

## **RRC STAFF OPINION**

*PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.*

AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06C .0602

RECOMMENDATION DATE: March 27, 2023

RECOMMENDED ACTION:

Note staff's comment for discussion

Approve, but note staff's comment

Object, based on:

Lack of statutory authority

Unclear or ambiguous

Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

*The language of 16 NCAC 06C .0602(2) raises a potentially novel question related to clarity. It is my opinion that there are non-frivolous legal arguments that would support either objection or approval. Based on the limited time afforded to temporary rules, I have not formed a definite recommendation. Instead, it is my intent to outline the problem in this staff opinion to aid the Commission in exercising their judgment on the issue.*

*G.S. 150B-21.8(b) charges this Commission with reviewing temporary and permanent rules under the standards of G.S. 150B-21.9.*

*G.S. 150B-21.9(a)(2) requires this Commission to determine whether a rule is "clear and unambiguous." As a result, if a rule is unclear or ambiguous, this Commission should object.*

*At issue is the language of 16 NCAC 06C .0602(2), which states that: "The educator is entrusted with the care and education of children and adolescents. As a result, the educator shall demonstrate a high standard of personal character and conduct and shall serve as a positive role model for students, parents, and the community."*

*On its face the language of this item appears to be ambiguous. The phrase "a high standard of personal character and conduct," without further specifics, could be subject to multiple contradictory applications based on the political, religious, or personal views of moral conduct.*

Seth Ascher  
Commission Counsel

Furthermore, the potential ambiguity of “serv[ing] as a positive role model for . . . parents, and the community” raises an authority question. Specifically, G.S. 115C-307(b), the heading of “Duties of teachers” provides:

*(b) To Provide for General Well-Being of Students. – It shall be the duty of all teachers, including student teachers, substitute teachers, voluntary teachers, and teacher assistants when given authority over some part of the school program by the principal or supervising teacher, to encourage temperance, morality, industry, and neatness; to promote the health of all pupils, especially of children in the first three grades, by providing frequent periods of recreation, to supervise the play activities during recess, and to encourage wholesome exercises for all children.*

*The language of the rule suggests that a teacher has a responsibility to serve as a role model in their personal parenting decisions or in community activities unrelated to their role at the school. This has the potential to be read to allow Boards of Education to evaluate behavior in areas well outside of the school or student view.*

*In a vacuum, this would lead me to recommend objection for lack of clarity. However, in their response to my request for changes the State Board of Education has identified a line of cases which appear to support their use of this potentially ambiguous language. While their position is more fully elaborated in their response, I will attempt to summarize some of the highlights here as well as some counter-veiling considerations.*

*The State Board of Education derived this language from a 1984 decision of the Supreme Court of North Carolina, *Faulkner v. New Bern-Craven Board of Education*. This case concerned a teacher’s dismissal for excessive alcohol use under a statute that has since been revised. In upholding the dismissal of that teacher, the Supreme Court considered the meaning of G.S. 115C-307(b) and opined that:*

*We do not hesitate to conclude that these men and women are intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges. Their character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil. It is not inappropriate or unreasonable to hold our teachers to a higher standard of personal conduct, given the youthful ideals they are supposed to foster and elevate.*

*While the language of 16 NCAC 06C .0602(2) is not identical to the Court’s language, it does appear that the rule is reasonably based on the Court’s language. However, it does not appear that the Court was considering the application of the Administrative Procedure Act in this case, and in fact the Court did not establish that the APA and RRC Review applied to the State Board of Education until nearly forty years later in 2018. As a result, while the State Board of Education could certainly reasonably argue that the Court’s language allows for the language at issue in this rule, it does not appear that the 1984 case directly considered the requirements of the APA in making such a determination.*

*The State Board of Education also points to a 1996 Court of Appeals case, *Barringer v. Caldwell County Board of Education*. In relevant part, the Court of Appeals noted that the Supreme Court “has stated that terminology such as ‘good moral character’ denoting acceptable and unacceptable standards of behavior has been so extensively used as a standard that its long usage and the case law surrounding that usage have given the term well-defined contours which make it a constitutionally appropriate standard.”*

Seth Ascher  
Commission Counsel

*Again, it does not appear that the Court of Appeals was considering the NC APA in evaluating the issue in Barringer. Further, Barringer v. Caldwell (and the cases cited therein) considered the minimum constitutional requirements for clarity of statutes related to discipline or denying licensure, it does not appear that those cases considered the statutory requirements for clarity of rules under the APA. To my knowledge, there is no case law which deals with the question of whether the clarity requirement in the APA is satisfied by constitutional minimums, or whether it requires something more. Generally, I would assume that by passing a statute the General Assembly intended to impose a higher requirement than already existed in the Constitution, but it does not appear that any Court has weighed in on this particular issue.*

*Finally, the State Board of Education has identified a number of other state agencies which currently use the phrase “good moral character” in their rules. However, this kind of argument is of limited value when considering rules currently before the RRC. There are any number of reasons which could explain this. Ultimately, the RRC must consider the application of the APA to the rules in front of them.*

*Two examples from other agencies do bear a brief mention. The State Board of Education is correct that the Supreme Court has in cases law explicitly approved the use of “good moral character” in the context of licensing lawyers. However, the state bar is not subject to the review requirements of the APA.*

*Second, this Commission approved a rule last year from CJETS that used the phrase “good moral character” while providing additional specificity as to the meaning of that phrase. That rule is 12 NCAC 09G. 0208(11), which requires that correctional officer:*

*be of good moral character, including possessing the characteristics of honesty, maturity, discipline, attention to detail, and respect for the rights of others, as more fully discussed and interpreted as defined in: In re Willis 288 N.C. 1.215 S.E. 2d 771 appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E. 2d 854 (1940); In re Legg, 325 N.C. 658, 386 S.E. 2d 29 174 (1989); in re Applicants for License, 143 N.C.1, 55 S.E. 635 (1906); In re Dillingham, 188 N.C.30 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538, 308 S.E. 2d 47 (1983); and later court decisions.*

*I bring this rule up not because this language is the only correct way to define good moral character, or even one which would be appropriate in an educational context. But, as an example of how an agency can incorporate judicial explanation into a rule to support clarity. The elements included in good moral character in the text of this rule came from an administrative law decision and the agency avoided potential ambiguity in the text of the rule by incorporating their desired standards into the rule itself. It is possible that a similar solution could apply here, although it may not be possible for the agency to find such a solution in the timeframe of review of a temporary rule.*

*\* \* \**

*Ultimately, because of the novel legal questions at issue in this rule and the agency’s response, I do not have a recommendation as to the appropriate action for the RRC to take. Instead, I recommend that the RRC consider the full context of this temporary rule and exercise its judgment to determine whether the statement that “The educator is entrusted with the care and education of children and adolescents. As a result, the educator shall demonstrate a high standard of personal character and conduct and shall serve as a positive role model for students, parents, and the community” is “clear and unambiguous.” If you determine that it is “clear and unambiguous,” you should approve the*

Seth Ascher  
Commission Counsel

*rule. If you determine that it is unclear or ambiguous, you should object for failing to meet the 21.9(a)(2) standard.*

1 16 NCAC 06C .0602 is amended under temporary procedures as follows:

2  
3 **16 NCAC 06C .0602 STANDARDS OF PROFESSIONAL CONDUCT**  
4

5 ~~(a) The standards [Standards of Professional Conduct (“Standards”)] listed in this Section shall be generally accepted~~  
6 ~~for the education profession and shall be the basis for State Board review of [reviewing the] performance of~~  
7 ~~professional educators. [educators by the State Board of Education (“SBE”).] These standards shall establish~~  
8 ~~mandatory prohibitions and requirements for educators. Violation of these standards [Standards] shall subject an~~  
9 ~~educator to investigation and disciplinary action by the SBE or LEA. [any public school unit by which the educator is~~  
10 ~~employed.]~~

11 ~~(b) Professional educators shall adhere to the standards of professional conduct contained [Standards as set forth] in~~  
12 ~~this Rule. Any intentional act or omission that violates these standards [Standards] is prohibited.~~

13 ~~This Rule establishes uniform Standards of Professional Conduct (“Standards”) for professional educators in North~~  
14 ~~Carolina, which apply to all persons who hold a professional educator license issued pursuant to this Subchapter and~~  
15 ~~Chapter 115C, Article 17E of the General Statutes. These Standards shall be the basis for reviewing the performance~~  
16 ~~or professional educators by the State Board of Education (“SBE”). Violation of these Standards shall be grounds for~~  
17 ~~disciplinary sanctions against a professional educator’s license as provided in this Section.~~

18 ~~(1) Generally recognized professional standards. Recognized Professional Standards. The educator shall adhere~~  
19 ~~to and practice the professional standards of all federal, state, and local governing bodies. [with oversight~~  
20 ~~of public education] with public education oversight.~~

21 ~~(2) Personal conduct. Conduct. The educator shall serve as a positive role model for students, parents, and the~~  
22 ~~community. Because the educator is entrusted with the care and education of small children and adolescents, the~~  
23 ~~educator shall demonstrate a high standard of personal character and conduct. The educator is entrusted with the~~  
24 ~~care and education of children and adolescents. As a result, the educator shall demonstrate a high standard of~~  
25 ~~personal character and conduct and shall serve as a positive role model for students, parents, and the community.~~

26 ~~(3) Conduct with Students. The educator shall treat all students with respect and maintain appropriate~~  
27 ~~professional boundaries with all students, regardless of whether that student is directly under the care or~~  
28 ~~supervision of the educator. [The] Specifically the, educator shall not engage in any of the following conduct~~  
29 ~~toward or in the presence of a student:~~

30 ~~(A) Use of profane, vulgar, or demeaning language.~~

31 ~~(B) Intentional or reckless exposure of students to profane, vulgar, or sexually explicit material except as part~~  
32 ~~of age-appropriate classroom instruction or other pedagogical practice.~~

33 ~~[(B) Intentional solicitation.] (C) Solicitation, encouragement, or consummation of a romantic, physical, or~~  
34 ~~sexual relationship with a [student,] student in any form, whether written, verbal, or physical. As used in this~~  
35 ~~context, “solicitation” or “encouragement” shall include engaging in a pattern of flirtatious behavior; efforts~~  
36 ~~to gain access to, or time alone with, a student with no clear educational or school-related objective; provision~~  
37 ~~of individualized or specialized treatment, including tangible or monetary gifts, to a student that does not~~

1 comply with generally recognized professional standards for educators; or any other behavior that could be  
2 perceived by a rational observer as excessively personal or intimate in the context of the educator-student  
3 relationship.

4 ~~[(C)]~~ (D) Solicitation, encouragement, or consummation of sexual contact with a student.

5 ~~[(D)]~~ (E) Sexual harassment, as defined in 34 C.F.R. 106.30(a).

6 ~~[(E)]~~ (F) Child abuse, as defined in G.S. 14-318.2 or G.S. 14-318.4.

7 (4) Alcohol and Controlled Substances. The educator shall not be under the influence of, possess, use, or consume  
8 an alcoholic beverage or a controlled substance, as defined in G.S. 90-95, on school premises, at a school-  
9 sponsored activity, or when otherwise discharging the educator's professional duties, unless the educator has a  
10 prescription from a licensed medical professional authorizing such use. The educator shall not furnish alcoholic  
11 beverages or controlled substances to a student, except for the administration of medication prescribed by a  
12 ~~licensee~~ licensed medical professional in accordance with the educator's professional duties.

13 ~~(3)~~(5) Honesty. The educator shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation  
14 in the performance of the educator's professional duties, including the following:

15 (A) ~~statement~~ statements or representations of professional qualifications;

16 (B) application or recommendation for professional employment, promotion, or licensure;

17 (C) ~~application or recommendation~~ applications or recommendations for college or university admission,  
18 scholarship, grant, academic award, or similar benefit;

19 (D) ~~representation~~ statements or representations of completion of college or staff development credit;

20 (E) evaluation or grading of students or school personnel;

21 (F) submission of financial or program compliance reports submitted to state, federal, or other governmental  
22 agencies;

23 (G) submission of information in the course of an official inquiry by the ~~employing LEA or the SBE~~ related  
24 to facts of unprofessional misconduct, provided, however, SBE or the educator's employing PSU into  
25 allegations of professional misconduct, provided that an educator shall be given adequate notice of the  
26 allegations and may be represented by legal counsel; and

27 (H) submission of information in the course of an investigation into school related criminal activity by a law  
28 enforcement agency, child protective services, or any other agency with the ~~right authority to investigate,~~  
29 ~~regarding school related criminal activity; provided, however, investigate, provided that an educator shall be~~  
30 ~~entitled to decline to give evidence may~~ refuse decline to provide information to law enforcement if such  
31 evidence ~~may tend to~~ could incriminate the educator ~~as that term is defined by the Fifth Amendment to in~~  
32 violation of the educator's rights under the U.S. Constitution, United States Constitution or North Carolina  
33 Constitution.

34 (6) Compliance with Criminal Laws. The educator shall not violate the criminal laws of this State, the United  
35 States, or any other state or territory under the jurisdiction of the United States.

36 ~~(4)~~(7) Proper remunerative conduct. Remunerative Conduct. The educator shall not solicit current students or  
37 parents of students to purchase equipment, supplies, or services from the educator in a private remunerative

1 capacity. An educator shall not tutor for remuneration students currently assigned to the educator's classes, unless  
2 approved by the local superintendent. An educator shall not accept any compensation, benefit, or thing of value  
3 other than the educator's regular compensation for the performance of any service that the educator is required to  
4 render in the course and scope of the educator's employment. This Rule shall not restrict performance of any  
5 overtime or supplemental services at the request of the ~~LEA; PSU,~~ nor shall it ~~apply to or~~ restrict the acceptance  
6 of gifts ~~or tokens of minimal value offered and accepted openly~~ from students, parents, or other persons in  
7 recognition or appreciation of ~~service,~~the educator's professional service, provided the gift is given and received  
8 freely, openly, and without expectation of favor or advantage to the donor in return.

9 ~~(5) Conduct with students. The educator shall treat all students with respect. The educator shall not commit any~~  
10 ~~abusive act or sexual exploitation with, to, or in the presence of a student, whether or not that student is or has~~  
11 ~~been under the care or supervision of that educator, as defined below:~~

12 (A) ~~any use of language that is considered profane, vulgar, or demeaning;~~

13 (B) ~~any sexual act;~~

14 (C) ~~any solicitation of a sexual act, whether written, verbal, or physical;~~

15 (D) ~~any act of child abuse, as defined by law;~~

16 (E) ~~any act of sexual harassment, as defined by law; and~~

17 (F) ~~any intentional solicitation, encouragement, or consummation of a romantic or physical relationship with~~  
18 ~~a student, or any sexual contact with a student. The term "romantic relationship" shall include dating any~~  
19 ~~student.~~

20 ~~(6)(8) Confidential information. Information.~~ The educator shall keep ~~in confidence~~ confidential all personally  
21 identifiable information regarding students or their family members that the educator has ~~been~~ obtained in the  
22 course of professional service, unless disclosure is required or permitted by law ~~or professional standards,~~ or is  
23 necessary for the personal safety of the student or others.

24 ~~(7)(9) Rights of [others.] Others.~~ The educator shall not willfully or maliciously violate the constitutional or civil  
25 rights of a student, parent/legal parent or legal guardian, or colleague.

26 ~~(8)(10) Required reports. Reports.~~ The educator shall make all reports required by G.S. 115C-Chapter 115C of  
27 the General Statutes.

28 ~~(9) Alcohol or controlled substance abuse. The educator shall not:~~

29 (A) ~~be under the influence of, possess, use, or consume on school premises or at a school sponsored activity~~  
30 ~~a controlled substance as defined by G.S. 90-95, the Controlled Substances Act, without a prescription~~  
31 ~~authorizing such use;~~

32 (B) ~~be under the influence of, possess, use, or consume an alcoholic beverage or a controlled substance on~~  
33 ~~school premises or at a school sponsored activity involving students; or~~

34 (C) ~~furnish alcohol or a controlled substance to any student except as indicated in the professional duties of~~  
35 ~~administering legally prescribed medications.~~

36 ~~(10) Compliance with criminal laws. The educator shall not commit any act referred to in G.S. 115C-332 and any~~  
37 ~~felony under the laws of the United States or of any state.~~

1 (11) ~~Public funds and property.~~ Funds and Property. The educator shall not misuse public funds or ~~property, funds~~  
2 ~~of a school-related organization, or colleague's funds.~~ property or any funds belonging to an organization affiliated  
3 with the school or PSU. The educator shall account for funds collected from students, colleagues, ~~or parents/legal~~  
4 ~~guardians.~~ parents, or legal guardians of students. The educator shall not submit fraudulent requests for  
5 reimbursement, expenses, or pay.

6 (12) ~~Scope of professional practice.~~ Professional Practice. The educator shall not perform any ~~act as an employee~~  
7 ~~in a position~~ professional duty or function for which licensure is required by ~~the rules of the SBE or by G.S. 115C~~  
8 ~~or the North Carolina General Statutes this Chapter or by Chapter 115C of the General Statutes~~ during any period  
9 in which the educator's license ~~has been~~ is suspended or revoked.

10 (13) ~~Conduct related to ethical violations.~~ Abuse of Authority. The educator shall not directly or indirectly use or  
11 threaten to use any official authority or influence in any manner that ~~tends to discourage, restrain, interfere with,~~  
12 ~~coerce, or discriminate~~ discourages, restrains, coerces, interferes with, or discriminates against any subordinate  
13 or any licensee who in good faith ~~reports, discloses, divulges, reports~~ or otherwise brings to the attention of ~~an~~  
14 ~~LEA, a PSU,~~ the SBE, or any other public agency authorized to take remedial action, any facts or information  
15 relative to the actual or suspected violation of any law or rule regulating the duties of persons serving in the public  
16 school system, including ~~but not limited to these Rules.~~ those established by this Section.

17  
18 *History Note:* Authority G.S. ~~115C-295.3; 115C-12(9); 115C-270.5; 115C-307;~~  
19 Eff. May 1, 1998.  
20 Temporary Adoption Eff. [DATE DETERMINED BY G.S. 150B-21.3(a)].  
21