting. If there are any other representatives from your agency who want to attend virtually, let me know prior to the meeting, and we will get invites out to them as well.

Attached is the Request for Changes Pursuant to G.S. 150B-21.10. Please submit the revised Rules and forms to me via email, no later than 5 p.m. on October 17, 2023.

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

### **Seth Ascher**

Counsel to the North Carolina Rules Review Commission  
Office of Administrative Hearings  
(984) 236-1934

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## Burgos, Alexander N

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**Subject:** FW: [External] Re: RFC SBE Rule 16 NCAC 06C .0408  
**Attachments:** 16 NCAC 06C .0408 (Paid Parental Leave).docx; RFC 16 NCAC 06C .0408 (Agency Response).docx

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**From:** Ryan Collins <Ryan.Collins@dpi.nc.gov>  
**Sent:** Monday, October 16, 2023 9:51 AM  
**To:** Ascher, Seth M <seth.ascher@oah.nc.gov>; Eric Davis <Eric.Davis@dpi.nc.gov>  
**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>  
**Subject:** [External] Re: RFC SBE Rule 16 NCAC 06C .0408

**CAUTION:** External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Seth,

I've attached the revised rule and responses to your Request for Changes. Please let me know if you have additional questions.

Best,

**Ryan M. Collins, J.D., M.Ed.**

*Assistant General Counsel*

North Carolina State Board of Education

[ryan.collins@dpi.nc.gov](mailto:ryan.collins@dpi.nc.gov)

984.236.2255 (o)



1 16 NCAC 06C .0408 is proposed for adoption under temporary procedures as follows:

2  
3 **16 NCAC 06C .0408 PARENTAL LEAVE**

4 (a) For the purposes of this Rule, the following definitions shall apply:

5 (1) “Child” means a newborn biological child or a newly placed adopted, foster, or otherwise legally  
6 placed child under the age of 18 whose parent is an eligible employee.

7 (2) “Continuous” leave means leave taken over a continuous period for the full amount of leave to  
8 which an eligible employee is entitled under Paragraph (c) of this Rule.

9 (2) “Eligible employee” means a person employed to fill a permanent, probationary, or time-limited  
10 position in a public-school unit (“PSU”) who meets the eligibility requirements set forth in  
11 Paragraph (b) of this Rule. “Eligible employee” shall not include temporary employees or  
12 independent contractors.

13 (4) “Intermittent” leave means leave taken in separate periods for a single qualify event that  
14 cumulatively equal the amount of leave to which an eligible employee is entitled under Paragraph  
15 (c) of this Rule. Intermittent leave may include periods of leave ranging from half of an employee’s  
16 regularly scheduled workday to several consecutive workdays.

17 (3) “Parent” means the legal guardian or custodian of a child through birth, adoption, foster care, or  
18 other legal placement.

19 (4) “Public school unit” or “PSU” is defined in G.S. 115C-5(7a). This Rule shall only apply to a charter  
20 school if the board of directors for the charter school has opted to provide for paid parental leave in  
21 accordance with G.S. 115C-218.90(a)(6).

22 (5) “Qualifying event” means when an eligible employee becomes a parent to a child.

23 (b) To be eligible for paid parental leave, a PSU employee shall, at the time of the qualifying event, have been in pay  
24 status, as defined in 25 NCAC 01D .0105, with a PSU, state agency, or other public entity providing paid parental  
25 leave under G.S. 126-8.6 for at least 1,040 hours without a break in service within the previous 12-month period. The  
26 employee may aggregate periods of employment with different employers to satisfy this requirement, except that any  
27 period of employment by a charter school shall not satisfy this requirement unless the governing board of the charter  
28 school has elected to provide paid parental leave in accordance with G.S. 115C-218.90(a)(6). For purposes of this  
29 Rule, a break in service is defined in 25 NCAC 01D .0114, provided it shall not include:

30 (1) Any period in the past 12 months during which the employee was receiving workers’ compensation  
31 under G.S. 97-1 et seq. or on short-term disability under G.S. 135-105.

32 (2) Any period in which the employee was on leave without pay.

33 (3) Any period in which the employee was absent due to military service in the Armed Forces of the  
34 United States, in accordance with the Uniformed Services Employment and Reemployment Rights  
35 Act of 1994, 38 U.S.C. §§ 4301–4333.

1           (4) For a 10- or 11-month employee whose employment will continue for the following school year,  
2           the time between the conclusion of one employment period and the commencement of the following  
3           employment period.

4           (5) For an employee who transitions from one employer offering paid parental leave under G.S. 126-  
5           8.6 to another employer providing paid parental leave under G.S. 126-8.6, any time between the  
6           date of separation from the first employer and the date of hire for the second employer, not to exceed  
7           31 days.

8 (c) A full-time eligible employee who becomes a parent to a child shall be entitled to the following:

9           (1) Up to eight (8) weeks of paid parental leave after giving birth to a child; or

10          (2) Up to four (4) weeks of paid parental leave after any other qualifying event.

11 (d) A part-time eligible employee who becomes a parent to a child shall be entitled to a prorated share of paid parental  
12 leave based upon the hours in the employee's regular, weekly schedule compared to the hours worked by a full-time  
13 employee in a similar position within the PSU, provided that the prorated share of leave shall not exceed:

14          (1) Eight (8) weeks of paid parental leave after the parent gives birth to a child; or

15          (2) Four (4) weeks of paid parental leave after any other qualifying event.

16 (e) The paid parental leave provided by this Rule shall result in compensation at 100 percent of the eligible employee's  
17 regular, straight-time pay.

18 (f) The paid parental leave provided under this Rule is in addition to any other leave authorized by this Chapter, State  
19 or federal law, or policies established by the PSU, provided that the paid parental leave:

20          (1) Shall not be counted against or deducted from an eligible employee's sick, vacation, or other accrued  
21          leave.

22          (2) Shall be reported by the PSU separately from all other paid leave.

23          (3) Shall not accrue and is not eligible for donation to another employee.

24          (4) Shall not be used for calculating the employee's retirement benefits.

25          (5) Shall run concurrently with any leave to which the employee may be entitled under the Family and  
26          Medical Leave Act, 28 U.S.C. §§ 2601–2654, provided the PSU has complied with the appropriate  
27          notice requirements in 29 C.F.R. § 825.300.

28 (g) An eligible employee who requests paid parental leave shall do so in accordance with policies adopted by the  
29 employee's PSU, subject to the following:

30          (1) The paid parental leave may be used any time during the 12 months following a qualifying event on  
31          either a continuous or intermittent basis. A PSU shall not deny or delay an employee's request to  
32          use paid parental leave, or otherwise require the employee to use the leave on a prescribed schedule,  
33          without the employee's consent.

34          (2) The employee shall provide advanced notice to the PSU of the employee's intent to use paid parental  
35          leave in accordance with policies adopted by the PSU. When possible, the employee shall provide  
36          notice at least ten (10) weeks in advance of a qualifying event, but under no circumstances shall a  
37          PSU require more than ten (10) weeks' notice.

1           (3) The paid parental leave provided by this Rule may be used only once for a qualifying event within  
2           a 12-month period. Multiple births, adoptions, or other legal placements within the same 12-month  
3           period shall not entitle an otherwise eligible employee to more than one award of paid parental  
4           leave.

5           (4) If both parents of a child are employed by the same PSU, the PSU shall permit both parents to take  
6           paid parental leave simultaneously if they so request, subject to Subparagraphs (1) and (2) of this  
7           Paragraph.

8           (5) An employee shall forfeit any unused paid parental leave 12 months after the date of the qualifying  
9           event.

10 (h) This paid parental leave provided by this Rule applies only to requests for paid parental leave related to qualifying  
11 events occurring on or after July 1, 2023. Nothing in this Rule shall prohibit an employer, if authorized, from providing  
12 paid parental leave in amounts greater than what is required by this Rule.

13  
14 History Note: Authority G.S. 115C-12(5); 115C-12(8); 115C-12(16); 115C-272; 115C-285; 115C-302.1; 115C-  
15 315; 126-8.6.

16 Temporary Adoption Eff. Nov. 7, 2023  
17

**Request for Changes Pursuant to  
N.C. Gen. Stat. § 150B-21.10**

Staff reviewed these Rules to ensure that each Rule is within the agency's statutory authority, reasonably necessary, clear and unambiguous, and adopted in accordance with Part 2 of the North Carolina Administrative Procedure Act. Following review, staff has issued this document that may request changes pursuant to G.S. 150B-21.10 from your agency or ask clarifying questions.

If the request includes questions, please contact the reviewing attorney to discuss.

In order to properly submit rewritten rules, please refer to the following Rules in the NC Administrative Code:

- Rule 26 NCAC 02C .0108 – The Rule addresses general formatting.
- Rule 26 NCAC 02C .0404 – The Rule addresses changing the introductory statement.
- Rule 26 NCAC 02C .0405 – The Rule addresses properly formatting changes made after publication in the NC Register.

**Note the following general instructions:**

1. You must submit the revised rule via email to oah.rules@oah.nc.gov. The electronic copy must be saved as the official rule name (XX NCAC XXXX).
2. For rules longer than one page, insert a page number.
3. Use line numbers; if the rule spans more than one page, have the line numbers reset at one for each page.
4. Do not use track changes. Make all changes using manual strikethroughs, underlines and highlighting.
5. You cannot change just one part of a word. For example:
  - Wrong: “~~a~~Association”
  - Right: “~~association~~ Association”
6. Treat punctuation as part of a word. For example:
  - Wrong: “day;; and”
  - Right: “~~day,~~ day, and”
7. Formatting instructions and examples may be found at:  
<https://www.oah.nc.gov/rule-format-examples>

**If you have any questions regarding proper formatting of edits after reviewing the rules and examples, please contact the reviewing attorney.**

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

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06C .0408

**DEADLINE FOR RECEIPT: October 17, 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 paragraph b, you use the terms “pay status,” lines 23 to 24, and “break in service,” line 25. These are defined terms in the SHRC rules, 25 NCAC 01D .0105 and 25 NCAC 01D .0114 respectively. I do not see a definition for these terms in SBE rules. Either include a definition or refer to the SHRC definitions, i.e., “have been in pay status status, as defined in 25 NCAC 01D .0105.” on line 24 and “without a break in service service, as defined in 25 NCAC 01D .0114.” on line 25.*

*I have revised the rule to define both terms by cross-referencing the relevant SHRC rule. I reference 25 NCAC 01D .0114 in a different part of the rule than you suggested, hopefully you'll agree with its placement there.*

*On p. 2, line 35, you say “when reasonably possible” the employee shall provide ten weeks’ notice. The equivalent SHRC rule, 25 NCAC 01E .1907 says “whenever possible”. The “reasonably” standard has the potential to be unclear, particularly when compared with the SHRC rule. Is this intended to mean something different? If so, what? If not, use the same language.*

*I have removed “reasonably” from the text of the rule.*

*The relevant statutes direct the SBE to adopt “substantially equivalent” rules to SHRC. On p. 2, lines 31-33, it appears that the SBE rules limit a PSU from delaying or denying leave without an employee’s consent. The SHRC rule includes a provision describing circumstances where an agency may delay parental leave, 25 NCAC 01E .1907. Why isn’t a similar provision necessary to have “substantially equivalent” rules?*

*The SBE and staff at DPI debated this issue extensively and concluded that the rationale for this provision in the SHRC rules simply was not relevant to the public-school setting and would impose undue burdens on public school employees entitled to paid parental leave. The SHRC provision appears designed for state employees who are responsible for public health and safety, such as law enforcement officers, prison guards, and hospital staff. Although public school employees do have some obligations*

Seth Ascher

Commission Counsel

Date submitted to agency: October 13, 2023

for the safety and well-being of students (see, e.g., G.S. 115C-307 (“Duties of teachers”)), those obligations do not rise to the level of public safety officers or healthcare professionals. Moreover, most public-school employees who will be taking this leave are teachers, and public-school units are required to hire substitute teachers when a teacher is out of the classroom. In recognition of this, the General Assembly specifically appropriated \$10 million in recurring funds to the Department of Public Instruction for the purpose of hiring substitute teachers for any public-school teacher using paid parental leave under G.S. 126-8.6 (see S.L. 2023-14, Section 5.1.(e), as amended by S.L. 2023-65, Section 13A.1.(d)).

The agency is aware of no other circumstances in which a public-school unit could deny a request by a public-school employee to use other forms of leave due to a public health or safety issue, so we don’t envision a circumstance in which such a provision could appropriately be invoked in a public school setting.

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