

NORTH CAROLINA COURT OF APPEALS

NORTH CAROLINA STATE)
BOARD OF EDUCATION,)
)
Plaintiff,)
)
v.)
)
THE STATE OF NORTH)
CAROLINA and THE NORTH)
CAROLINA RULES REVIEW)
COMMISSION,)
)
Defendants.)
)

From Wake County

BRIEF OF APPELLANT NORTH CAROLINA
RULES REVIEW COMMISSION

INDEX

ISSUES PRESENTED	1
STATEMENT OF THE CASE	2
STATEMENT OF GROUNDS FOR APPELLATE REVIEW	3
STATEMENT OF FACTS	4
ARGUMENT	6
I. STANDARD OF REVIEW	6
II. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE SBOE AND SHOULD BE DIRECTED TO ENTER SUMMARY JUDGMENT IN FAVOR OF THE RULES REVIEW COMMISSION AND THE STATE OF NORTH CAROLINA	7
A. Summary Judgment Cannot Be Justified Based on the Allegations of Count 2 of the Complaint.....	7
1. The North Carolina Constitution makes the SBOE’s rulemaking authority subject to laws enacted by the General Assembly	8
2. Consistent with Article IX, Section 5 of the North Carolina Constitution, the General Assembly has made the SBOE’s rulemaking authority subject to the procedural requirements of the APA.....	9
3. The arguments as to why the SBOE should not be subject to the APA lack merit.....	16
a. The RRC does not “veto” rules of the SBOE or any other agency	17
b. The General Assembly has not taken away the SBOE’s rulemaking authority and given it to the RRC	20
c. The North Carolina Supreme Court’s decision in <i>Guthrie v. Taylor</i> does not support the SBOE’s arguments	22

B.	Summary Judgment Cannot Be Justified Based on the Allegations of Count 3 of the Complaint.....	25
C.	Summary Judgment Should Be Entered In Favor of Defendants-Appellants.....	29
III.	ALTERNATIVELY, BECAUSE THE DECISION OF THE SUPERIOR COURT IS UNCLEAR AND AMBIGUOUS AS TO WHETHER IT DECLARES FACIALLY INVALID N.C. GEN. STAT. §§ 115C-2, 115C-106.3(19), 115C-150.13 AND 115C-218.1(C), THIS COURT SHOULD REMAND FOR CLARIFICATION BY THE SUPERIOR COURT.....	30
A.	The Superior Court’s Order is Ambiguous as to Whether It Declares N.C. Gen. Stat. §§ 115C-106.3(19) and 115C-218.1(c) to be Facially Invalid	33
B.	The Superior Court’s Order is Ambiguous as to Whether It Declares N.C. Gen. Stat. § 115C-150.13 to be Facially Invalid	34
C.	The Superior Court’s Order is Ambiguous as to Whether It Renders N.C. Gen. Stat. § 115C-2 Facially Invalid	34
D.	Remand is Required in Light of the Ambiguities in the Superior Court’s Order that Hinder Meaningful Appellate Review	35
	CONCLUSION.....	36
	CERTIFICATE OF COMPLIANCE	38
	CERTIFICATE OF SERVICE	39
	APPENDIX	
	N.C. Gen. Stat. § 1-267.1 (2014)	App. 1-2
	N.C. Gen. Stat. § 7A-27 (2014).....	App. 3-4
	N.C. Gen. Stat. § 115C-2	App. 5
	N.C. Gen. Stat. § 115C-17 (2014, repealed 11 June 2015)	App. 6

N.C. Gen. Stat. § 115C-106.3	App. 7-9
N.C. Gen. Stat. § 115C-150.13	App. 10
N.C. Gen. Stat. § 115C-218.1 (2014).....	App. 11-12
N.C. Gen. Stat. § 143A-44.1	App. 13
N.C. Gen. Stat. § 143B-30.2	App. 14
N.C. Gen. Stat. § 150B-1 (2014).....	App. 15-18
N.C. Gen. Stat. § 150B-2 (2014).....	App. 19-21
N.C. Gen. Stat. § 150B-19	App. 22
N.C. Gen. Stat. § 150B-19.1	App. 23-24
N.C. Gen. Stat. § 150B-21.1 (2014).....	App. 25-28
N.C. Gen. Stat. § 150B-21.1A.....	App. 29-30
N.C. Gen. Stat. § 150B-21.2	App. 31-32
N.C. Gen. Stat. § 150B-21.3 (2014).....	App. 33-34
N.C. Gen. Stat. § 150B-21.8	App. 35
N.C. Gen. Stat. § 150B-21.9	App. 36
N.C. Gen. Stat. § 150B-21.12	App. 37
N.C. Gen. Stat. § 150B-21.17	App. 38
16 N.C. Admin Code 1A.0106.....	App. 39
16 N.C. Admin Code 6D.0306.....	App. 40-43

TABLE OF AUTHORITIES

CASES

<i>Adams v. N.C. Dep't of Natural & Econ. Res.</i> , 295 N.C. 683, 249 S.E.2d 402 (1978)	25, 26, 27, 28
<i>Beaufort Cnty. Sch. v. Roach</i> , 114 N.C. App. 330, 443 S.E.2d 339 (1994)	11
<i>Bennett v. Hawks</i> , 170 N.C. App. 426, 613 S.E.2d 40 (2005)	32
<i>Candid Camera Video World, Inc. v. Matthews</i> , 76 N.C. App. 634, 334 S.E.3d 94 (1985)	29
<i>Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res.</i> , 337 N.C. 569, 447 S.E.2d 768 (1994)	14, 15
<i>Greenway v. N.C. Farm Bureau Mut. Ins. Co.</i> , 35 N.C. App. 308, 241 S.E.2d 339 (1978)	29
<i>Guthrie v. Taylor</i> , 279 N.C. 703, 185 S.E.2d 193 (1971)	17, 23, 24
<i>Harwell v. Thread</i> , 78 N.C. App. 437, 337 S.E.2d 112 (1985)	32
<i>Heath v. Office of the State Superintendent</i> , 2015 N.C. OAH LEXIS 16 (Jan. 27, 2015)	16
<i>In re Advisory Opinion</i> , 1994 N.C. AG LEXIS 41 (June 23, 1994)	21, 22
<i>In re Advisory Opinion</i> , 1995 N.C. AG LEXIS 32 (May 1, 1995)	22
<i>In re Appeal of Broad & Gales Creek Cmty. Ass'n</i> , 300 N.C. 267, 266 S.E.2d 645 (1980)	26
<i>In re Declaratory Ruling</i> , 134 N.C. App. 22, 517 S.E.2d 134 (1999)	26, 27, 28

<i>In re Green</i> , 67 N.C. App. 501, 313 S.E.2d 193 (1984)	30
<i>In re J.E.</i> , 182 N.C. App. 612, 643 S.E.2d 70 (2007)	20
<i>In re Trulove</i> , 54 N.C. App. 218, 282 S.E.2d 544 (1981)	31
<i>In re Z.T.B.</i> , 170 N.C. App. 564, 613 S.E.2d 298 (2005)	31
<i>Liberty Mut. Ins. Co. v. Pennington</i> , 356 N.C. 571, 573 S.E.2d 118 (2002)	7
<i>N.C. Bd. of Examiners for Speech & Language Pathologists & Audiologists v. N.C. State Bd. of Educ.</i> , 122 N.C. App. 15, 468 S.E.2d 826 (1996)	9
<i>N.C. Chiropractic Ass’n v. N.C. State Bd. of Educ.</i> , 122 N.C. App. 122, 468 S.E.2d 539 (1996)	10
<i>N.C. State Bar v. Rush</i> , 121 N.C. App. 488, 466 S.E.2d 340 (1996)	32
<i>N.C. State Bd. of Educ. v. N.C. Learns, Inc.</i> , 751 S.E.2d 625 (N.C. Ct. App. 2013)	10
<i>Pitts v. N.C. Dep’t of Pub. Instruction</i> , 2014 N.C. OAH LEXIS 103 (July 23, 2014)	16
<i>State v. Coffey</i> , 336 N.C. 412, 444 S.E.2d 431 (1994)	15
<i>State v. Johnson</i> , 298 N.C. 355, 259 S.E.2d 752 (1979)	30
<i>State v. Whittle Commc’ns</i> , 328 N.C. 456, 402 S.E.2d 556 (1991)	9, 10, 28
<i>Streeter v. Cotton</i> , 133 N.C. App. 80, 514 S.E.2d 539 (1999)	32

<i>Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs. LLC</i> , 365 N.C. 520, 723 S.E.2d 744 (2012)	6
---	---

<i>Vass v. Bd. of Trustees</i> , 324 N.C. 402, 379 S.E.2d 26 (1989)	15
--	----

CONSTITUTIONAL PROVISIONS AND STATUTES

N.C. Const., art. I, sec. 6	2, 6, 25, 31
N.C. Const., art. II, sec. 1	3, 6, 25
N.C. Const., art. IX, sec. 5	<i>passim</i>
N.C. Gen. Stat. § 1-267.1	3, 30
N.C. Gen. Stat. § 1A-1	7, 29
N.C. Gen. Stat. § 7A-27	3, 36
N.C. Gen. Stat. § 115C-1	35
N.C. Gen. Stat. § 115C-2	<i>passim</i>
N.C. Gen. Stat. § 115C-10	35
N.C. Gen. Stat. § 115C-12	35
N.C. Gen. Stat. § 115C-17 (2014, repealed 11 June 2015)	12, 13, 14
N.C. Gen. Stat. § 115C-106.3(19)	<i>passim</i>
N.C. Gen. Stat. § 115C-107.2	33
N.C. Gen. Stat. § 115C-150.11	34
N.C. Gen. Stat. § 115C-150.13(b)	<i>passim</i>
N.C. Gen. Stat. § 115C-218.1(c)	<i>passim</i>
N.C. Gen. Stat. § 115-238.29B(e)	15
N.C. Gen. Stat. § 115C-296(a1)	14

N.C. Gen. Stat. § 143A-44.1.....	5, 16
N.C. Gen. Stat. § 143B-30.2.....	26
N.C. Gen. Stat. § 150B-1.....	2
N.C. Gen. Stat. § 150B-1(b).....	4, 10, 18
N.C. Gen. Stat. § 150B-1(c).....	13
N.C. Gen. Stat. § 150B-1(d).....	13, 14
N.C. Gen. Stat. § 150B-1(e).....	13
N.C. Gen. Stat. § 150B-2(1a).....	15, 16
N.C. Gen. Stat. § 150B-2(2).....	16
N.C. Gen. Stat. § 150B-18.....	9
N.C. Gen. Stat. § 150B-19(3).....	4
N.C. Gen. Stat. § 150B-19(5).....	4
N.C. Gen. Stat. § 150B-19.1(a).....	18, 27
N.C. Gen. Stat. § 150B-19.1(c).....	4
N.C. Gen. Stat. § 150B-20.....	11
N.C. Gen. Stat. § 150B-21.1.....	4, 19
N.C. Gen. Stat. § 150B-21.1A.....	4, 19
N.C. Gen. Stat. § 150B-21.2.....	4
N.C. Gen. Stat. § 150B-21.3(b1).....	18
N.C. Gen. Stat. § 150B-21.8.....	<i>passim</i>
N.C. Gen. Stat. § 150B-21.9.....	<i>passim</i>
N.C. Gen. Stat. § 150B-21.12(c).....	5, 17, 27, 28, 29
N.C. Gen. Stat. § 150B-21.17.....	4

N.C. Gen. Stat. § 150B-21.25	9
Act of Aug. 6, 2014, ch. 101, § 7, 2014 N.C. Sess. Laws 616.....	15
Act of July 25, 2013, ch. 355, § 1.(b), 2013 N.C. Sess. Laws 965.....	14, 15
Act of July 25, 2013, ch. 360, § 9.3(d), 2013 N.C. Sess. Laws 995.....	14, 33
Act of July 3, 2013, ch. 247, § 2, 2013 N.C. Sess. Laws 689.....	14
Act of June 21, 1996, ch. 716, 1995 N.C. Sess. Laws 352.....	12
Act of June 11, 2015, ch. 65, § 1.1, 2015 N.C. Adv. Legis. Serv. 65 (Lexis).....	12

REGULATIONS AND OTHER AUTHORITIES

16 N.C. Admin. Code 1A.0106	11
16 N.C. Admin. Code 6D.0306(h).....	11
N.C. R. Civ. P. 56(c).....	7, 29
Senate Bill 94 (introduced 18 February 2015)	15
Br. of SBOE, <i>State v. Whittle Commc'ns</i> , 164PA90 (filed May 11, 1990).....	10

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COMMISSION,)	
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Defendants.)	
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BRIEF OF APPELLANT NORTH CAROLINA
RULES REVIEW COMMISSION

ISSUES PRESENTED

- I. Did the Superior Court err in granting summary judgment in favor of the State Board of Education and in failing to grant summary judgment in favor of Defendants-Appellants Rules Review Commission and State of North Carolina?
- II. In the alternative, is the decision of the Superior Court ambiguous and unclear as to whether it declares facially invalid N.C. Gen. Stat. §§ 115C-2, 115C-106.3(19), 115C-150.13 and 115C-218.1(c), such that remand is appropriate to require clarification by the Superior Court?

STATEMENT OF THE CASE

On 7 November 2014, Plaintiff-Appellee North Carolina State Board of Education (“SBOE”) commenced this action by filing a complaint seeking a declaratory judgment against Defendants-Appellants State of North Carolina and the North Carolina Rules Review Commission (“RRC”). R pp 8-24. The SBOE’s complaint sets out seven counts, five of which have been voluntarily dismissed without prejudice by the SBOE. R pp 8-24, 29-30, 34-35

On 12 January 2015, Defendants-Appellants timely moved to dismiss the complaint. R pp 25-28. On 23 February 2015, the SBOE voluntarily dismissed without prejudice Counts 4-7. R p 29. On 20 March 2015 (prior to a ruling on the motion to dismiss or the filing of an answer by Defendants-Appellants), the SBOE moved for summary judgment on Counts 1-3. R p 31. On 19 June 2015, the SBOE voluntarily dismissed without prejudice Count 1 – leaving only Counts 2 and 3. Count 2 seeks a declaratory judgment that the RRC’s “interpretation and application” of the North Carolina Administrative Procedure Act (“APA”), N.C. Gen. Stat. §§ 150B-1 *et seq.*, to rulemaking by the SBOE violates Article IX, Section 5 of the North Carolina Constitution. R p 17. Count 3 seeks a declaratory judgment that the RRC’s “interpretation and application” of the APA to rulemaking by the SBOE constitutes an improper delegation of authority by the General Assembly to the RRC in violation of Article I, Section 6 (separation of

powers) and Article II, Section 1 (legislative power vests in the General Assembly) of the North Carolina Constitution. R p 18.

Defendants-Appellants' motion to dismiss and the SBOE's motion for summary judgment were heard by the Honorable Paul G. Gessner on 29 June 2015. T p 1. On 2 July 2015, R p 156, Judge Gessner issued summary judgment in favor of the SBOE without convening a three-judge panel. *See* N.C. Gen. Stat. § 1-267.1. On 27 July 2015, Defendants-Appellants gave notice of appeal to this Court. R p 159. Following transcription of the hearing, Defendants-Appellants timely served a proposed record on appeal on 29 September 2015. R p 169; *see* R pp 168-69. The record was settled by agreement on 2 November 2015 and docketed on 12 November 2015. R p 169.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

The trial court's summary judgment order disposed of all claims as to all parties and is therefore final. The Court of Appeals has jurisdiction to review the summary judgment order under N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF FACTS

The APA sets out certain procedural protections for the citizens of North Carolina to ensure that state agencies do not abuse their rulemaking powers. N.C. Gen. Stat. § 150B-1(b). The APA includes a procedure by which an agency may enact emergency or temporary rules on an expedited basis. N.C. Gen. Stat. §§ 150B-21.1, -21.1A. The General Assembly has established a more detailed process for the enactment of permanent rules. N.C. Gen. Stat. § 150B-21.2.

Under the APA, permanent rules must be published – prior to enactment – in the North Carolina Register and on the agency’s website. N.C. Gen. Stat. §§ 150B-19.1(c), -21.17. Additionally, the APA directs that rules promulgated by an agency must be within the agency’s statutory authority and must be clear and unambiguous. N.C. Gen. Stat. § 150B-21.9(a)(1), (2). Moreover, the APA precludes an agency from enacting a rule that imposes a civil penalty or criminal liability unless a law specifically authorizes the agency to do so. N.C. Gen. Stat. § 150B-19(3). The APA also restricts an agency’s ability to promulgate rules imposing fees for services rendered by the agency. N.C. Gen. Stat. § 150B-19(5).

The APA directs that temporary and permanent rules proposed by an agency must be reviewed by the RRC before becoming effective. N.C. Gen. Stat. §§ 150B-21.8(b), -21.9. The APA, however, limits the RRC’s review to determining whether the agency has complied with the specific procedural

requirements set out in the APA. N.C. Gen. Stat. §§ 150B-21.9(a), -21.12(c). In its review of proposed rules, the RRC is precluded from considering the quality or efficacy of a rule. N.C. Gen. Stat. § 150B-21.9(a). The APA also imposes very specific time periods on the RRC's review of an agency rule. N.C. Gen. Stat. §150B-21.9(b).

The SBOE has repeatedly conceded that it is subject to the APA's rulemaking provisions. R pp 72-73, 88-89, 92. Additionally, numerous provisions of the General Statutes expressly state that the SBOE shall comply with the APA. N.C. Gen. Stat. §§ 115C-2, -106.3(19), -150.13(b), -218.1(c); *see also* N.C. Gen. Stat. § 143A-44.1 (providing that the SBOE shall be the head of the Department of Public Instruction – an executive branch agency). Nevertheless, the SBOE originally sought a declaratory judgment that it is not an “agency” within the meaning of the APA. R p 17. The SBOE has subsequently abandoned that claim. R pp 15-16, 34.

Contending that the SBOE does not need or want review of its rules by the RRC, R pp 139-41, the SBOE filed a motion for summary judgment with respect to Counts 2 and 3 of the complaint. Count 2 seeks a declaratory judgment that the RRC's interpretation of the APA violates Article IX, Section 5 (authorizing the SBOE to engage in rulemaking “subject to laws enacted by the General Assembly”) of the North Carolina Constitution. Count 3 seeks a declaratory

judgment that the RRC's interpretation of the APA violates Article I, Section 6 (separation of powers) and Article II, Section 1 (legislative power vests in the General Assembly) of the North Carolina Constitution. Prior to the hearing, the SBOE voluntarily dismissed all remaining counts of the complaint.

On 2 July 2015, Judge Gessner issued summary judgment in favor of the SBOE. His order merely states:

Upon consideration of the plain language of the North Carolina Constitution, and the verified complaint, there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

R p 156. The order fails to set out the scope of the declaratory relief being granted. Moreover, the order does not address whether the provisions of the General Statutes that expressly reference the applicability of the APA to the SBOE remain in effect or whether these provisions are being declared by the Superior Court to be facially invalid. *See* N.C. Gen. Stat. §§ 115C-2, -106.3(19), -150.13, -218.1(c).

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the trial court's grant of summary judgment de novo applying the same standard used by the trial court. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012). Summary judgment is warranted only "if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c). As the party seeking summary judgment, the SBOE had the “burden of demonstrating the absence of a genuine issue of material fact.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002).

II. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE SBOE AND SHOULD BE DIRECTED TO ENTER SUMMARY JUDGMENT IN FAVOR OF THE RULES REVIEW COMMISSION AND THE STATE OF NORTH CAROLINA.

The Superior Court’s order merely states that summary judgment is granted in favor of the SBOE without specifying whether the allegations of Count 2 or Count 3 (the only counts that the SBOE had not voluntarily dismissed) justify summary judgment. R p 156. Neither of these two counts supports the granting of summary judgment in favor of the SBOE.

A. Summary Judgment Cannot Be Justified Based on the Allegations of Count 2 of the Complaint.

In Count 2 of the complaint, the SBOE asserts that Article IX, Section 5 of the North Carolina Constitution precludes the RRC from reviewing rules promulgated by the SBOE in accordance with the provisions of the APA. Count 2 of the complaint fails as a matter of law. The North Carolina Constitution provides that the SBOE’s rulemaking authority is subject to laws enacted by the General

Assembly. The RRC's conclusion that the SBOE is subject to the APA's rulemaking provisions is soundly based on the plain language of the applicable statutes, as well as the SBOE's own concessions. The application of the APA to the SBOE does not violate the North Carolina Constitution. The SBOE's arguments to the contrary are unavailing.

1. The North Carolina Constitution makes the SBOE's rulemaking authority subject to laws enacted by the General Assembly.

Contrary to the SBOE's argument to the trial court, the SBOE does not have the power "to make whatever rules it deems necessary for North Carolina's public schools." R p 129. Rather, its rulemaking authority is "subject to" enactments by the General Assembly, N.C. Const. art. IX, § 5 – including statutes (such as the APA) that set out the rulemaking process that the SBOE is to follow.

The North Carolina Constitution directs the SBOE to adopt rules and regulations relating to the public school system, "subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5. This section of the Constitution provides:

Powers and duties of Board.

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, *subject to laws enacted by the General Assembly.*

Id. (emphasis added). As the North Carolina Supreme Court has explained, although Article IX, Section 5 “grants the State Board the authority to ‘make all needed rules,’ [it] also limits this authority by making it ‘subject to the laws enacted by the General Assembly.’” *State v. Whittle Commc’ns*, 328 N.C. 456, 464, 402 S.E.2d 556, 560 (1991). When the General Assembly intends to “limit the power of the [SBOE]” to make rules, that intent must be given effect. *Id.* at 464, 402 S.E.2d at 560-61. As this Court has stated, the power of the SBOE to enact regulations is not “unfettered.” *N.C. Bd. of Examiners for Speech & Language Pathologists & Audiologists v. N.C. State Bd. of Educ.*, 122 N.C. App. 15, 20, 468 S.E.2d 826, 830 (1996), *aff’d*, 345 N.C. 493, 480 S.E.2d 50 (1997). Rather, it is subject to restrictions and limitations imposed by the General Assembly. *Id.*

2. Consistent with Article IX, Section 5 of the North Carolina Constitution, the General Assembly has made the SBOE’s rulemaking authority subject to the procedural requirements of the APA.

Consistent with Article IX, Section 5, the General Assembly has made the rules and regulations promulgated by the SBOE subject to the procedural requirements of the APA.¹ N.C. Gen. Stat. §§ 150B-18 to -21.25. In Chapter

¹ In *Whittle*, the SBOE conceded that when its rulemaking authority is based on a statute, it is subject to the APA’s rulemaking provisions. 328 N.C. at 464, 402 S.E.2d at 560. The SBOE, however, argued that when its grant of rulemaking authority arises under Article IX, § 5, the SBOE need not comply with the APA. *Id.* In its brief before the North Carolina Supreme Court, the SBOE argued: “The General Assembly has made the State Board of Education

115C, which sets out the organization and statutory authority of the SBOE, the General Assembly has stated:

Administrative procedure.

All action of agencies taken pursuant to this Chapter, as agency is defined in G.S. 150B-2, *is subject to the requirements of the Administrative Procedure Act, Chapter 150B of the General Statutes.*

N.C. Gen. Stat. § 115C-2 (emphasis added). Through this statute, the General Assembly has done exactly what Article IX, Section 5 of the North Carolina authorizes. The General Assembly has made the SBOE's rulemaking procedures subject to certain procedural protections set out in the APA. *See* N.C. Gen. Stat. § 150B-1(b). The General Assembly intended a broad application of the APA to the SBOE.

This Court has repeatedly recognized that the SBOE stands as an "agency" under the APA. *See N.C. State Bd. of Educ. v. N.C. Learns, Inc.*, 751 S.E.2d 625, 634 (N.C. Ct. App. 2013) (noting that the provisions of Chapter 150B apply to "an agency such as the SBOE"); *N.C. Chiropractic Ass'n v. N.C. State Bd. of Educ.*, 122 N.C. App. 122, 124, 468 S.E.2d 539, 541 (1996) (holding SBOE's decision

subject to the rulemaking provisions of the APA. G.S. § 115C-2. The APA's rulemaking requirements, however, only apply to rules implementing statutes." Br. of SBOE, *State v. Whittle Commc'ns*, 164PA90, at 28 (filed May 11, 1990). The North Carolina Supreme Court concluded that it need not address this specific point and held that the SBOE did not have rulemaking authority given that the General Assembly had already spoken on the very point that the rule sought to address. 328 N.C. at 464, 402 S.E.2d at 560. Contrary to the SBOE's concession in *Whittle*, the SBOE argued to the Superior Court in the present case that the APA is *never* applicable to rulemaking by the SBOE. *See* R p 130.

not to amend a rule was a rulemaking decision that under the APA was not subject to being challenged through a contested case proceeding); *Beaufort Cnty. Sch. v. Roach*, 114 N.C. App. 330, 443 S.E.2d 339 (1994) (Orr, J.) (applying Chapter 150B and concluding that SBOE's final agency decision was not supported by substantial evidence).

Moreover, the SBOE itself has conceded that "the APA imposes upon the [SBOE] rulemaking obligations." R p 92 (SBOE Report to the Administrative Procedure Act Committee of the General Assembly); *see also* R p 88-89 (inquiry by SBOE Chairman to General Assembly as to "why the State Board of Education cannot be exempt from the rulemaking process"). In proceedings before the General Assembly, the SBOE's counsel has testified that the SBOE is subject to the APA (including the APA's rulemaking provisions) and that the SBOE "does not have a blanket exemption" from the APA's rulemaking requirements. R pp 72-73. In fact, when enacting rules, the SBOE has frequently relied on the APA as its statutory authority for doing so and has recognized that the SBOE is an agency within the meaning of the APA. *See, e.g.*, 16 N.C. Admin. Code 1A.0106 (SBOE rule entitled "Petitions for Rule-Making" cites N.C. Gen. Stat. § 150B-20 as the SBOE's sole statutory authority for enacting the rule); 16 N.C. Admin. Code 6D.0306(h) (recognizing APA's contested case provisions are applicable to SBOE).

In numerous statutes, the General Assembly has made clear that it intends for the APA to apply to the SBOE. For example, in June of 1996, the General Assembly enacted comprehensive legislation to implement the recommendations of the Joint Legislative Education Oversight Committee (North Carolina's ABC's Plan). Act of June 21, 1996, ch. 716, 1995 N.C. Sess. Laws 352. This legislation directed the SBOE to promulgate various rules in order to implement a system that would make local schools accountable for student performance. *Id.* § 1. To facilitate the prompt adoption of these rules, the General Assembly altered the public notice requirements, the provisions requiring a fiscal note and the date the SBOE's rules would become effective. *See* N.C. Gen. Stat. § 115C-17 (2014).² Although the General Assembly chose to modify some of these rulemaking provisions with respect to North Carolina's ABC's Plan, it expressly stated that the SBOE would remain subject to the APA's provision that a permanent rule may not take effect until it has been determined to comply with the APA by either the RRC or the courts. N.C. Gen. Stat. § 115C-17 (2014); *see* N.C. Gen. Stat. § 150B-21.8 (setting out process for reviewing compliance with the APA by the RRC or the

² During the 2015 Regular Session, the General Assembly changed the name of the "ABC's Program" to the "School Based Management and Accountability Program." *See* Act of June 11, 2015, ch. 65, § 1.1, 2015 N.C. Adv. Legis. Serv. 65 (Lexis) ("An Act to Repeal References to the ABCs Program in the General Statutes"). That session law also repealed N.C. Gen. Stat. § 115C-17 – almost two decades after the General Assembly directed the SBOE to adopt rules that would implement the ABC's Program.

courts). Specifically, Section 115C-17 stated: “*A permanent rule that is adopted by the State Board of Education that is directly related to the implementation of this act [1995 (Reg. Sess., 1996), c. 716, s. 28 – which sets out the ABC’s Program], but is not approved by the Rules Review Commission, shall not become effective.*” N.C. Gen. Stat. § 115C-17(b) (2014) (emphasis added).

In addition to the General Assembly’s express language in Chapter 115C, the General Assembly’s failure to exempt the SBOE from the APA when it has excluded other agencies further demonstrates that the General Assembly intended the APA to apply to the SBOE. The General Assembly has exempted certain boards, commissions and agencies from the provisions of the APA. The Utilities Commission and State Lottery, for example, are exempt from all provisions of the APA. N.C. Gen. Stat. § 150B-1(c)(3), (7). Other boards and agencies are exempt from specific provisions of the APA, such as rulemaking requirements or contested case proceedings. *See, e.g.*, N.C. Gen. Stat. § 150B-1(d)(11) (exempting the State Ports Authority from rulemaking provisions when the Authority is setting fees); N.C. Gen. Stat. § 150B-1(e)(7) (exempting the Division of Adult of Correction from the statute’s contested case provisions). In total, the APA exempts 24 boards, commissions and agencies from its provisions in whole or in part. N.C. Gen. Stat. § 150B-1(c) to (e). The SBOE is conspicuously absent from the APA’s listing of exempt agencies. Although the SBOE has repeatedly pleaded its case to the

General Assembly asking to be included within N.C. Gen. Stat. § 150B-1(d) as a board that is exempt from the APA's rulemaking provisions, the General Assembly has declined to do so. *See R pp 88-89.*

Moreover, the General Assembly's intent that the APA's rulemaking provisions shall apply to the SBOE is underscored by the limited exemptions from the APA provided to the SBOE. The General Assembly has granted the SBOE an exemption from the APA's rulemaking provisions in only three narrow areas. *See* N.C. Gen. Stat. § 115C-17(a), (c) (2014) (exempting SBOE rules relating to the State's ABC's Program from the requirements for a fiscal note and publication); N.C. Gen. Stat. § 115C-296(a1) (exempting SBOE rules relating to minimum scores for standardized examination in connection with teacher certifications); Act of July 25, 2013, ch. 360, § 9.3(d), 2013 N.C. Sess. Laws 995, 1088 (exempting SBOE from APA's rulemaking provisions for fiscal year 2013-14 only with respect to fees for teacher licensure). The General Assembly would not have exempted the SBOE in these three areas if it did not intend for the SBOE to be otherwise subject to the APA.³ *See Empire Power Co. v. N.C. Dep't of Env't,*

³ In fact, the General Assembly has begun to emphasize the applicability of the APA to the SBOE in new legislation. In recent years, the SBOE has attempted to circumvent the APA's rulemaking provisions by promulgating "policies" rather than "rules." *See R pp 95-96, 107-13.* In an apparent response to this practice by the SBOE, the General Assembly has begun expressly stating that the SBOE shall comply with the APA when the General Assembly expands the SBOE's regulatory authority. *See, e.g.,* Act of July 3, 2013, ch. 247, § 2, 2013 N.C. Sess. Laws 689, 690 (adding N.C. Gen. Stat. § 115C-150.13); Act of July 25, 2013, ch. 355, § 1.(b), 2013

Health & Nat. Res., 337 N.C. 569, 578-79, 447 S.E.2d 768, 774 (1994) (because the General Assembly expressly provided for specific agencies to be exempt from the APA, further exemptions should not be implied); *Vass v. Bd. of Trustees*, 324 N.C. 402, 407-08, 379 S.E.2d 26, 29 (1989) (“under the maxim *expressio unius est exclusio alterius*, mention of specific exceptions implies the exclusion of others”). If the General Assembly did not intend for the SBOE to be subject to the APA, the partial exemptions from the APA’s rulemaking provisions set out in Chapter 115C would be superfluous. *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) (“[A] statute should not be interpreted in a manner which would render any of its words superfluous.”).

Although the SBOE originally asserted in its complaint that the term “agency” as used in the APA, N.C. Gen. Stat. § 150B-2(1a), should not be read as including the SBOE, the SBOE has subsequently withdrawn and abandoned that argument⁴ – and rightly so. R pp 15-16, 34. Not only is such an argument contrary

N.C. Sess. Laws 965, 968 (adding N.C. Gen. Stat. § 115-238.29B(e), recodified as § 115C-218.1(c) pursuant to Act of Aug. 6, 2014, ch. 101, § 7, 2014 N.C. Sess. Laws 616, 620).

⁴ Before the Superior Court, the SBOE explained that it dismissed Count 1 of its complaint “in light of legislation introduced in the 2015 Legislative Session that, if enacted, could ultimately moot that claim.” R p 122. The bill to which the SBOE was referring was Senate Bill 94 (introduced 18 February 2015). Senate Bill 94 was introduced as a result of the SBOE’s position in this case that it is not an executive branch agency. Senate Bill 94 would have put to the voters a constitutional amendment that would have eliminated the SBOE and replaced it with a newly-created executive branch agency.

to the express language of Chapter 115C⁵ and binding precedent of this Court, the adoption of the SBOE's novel theory would have had grave public policy implications.⁶ The General Assembly has provided throughout Chapter 115C that the SBOE shall be subject to the APA.

3. The arguments as to why the SBOE should not be subject to the APA lack merit.

Before the trial court, the SBOE made three arguments as to why the General Assembly does not have authority to subject the SBOE to the rulemaking provisions of the APA. First, the SBOE argued that the RRC “strikes down” or “vetoes” rules promulgated by the SBOE – a power that rests solely with the General Assembly. R pp 123-25, 135-36. Second, the SBOE argued that the General Assembly cannot take away the SBOE's rulemaking authority and give it to the RRC. R p 132-38. Third, the SBOE argued that the North Carolina

⁵ Numerous provisions of the General Statutes provide that the SBOE stands as an “agency” within the meaning of Chapter 150B. *See, e.g.*, N.C. Gen. Stat. §§ 115C-2, 115C-106.3(19), 115C-150.13(b), 115C-218.1(c); *see also* N.C. Gen. Stat. § 143A-44.1 (providing that the SBOE shall be the head of the Department of Public Instruction – an executive branch agency).

⁶ If a court were to hold that the SBOE is not an “agency” within the meaning of N.C. Gen. Stat. § 150B-2(1a), the Office of Administrative Hearings (“OAH”) would have no jurisdiction over the SBOE in contested case proceedings filed under the APA. *See* N.C. Gen. Stat. § 150B-2(2). The OAH has rendered decisions in scores of contested case proceedings involving the SBOE. *See, e.g., Heath v. Office of the State Superintendent*, 2015 N.C. OAH LEXIS 16 (Jan. 27, 2015) (holding SBOE's decision to suspend teacher's license not supported by substantial evidence); *Pitts v. N.C. Dep't of Pub. Instruction*, 2014 N.C. OAH LEXIS 103 (July 23, 2014) (upholding SBOE's denial of a teacher's license). Neither the SBOE nor the people of this State would be served if those decisions were rendered null and void.

Supreme Court's decision in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), provides that the General Assembly may only revise an SBOE rule if it does so "specifically." R pp 13 (§ 18), 17 (§ 40). Each of these arguments lacks merit.

- a. The RRC does not "veto" rules of the SBOE or any other agency.

The SBOE's argument that the RRC vetoes or strikes down rules is based on a fundamental misunderstanding of the APA. The role that the General Assembly has given to the RRC is limited and specific. The RRC's review of rules submitted to it by state agencies such as the SBOE is limited to whether the proposed rule: (1) is within the agency's authority, (2) is clear and unambiguous, (3) is reasonably necessary in light of state and federal statutes, (4) was adopted in accordance with the procedures of the APA relating to rulemaking, and (5) whether changes during the review process require an opportunity for further public comment. N.C. Gen. Stat. §§ 150B-21.9(a), -21.12(c).

The General Assembly has directed that the RRC shall not engage in a substantive review of any proposed rules. N.C. Gen. Stat. § 150B-21.9(a). The RRC is not permitted to consider the effects and burdens imposed by a rule, whether a rule is cost-effective or whether a rule is based on sound scientific or technical information. Those considerations are left to the agency and the

legislature. N.C. Gen. Stat. § 150B-19.1(a)(2), (4), (5), (6). The RRC's limited role is to determine whether the agency has complied with the minimum procedural steps that the APA directs must be performed as part of the rulemaking process. Only the General Assembly may undertake a substantive review of proposed rules. *See* N.C. Gen. Stat. § 150B-21.3(b1) (proposed permanent rule does not become effective if a bill specifically disapproves a proposed rule before its effective date).

Thus, the role of the RRC is essentially to ensure that an agency has complied with notice, publication and similar requirements of the APA, that the rule is written in such a manner that it can be clearly understood, and that the rule is not in conflict with state or federal statutes. As the General Assembly has stated, these steps are “procedural” – not substantive. *See* N.C. Gen. Stat. §150B-1(b). Review by the RRC for the limited purpose of determining whether a proposed rule has been adopted in accordance with proper procedure does not impinge on the agency's ability to make rules. Nor does such limited review stand as the power to “veto” a rule.

Moreover, the RRC's decision as to whether an agency has properly followed the APA's procedures for promulgating rules is subject to judicial review. Under the APA, the final word as to whether an agency has complied with the rulemaking process set out in the APA lies with the courts. When the RRC

determines that a proposed agency rule does not comply with the procedural steps mandated by the General Assembly, the agency may seek a judicial declaration as to whether there has been compliance. N.C. Gen. Stat. §150B-21.8(d).

Conversely, when the RRC determines that the procedural requirements of the APA have been met and the rule is then published in the Administrative Code, a rebuttable presumption exists that the rule was adopted in accordance with the APA's requirements. N.C. Gen. Stat. §150B-21.9(a1). Referring to the RRC as having a "veto" power over agency rulemaking is just as misleading and inaccurate as describing the Superior Court or our appellate courts as having the power to "veto" agency rules.

Finally, the SBOE claims that the RRC holds a "veto" power because of the length of time it takes to review SBOE proposed rules. R p 15 (¶ 26), 135. The timeline for review by the RRC is expressly set by the General Assembly in the APA. *See* N.C. Gen. Stat. §150B-21.9(b). The policy determination as to whether the protections and safeguards provided by the APA outweigh the time and cost of a rules review process lies in the hands of the General Assembly.⁷ To the extent that the SBOE is concerned about the length of time it takes to enact rules, *see* R p 15 (¶ 26), its recourse is to present its arguments and concerns to the General

⁷ The General Assembly has balanced such time considerations by creating a process that allows for the enactment of emergency and temporary rules under appropriate circumstances. N.C. Gen. Stat. §§ 150B-21.1, -21.1A.

Assembly – not to the courts. Moreover, the time delay from the review process is minimal when the SBOE complies with the procedural requirements of the APA. The fact that the SBOE’s rules do not become effective until either the RRC or the courts have determined that the SBOE has complied with the procedural steps mandated by the APA does not constitute a “veto.”

The General Assembly has not given the RRC the power or authority to veto or strike down rules. Rather, the General Assembly has established a procedure to ensure that state agencies do not enact rules without first taking certain rudimentary steps to ensure that the citizens of this State have an opportunity to be aware of and to be heard during the rulemaking process.

- b. The General Assembly has not taken away the SBOE’s rulemaking authority and given it to the RRC.

Before the Superior Court, the SBOE repeatedly argued that the General Assembly cannot take away the SBOE’s rulemaking authority and give it to another agency. In support of this argument, the SBOE relied extensively on two letter opinions from a Chief Deputy at the North Carolina Department of Justice (“DOJ”). Neither of those two DOJ letters, however, advances the argument that the SBOE is attempting to make here.⁸

⁸ Opinions by DOJ, of course, are non-binding and have no precedential value. *In re J.E.*, 182 N.C. App. 612, 615 n.1, 643 S.E.2d 70, 72 n.1 (2007).

In 1994, Chief Deputy Andrew Vanore issued an opinion in which he opined that a proposed bill “may be unconstitutional” because the bill would have removed from the SBOE the power to set standards for the licensing of public school teachers and placed that responsibility in a newly-created board. *In re Advisory Opinion*, 1994 N.C. AG LEXIS 41, at *2 (June 23, 1994). The Chief Deputy noted:

We think that a legislative act transferring the State Board’s constitutional power regarding teacher licensing to another agency to be exercised by that agency independently of the State Board would amount to more than a limitation or revision of the constitutional powers of the State Board. . . . While the General Assembly has the power to limit and revise the manner in which the State Board exercises its constitutional powers, the General Assembly in our opinion likely does not have the power to take away completely a constitutionally specified power of the State Board and give it to another agency.

Id. at *3-4. Here, the General Assembly has not transferred the SBOE’s authority to promulgate rules to the RRC. The RRC has no authority to promulgate rules – other than rules relating to the internal procedures of the RRC. Moreover, the RRC is expressly prohibited from considering “questions relating to the quality or efficacy” of a rule proposed by the SBOE or any other agency. N.C. Gen. Stat. § 150B-21.9(a). Rather, the RRC review process (which simply ensures agency compliance with the APA) falls within the General Assembly’s power “to limit and revise the manner in which the [SBOE]” promulgates rules. *In re Advisory*

Opinion, 1994 N.C. AG LEXIS 41, at *4. The 1994 DOJ letter opinion does not support the SBOE's arguments.

The same is true with respect to the 1995 DOJ letter opinion relied on by the SBOE below. *In re Advisory Opinion*, 1995 N.C. AG LEXIS 32 (May 1, 1995). Similar to the 1994 letter, the 1995 letter opinion concludes that the General Assembly could not take away all of the SBOE's rulemaking authority with respect to teacher qualifications and transfer such rulemaking in toto to "an independent body other than the State Board of Education." *Id.* at *4. The Chief Deputy opined that such a step "goes beyond merely limiting the manner in which the [SBOE] adopts policies." *Id.* Here, the General Assembly has not authorized the RRC to draft rules relating to public education in lieu of the SBOE. Rather, the RRC is simply tasked with reviewing the SBOE's rules to ensure that they satisfy the procedural requirements of the APA. Requiring the SBOE to comply with the APA does not remove the SBOE from the rulemaking process as was the case in the two advisory opinions relied on by the SBOE below. These non-binding DOJ letter opinions do not support an argument that the General Assembly's decision to require the SBOE to comply with the rulemaking provisions of the APA is unconstitutional.

- c. The North Carolina Supreme Court's decision in *Guthrie v. Taylor* does not support the SBOE's arguments.

Before the Superior Court, the SBOE repeatedly cited the North Carolina Supreme Court's decision in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), for the proposition that the General Assembly may only revise (or repeal) an SBOE rule if it does so "specifically." R pp 13 (¶ 18), 17 (¶ 40). The *Guthrie* decision, however, does not support the SBOE's claims in this case.

In *Guthrie*, a school teacher asserted that the SBOE lacked the authority to make rules requiring teachers to take certain courses in order to renew their teaching certificates. The Supreme Court noted that the North Carolina Constitution gives the SBOE the authority to make rules and regulations regarding the State's free public school system, subject to laws enacted by the General Assembly. 279 N.C. at 710, 185 S.E.2d at 199. The Supreme Court tersely concluded that because the General Assembly had made no law restricting the SBOE's authority to regulate the certification of public school teachers, the SBOE had the authority to make the rule in question. The Court stated:

Chapter 115 of the General Statutes, entitled "Elementary and Secondary Education," contains 357 sections dealing in detail with various aspects of the maintenance and operation of the public school system in North Carolina. None of these provisions *specifically* limits the authority of the State Board of Education to promulgate or administer rules and regulations concerning the certification of teachers.

Id. at 710-11, 185 S.E.2d at 199 (emphasis added). Nowhere else do the words “specific” or “specifically” appear in the *Guthrie* opinion. Nevertheless, the SBOE argued below that the only action that the General Assembly may take that will impact the SBOE’s rules would be to: (1) enact legislation that specifically repeals or revises an SBOE rule or (2) enact legislation that addresses the specific topic set out in the SBOE rule (effectively “preempting” the SBOE rule). R p 130; T pp 73-74. The *Guthrie* decision, however, has no such language nor can the SBOE’s argument be fairly and reasonably read from the holding of the case.

The *Guthrie* opinion simply stands for the proposition that if the General Assembly has not enacted substantive legislation in an area involving the State’s public education system, the SBOE may enact appropriate rules. The *Guthrie* opinion does not state or intimate that the General Assembly is constitutionally prohibited from enacting appropriate limitations on the process that the SBOE must use to promulgate rules. The SBOE’s argument is made from whole-cloth and has no support from *Guthrie*.

The General Assembly has clearly and unambiguously provided that rules promulgated by the SBOE are subject to the APA. That determination by the General Assembly amply complies with Article IX, Section 5 of the Constitution. Count 2 of the complaint does not support the issuance of summary judgment in favor of the SBOE.

B. Summary Judgment Cannot Be Justified Based on the Allegations of Count 3 of the Complaint.

In Count 3 of the complaint, the SBOE asserts that the RRC's interpretation of the APA constitutes an improper delegation of authority by the General Assembly to the RRC in violation of Article I, Section 6 (separation of powers) and Article II, Section 1 (legislative power vests in the General Assembly). Before the Superior Court, the SBOE argued that the APA fails to set forth adequate standards to guide the RRC's review of SBOE proposed rules. R pp 138-42. The SBOE made this argument even though it had earlier dismissed its allegation that the General Assembly's delegation of authority to the SBOE failed to provide adequate guiding standards (Count 6). R pp 19-20, 29. The SBOE's argument is without merit.

The General Assembly may delegate legislative authority to an administrative body, such as the RRC, provided the General Assembly establishes adequate guiding standards to govern the work of that entity.

[W]e have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers.

Adams v. N.C. Dep't of Natural & Econ. Res., 295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978); *see id.* at 697, 249 S.E.2d at 411 ("if the General Assembly is to

legislate effectively it must have the capacity in proper instances to delegate authority to administrative bodies”).

The guiding standards provided by the legislature to an agency need be no more specific than the circumstances permit. “It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.” *Id.* at 698, 249 S.E.2d at 411; *see In re Appeal of Broad & Gales Creek Cmty. Ass’n*, 300 N.C. 267, 273, 266 S.E.2d 645, 651 (1980); *In re Declaratory Ruling*, 134 N.C. App. 22, 33, 517 S.E.2d 134, 142 (1999).

The RRC’s purpose is to help ensure that administrative rulemaking complies with the APA and that the rules promulgated by state agencies conform to their statutory authority. *See* N.C. Gen. Stat. § 143B-30.2. To that end, the General Assembly has provided the RRC with five criteria for evaluating proposed rules: (1) whether promulgation of the rule in question is within the submitting agency’s statutory authority, (2) whether the rule is clear and unambiguous, (3) whether the rule is reasonably necessary to implement or interpret State or federal law, (4) whether the agency submitting the rule conformed to the APA’s procedural requirements for rulemaking, and (5) whether changes to the rule made by the agency during the review process are substantial enough to require an opportunity for further public comment. N.C. Gen. Stat. §§ 150B-21.9(a),

-21.12(c). In addition to these criteria, the RRC is expressly prohibited from considering “questions relating to the quality or efficacy” of a proposed rule. N.C. Gen. Stat. § 150B-21.9(a). The General Assembly has limited the role of the RRC to determining procedural compliance with the provisions of the APA. The RRC makes no substantive review of proposed agency rules. Under the APA, any evaluation of the benefits, burdens and effects of a proposed rule lies with the agency and the General Assembly. N.C. Gen. Stat. § 150B-19.1(a)(2), (4), (5), (6).

The legislature’s directions to the RRC are as specific as the circumstances permit. The review criteria imposed by the General Assembly allows the RRC the latitude it needs to evaluate compliance with the APA while also prohibiting the RRC from intruding on the rulemaking authority of state agencies.

In determining whether the guiding standards imposed by the General Assembly are constitutionally sufficient, courts should consider the applicable procedural safeguards. *See, e.g., Adams*, 295 N.C. at 698, 249 S.E.2d at 411.

“[T]he existence of adequate procedural safeguards supports the constitutionality of the delegated power and tends to ‘insure that the decision-making by the agency is not arbitrary and unreasoned.’” *In re Declaratory Ruling*, 134 N.C. App. at 33, 517 S.E.2d at 142 (citation omitted).

An agency’s ability to obtain judicial review of the RRC’s decisions is a significant procedural safeguard. *See Adams*, 295 N.C. at 701-02, 249 S.E.2d at

412-13; *In re Declaratory Ruling*, 134 N.C. App. at 33, 517 S.E.2d at 142. Under the APA, when the RRC returns a permanent rule to an agency, “the agency may file an action for declaratory judgment in Wake County Superior Court” to obtain review of the RRC’s decision. N.C. Gen. Stat. § 150B-21.8(d).

Adequate guiding standards limit the RRC’s review process. Moreover, procedural safeguards ensure against arbitrary and unreasoned decisions in the rules review process. The General Assembly’s delegation of powers to the RRC complies with the North Carolina Constitution.

Before the trial court, the SBOE argued that the guiding standards set out in N.C. Gen. Stat. §§ 150B-21.8(b), -21.9(a), -21.12(c), were not needed or applicable to the SBOE. For example, the SBOE asserted that because the North Carolina Constitution gives the SBOE authority to make rules, the provision of the APA that prohibit an agency from enacting a rule in excess of its authority is “nonsensical.” R p 140. History has proven the SBOE wrong. In *State v. Whittle Communications*, 328 N.C. 456, 471, 402 S.E.2d 556, 565 (1991), the North Carolina Supreme Court struck down an SBOE rule in light of the fact that the SBOE did not have the authority to promulgate the rule. The Court concluded: “[T]he State Board had no authority to make rules regarding supplementary instructional materials, an area which was and still is under the supervision of the local school boards rather than the State Board.” *Id.* at 468, 402 S.E.2d at 563.

The SBOE has failed to establish that the guiding standards set out in N.C. Gen. Stat. §§ 150B-21.8(b), -21.9(a), -21.12(c) are inadequate. To the contrary, the General Assembly has properly concluded that the APA's procedural protections should be afforded to teachers, students and parents when the SBOE is engaged in rulemaking.

C. Summary Judgment Should Be Entered In Favor of Defendants-Appellants.

A party is “not require[d to] . . . move for summary judgment in order to be entitled to it.” *Greenway v. N.C. Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 314, 241 S.E.2d 339, 343 (1978). Under Rule 56(c), summary judgment is appropriate when “*any* party is entitled to a judgment as a matter of law” and “may be rendered against the moving party.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (emphasis added). When summary judgment was improperly entered against a nonmoving party that was entitled to summary judgment in its favor, this Court will reverse and remand with instructions to enter summary judgment against the moving party. *See Candid Camera Video World, Inc. v. Matthews*, 76 N.C. App. 634, 637-38, 334 S.E.3d 94, 96-97 (1985).

Here, Defendants-Appellants are entitled to judgment as a matter of law. As set forth above, the General Assembly has clearly and unambiguously provided that the SBOE shall be subject to the rulemaking provisions of the APA. The

General Assembly's determination that the people of North Carolina should be afforded the procedural protections provided in the APA is not unconstitutional. Accordingly, judgment should be entered in favor of the RRC as a matter of law. This Court should remand with instructions that the lower court enter judgment in favor of Defendants-Appellants and against the SBOE.

III. ALTERNATIVELY, BECAUSE THE DECISION OF THE SUPERIOR COURT IS UNCLEAR AND AMBIGUOUS AS TO WHETHER IT DECLARES FACIALLY INVALID N.C. GEN. STAT. §§ 115C-2, 115C-106.3(19), 115C-150.13 AND 115C-218.1(C), THIS COURT SHOULD REMAND FOR CLARIFICATION BY THE SUPERIOR COURT.

For the reasons set forth above, the issuance of summary judgment in favor of the SBOE was in error and should be reversed. Alternatively, this Court should remand to the Superior Court with instructions that it clarify whether its declaratory judgment precludes the RRC from implementing the provisions of several specific statutes.

A single Superior Court judge does not have subject matter jurisdiction to render state statutes facially invalid in the absence of a properly constituted three-judge panel.⁹ N.C. Gen. Stat. § 1-267.1(c) ("No order or judgment shall be entered

⁹ The General Assembly has directed that a three-judge panel "shall" be convened whenever a state statute is challenged as facially invalid. N.C. Gen. Stat. § 1-267.1. The General Assembly's use of the word "shall" precludes a single Superior Court judge from declaring a state statute to be facially invalid. *See In re Green*, 67 N.C. App. 501, 503-04, 313 S.E.2d 193, 194-95 (1984); *see also State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757

. . . that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County . . .”). Accordingly, the Superior Court’s order should not be read as declaring state statutes to be unconstitutional.

Here, however, the Superior Court granted summary judgment in favor of the SBOE stating:

Upon consideration of the plain language of the North Carolina Constitution, and the verified complaint, there is no genuine issue of material fact and Plaintiff is entitled to judgment as a matter of law pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

R p 156. The only claims before the Superior Court were the SBOE’s request for a declaratory judgment that the RRC’s “interpretation and application” of the APA violates Article IX, Section 5 of the North Carolina Constitution (Count 2) and Article I, Section 6 and Article IX, Section 5 of the North Carolina Constitution (Count 3). Thus, the two counts of the complaint were worded in such a way as to avoid asking the Superior Court to declare legislation to be facially invalid.

Moreover, the Superior Court did not expressly declare any specific statute to be facially invalid. Nevertheless, this order could be construed as granting the SBOE the relief that the SBOE has requested in its entirety – that no SBOE rules are subject to RRC review. If that is what the Superior Court intended by its statement

(1979); *In re Z.T.B.*, 170 N.C. App. 564, 569, 613 S.E.2d 298, 300 (2005); *In re Trulove*, 54 N.C. App. 218, 222, 282 S.E.2d 544, 547 (1981).

that “Plaintiff is entitled to judgment as a matter of law,” the effect is to render multiple state statutes facially invalid. The Superior Court’s intent and the scope of the summary judgment order cannot be discerned from the language of the order, thereby creating an ambiguity.

This Court has repeatedly recognized that when the decision being appealed is “so ambiguous as to preclude appellate review,” the Court of Appeals should remand so that the order on appeal may be clarified. *Harwell v. Thread*, 78 N.C. App. 437, 439, 337 S.E.2d 112, 113 (1985); *accord Bennett v. Hawks*, 170 N.C. App. 426, 428-29, 613 S.E.2d 40, 41-42 (2005); *Streeter v. Cotton*, 133 N.C. App. 80, 83, 514 S.E.2d 539, 542 (1999); *N.C. State Bar v. Rush*, 121 N.C. App. 488, 490, 466 S.E.2d 340, 341 (1996). Here, as set out above, the Superior Court entered a final judgment in favor of the SBOE without setting out the terms of a specific declaration to guide the parties (or the appellate courts). Under these circumstances, remand is appropriate to require the Superior Court to expressly specify the scope of the declaratory judgment it has entered and to clarify whether its order bars the RRC from reviewing the SBOE’s rules as provided in Sections 115C-2, 115C-106.3(19), 115C-150.13 and 115C-218.1(c). That clarification is crucial for permitting meaningful appellate review.

A. The Superior Court's Order is Ambiguous as to Whether It Declares N.C. Gen. Stat. §§ 115C-106.3(19) and 115C-218.1(c) to be Facially Invalid.

The General Assembly has expressly directed the SBOE to implement rules to provide for the education of children with disabilities consistent with the federal Individuals with Disabilities Education Act. N.C. Gen. Stat. §115C-107.2(a), (c). The General Assembly has also directed the SBOE to establish reasonable fees for applications to operate a charter school. N.C. Gen. Stat. § 115C-218.1(c). In both statutes, the General Assembly has further stated that these SBOE rules shall be adopted “in accordance with Article 2A of Chapter 150B of the General Statutes.” N.C. Gen. Stat. §§ 115C-106.3(19), -218.1(c).¹⁰ Article 2A of Chapter 150B directs that rules shall not become effective until reviewed by the RRC. N.C. Gen. Stat. § 150B-21.8. Thus, the General Assembly has expressly declared that these SBOE rules shall be reviewed by the RRC. The Superior Court's order, however, could be read as either foreclosing such review or as implicitly carving out an exception for Sections 115C-106.3(19) and 115C-218.1(c) from the declaratory relief being granted.

¹⁰ As a further example, the General Assembly directed that the SBOE “shall develop by rule as provided in Article 2A of Chapter 150B” a model teacher contract. Act of July 25, 2013, ch. 360, § 9.6(e), 2013 N.C. Sess. Laws 995, 1102-03. Ironically, before the trial court, the SBOE cited its proposed rule regarding model teacher contracts as an example of the RRC interfering with the SBOE's rulemaking authority – even though the General Assembly expressly stated that the process for enacting this rule must comply with the APA's rulemaking provisions. *See R p 132.*

B. The Superior Court's Order is Ambiguous as to Whether It Declares N.C. Gen. Stat. § 115C-150.13 to be Facially Invalid.

North Carolina General Statutes § 115C-150.13 directs the SBOE to adopt rules relating to the administration and oversight of the Governor Morehead School for the Blind, the Eastern North Carolina School for the Deaf, and the North Carolina School for the Deaf. N.C. Gen. Stat. §§ 115C-150.11, -150.13. The General Assembly expressly directs that these “[r]ules shall be adopted in accordance with Chapter 150B of the General Statutes.” N.C. Gen. Stat. § 115C-150.13(b). Chapter 150B provides that before a permanent rule may become effective, it must be submitted for review by the RRC. N.C. Gen. Stat. § 150B-21.8. The Superior Court’s order fails to make clear whether it renders facially invalid the General Assembly’s express mandate that the SBOE’s rules relating to the Governor Morehead School for the Blind, the Eastern North Carolina School for the Deaf, and the North Carolina School for the Deaf must be submitted for review by the RRC or excludes Section 115C-150.13 from the scope of the declaratory ruling.

C. The Superior Court's Order is Ambiguous as to Whether It Renders N.C. Gen. Stat. § 115C-2 Facially Invalid.

Chapter 115C of the General Statutes, which governs the “general and uniform system of free public schools . . . throughout the State,” sets out the procedures applicable to appointments to the SBOE, the organization of the SBOE

and the powers and duties of the SBOE. N.C. Gen. Stat. §§ 115C-1, -10 to -12.

The General Assembly has provided that all governmental action taken pursuant to Chapter 115C “is subject to the requirements of the Administrative Procedure Act, Chapter 150B of the General Statutes.” N.C. Gen. Stat. § 115C-2.

Given the language of Chapter 115C, the binding precedent of this Court and the SBOE’s repeated concessions that the APA governs the SBOE’s rulemaking, *see supra* pp. 9 - 16, the General Assembly unquestionably intended that N.C. Gen. Stat. § 115C-2 would make the APA’s rulemaking provisions expressly applicable to the SBOE. Due to the ambiguity in Judge Gessner’s order, it is impossible to tell whether he intended to implicitly declare Section 115C-2 to be facially invalid or whether he intended for this statute to continue to govern rulemaking by the SBOE.

D. Remand is Required in Light of the Ambiguities in the Superior Court’s Order that Hinder Meaningful Appellate Review.

At a minimum, this Court should remand with instructions that the Superior Court clarify the scope and extent of the declaratory relief the Superior Court intended to grant. The ambiguity in the Superior Court’s order prevents this Court from providing meaningful review of the order below. Moreover, if the intent of a Superior Court is to strike down a state statute as facially invalid, the lower court’s order must do so expressly. Otherwise, our appellate courts will be hindered in

carrying out meaning review consistent with their appellate jurisdiction. *See* N.C. Gen. Stat. § 7A-27(a1) (providing that appeal of an order striking a statute as facially invalid shall be to the North Carolina Supreme Court rather than the Court of Appeals).

CONCLUSION

For the reasons stated above, the Court of Appeals should reverse the trial court's summary judgment order and remand with instructions that the Superior Court enter judgment in favor of Defendants-Appellants. In the alternative, this Court should remand with instructions that the Superior Court clarify whether it intended to strike down N.C. Gen. Stat. §§ 115C-2, 115C-106.3(19), 115C-150.13 and 115C-218.1(c), as facially invalid.

Respectfully submitted, this the 9th day of December, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Defendant-Appellant North Carolina Rules Review Commission certifies that the foregoing brief, which was prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, and appendices) as reported by the word-processing software.

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The undersigned attorney for Defendant-Appellant North Carolina Rules Review Commission hereby certifies that on this day the foregoing Brief of Defendant-Appellant North Carolina Rules Review Commission was served upon counsel for all parties in this action by depositing a copy thereof in the United States mail, First Class, postage pre-paid, and addressed as follows:

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CONTENTS OF APPENDIX¹

N.C. Gen. Stat. § 1-267.1 (2014).....	App. 1-2
N.C. Gen. Stat. § 7A-27 (2014).....	App. 3-4
N.C. Gen. Stat. § 115C-2.....	App. 5
N.C. Gen. Stat. § 115C-17 (2014, repealed 11 June 2015).....	App. 6
N.C. Gen. Stat. § 115C-106.3.....	App. 7-9
N.C. Gen. Stat. § 115C-150.13.....	App. 10
N.C. Gen. Stat. § 115C-218.1 (2014).....	App. 11-12
N.C. Gen. Stat. § 143A-44.1.....	App. 13
N.C. Gen. Stat. § 143B-30.2.....	App. 14
N.C. Gen. Stat. § 150B-1 (2014).....	App. 15-18
N.C. Gen. Stat. § 150B-2 (2014).....	App. 19-21
N.C. Gen. Stat. § 150B-19.....	App. 22
N.C. Gen. Stat. § 150B-19.1.....	App. 23-24
N.C. Gen. Stat. § 150B-21.1 (2014).....	App. 25-28
N.C. Gen. Stat. § 150B-21.1A.....	App. 29-30
N.C. Gen. Stat. § 150B-21.2.....	App. 31-32
N.C. Gen. Stat. § 150B-21.3 (2014).....	App. 33-34

¹ N.C. Gen. Stat. § 115C-17 was repealed on 11 June 2015. Additionally, various changes were made to N.C. Gen. Stat. §§ 1-267.1, 7A-27, 115C-218.1, 150B-1, 150B-2, 150B-21.1, 150B-21.3 during the 2015 Regular Session of the General Assembly. Because these changes do not impact the specific statutory subsections cited in the brief and given that the inclusion in this Appendix of the Session Laws amending these statutes would render the Appendix cumbersome and unwieldy, this Appendix cites to the General Statutes through the 2014 Regular Session (i.e., the version of the General Statutes currently available on Lexis' website).

N.C. Gen. Stat. § 150B-21.8.....	App. 35
N.C. Gen. Stat. § 150B-21.9.....	App. 36
N.C. Gen. Stat. § 150B-21.12.....	App. 37
N.C. Gen. Stat. § 150B-21.17.....	App. 38
16 N.C. Admin Code 1A.0106	App. 39
16 N.C. Admin Code 6D.0306	App. 40-43

[N.C. Gen. Stat. § 1-267.1](#)

Statutes current through the 2014 Regular Session

General Statutes of North Carolina > *CHAPTER 1. CIVIL PROCEDURE* > *SUBCHAPTER 08 . JUDGMENT* > *ARTICLE 26A. THREE-JUDGE PANEL FOR REDISTRICTING CHALLENGES AND FOR CERTAIN CHALLENGES TO STATE LAWS*

§ 1-267.1. Three-judge panel for actions challenging plans apportioning or redistricting State legislative or congressional districts; claims challenging the facial validity of an act of the General Assembly

- (a) Any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) of this section.
- (a1) Except as otherwise provided in subsection (a) of this section, any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to [G.S. 1A-1, Rule 42\(b\)\(4\)](#), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.
- (b) Whenever any person files in the Superior Court of Wake County any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, a copy of the complaint shall be served upon the senior resident superior court judge of Wake County, who shall be the presiding judge of the three-judge panel required by subsection (a) of this section. Upon receipt of that complaint, the senior resident superior court judge of Wake County shall notify the Chief Justice, who shall appoint two additional resident superior court judges to the three-judge panel of the Superior Court of Wake County to hear and determine the action. Before making those appointments, the Chief Justice shall consult with the North Carolina Conference of Superior Court Judges, which shall provide the Chief Justice with a list of recommended appointments. To ensure that members of the three-judge panel are drawn from different regions of the State, the Chief Justice shall appoint to the three-judge panel one resident superior court judge from the First through Fourth Judicial Divisions and one resident superior court judge from the Fifth through Eighth Judicial Divisions. In order to ensure fairness, to avoid the appearance of impropriety, and to avoid political bias, no member of the panel, including the senior resident superior court judge of Wake County, may be a former member of the General Assembly. Should the senior resident superior court judge of Wake County be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice shall appoint another resident superior court judge of Wake County as the presiding judge of the three-judge panel. Should any other member of the three-judge panel be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice shall appoint as a replacement another resident superior court judge from the same group of judicial divisions as the resident superior court judge being replaced.
- (b1) Any facial challenge to the validity of an act of the General Assembly filed in the Superior Court of Wake County, other than a challenge to plans apportioning or redistricting State legislative or congressional districts that shall be heard pursuant to subsection (b) of this section, or any claim transferred to the Superior Court of Wake County pursuant to subsection (a1) of this section, shall be assigned by the senior resident Superior Court Judge of Wake County to a three-judge panel established pursuant to subsection (b2) of this section.
- (b2) For each challenge to the validity of statutes and acts subject to subsection (a1) of this section, the Chief Justice of the Supreme Court shall appoint three resident superior court judges to a three-judge panel of the Superior Court of Wake County to hear the challenge. The Chief Justice shall appoint a presiding judge of each three-judge panel. To ensure that members of each three-judge panel are drawn from different regions of the State, the Chief Justice shall appoint to each three-judge panel one resident superior court judge from the First, Second, or Fourth Judicial Division, one resident superior court judge from the Seventh or Eighth Judicial Division, and one resident superior court judge from the Third, Fifth, or Sixth Judicial Division. Should any member of a three-judge panel be

disqualified or otherwise unable to serve on the three-judge panel or be removed from the panel at the discretion of the Chief Justice, the Chief Justice shall appoint as a replacement another resident superior court judge from the same group of judicial divisions as the resident superior court judge being replaced.

- (c) No order or judgment shall be entered affecting the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, or finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) or subsection (b2) of this section. In the event of disagreement among the three resident superior court judges comprising a three-judge panel, then the opinion of the majority shall prevail.
- (d) This section applies only to civil proceedings. Nothing in this section shall be deemed to apply to criminal proceedings, to proceedings under Chapter 15A of the General Statutes, to proceedings making a collateral attack on any judgment entered in a criminal proceeding, or to appeals from orders of the trial courts pertaining to civil proceedings filed by a taxpayer pursuant to [G.S. 105-241.17](#).

History

[2003-434, 1st Ex. Sess., s. 7\(a\)](#); [2014-100, s. 18B.16\(a\)](#).

General Statutes of North Carolina

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[N.C. Gen. Stat. § 7A-27](#)

Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 7A. JUDICIAL DEPARTMENT](#) > [SUBCHAPTER 02](#)
[. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE](#) > [ARTICLE 5. JURISDICTION](#)

§ 7A-27. Appeals of right from the courts of the trial divisions

- (a) Appeal lies of right directly to the Supreme Court in any of the following cases:
- (1) All cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death.
 - (2) From any final judgment in a case designated as a mandatory complex business case pursuant to [G.S. 7A-45.4](#) or designated as a discretionary complex business case pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts.
 - (3) From any interlocutory order of a Business Court Judge that does any of the following:
 - a. Affects a substantial right.
 - b. In effect determines the action and prevents a judgment from which an appeal might be taken.
 - c. Discontinues the action.
 - d. Grants or refuses a new trial.
- (a1) Appeal lies of right directly to the Supreme Court from any order or judgment of a court, either final or interlocutory, that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law. Nothing in this section shall be deemed to apply to appeals from orders of the trial courts pertaining to criminal proceedings, to proceedings under Chapter 15A of the General Statutes, to proceedings making a collateral attack on any judgment entered in a criminal proceeding, or to appeals from orders of the trial courts pertaining to civil proceedings filed by a taxpayer pursuant to [G.S. 105-241.17](#).
- (b) Appeal lies of right directly to the Court of Appeals in any of the following cases:
- (1) From any final judgment of a superior court, other than the one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, except for a final judgment entered upon review of a court martial under [G.S. 127A-62](#).
 - (2) From any final judgment of a district court in a civil action.
 - (3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that does any of the following:
 - a. Affects a substantial right.
 - b. In effect determines the action and prevents a judgment from which an appeal might be taken.
 - c. Discontinues the action.
 - d. Grants or refuses a new trial.
 - e. Determines a claim prosecuted under [G.S. 50-19.1](#).
 - f. Grants temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly as applied against a party in a civil action. This subsection only applies where the State or a political subdivision of the State is a party in the civil action. This subsection does not apply to facial challenges to an act's validity heard by a three-judge panel pursuant to [G.S. 1-267.1](#).

(4) From any other order or judgment of the superior court from which an appeal is authorized by statute.

(c) **through** (e) Repealed by Session Laws 2013-411, s. 1, effective August 23, 2013.

History

1967, c. 108, s. 1; 1971, c. 377, s. 3; 1973, c. 704; 1977, c. 711, s. 4; 1987, c. 679; [1995, c. 204, s. 1](#); [2010-193, s. 17](#); [2013-411, s. 1](#); [2014-100, s. 18B.16\(e\)](#); [2014-102, s. 1](#).

General Statutes of North Carolina

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[N.C. Gen. Stat. § 115C-2](#)

Statutes current through the 2014 Regular Session

General Statutes of North Carolina > *CHAPTER 115C. ELEMENTARY AND SECONDARY EDUCATION*
> *SUBCHAPTER 01. GENERAL PROVISIONS* > *ARTICLE 1. DEFINITIONS AND PRELIMINARY PROVISIONS*

§ 115C-2. Administrative procedure

All action of agencies taken pursuant to this Chapter, as agency is defined in [G.S. 150B-2](#), is subject to the requirements of the Administrative Procedure Act, Chapter 150B of the General Statutes.

History

1981, c. 423, s. 1; 1987, c. 827, s. 1.

General Statutes of North Carolina

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N.C. Gen. Stat. § 115C-17

Statutes current through the 2014 Regular Session

**General Statutes of North Carolina > CHAPTER 115C. ELEMENTARY AND SECONDARY EDUCATION
> SUBCHAPTER 02 . ADMINISTRATIVE ORGANIZATION OF STATE AND LOCAL EDUCATION
AGENCIES > ARTICLE 2. STATE BOARD OF EDUCATION**

§ 115C-17. Rulemaking to implement ABC's Plan

- (a) G.S. 150B-21.2(a)(1) shall not apply to proposed rules adopted by the State Board of Education if the proposed rules are directly related to the implementation of this act [1995 (Reg. Sess., 1996), c. 716, s. 28].
- (b) Notwithstanding G.S. 150B-21.3(b), a permanent rule that is adopted by the State Board of Education, is approved by the Rules Review Commission, and is directly related to the implementation of this act, shall become effective five business days after the Commission delivers the rule to the Codifier of Rules, unless the rule specifies a later effective date. If the State Board of Education specifies a later effective date, the rule becomes effective upon that date. A permanent rule that is adopted by the State Board of Education that is directly related to the implementation of this act, but is not approved by the Rules Review Commission, shall not become effective.
- (c) G.S. 150B-21.4(b1) shall not apply to permanent rules the State Board of Education proposes to adopt if those rules are directly related to the implementation of this act [1995 (Reg. Sess., 1996), c. 716, s. 28].
- (d) The State Board of Education shall determine whether a proposed rule is directly related to this act based upon a finding that there is a rational relationship between the proposed rule and specific provisions of this act. A proposed rule may create, amend, or repeal a rule. The State Board shall indicate in the notice of proposed text that the rule is directly related to the implementation of this act and that the Board is proceeding under the authority granted by this act.
- (e) The State Board of Education shall provide written notice to all boards of county commissioners and all local boards of education of proposed rules that are directly related to the implementation of this act and that would affect the expenditures or revenues of a unit of local government under G.S. 150B-21.4(b). The notice shall state that a copy of the fiscal note may be obtained from the State Board.

History

1995 (Reg. Sess., 1996), c. 716, s. 28.

General Statutes of North Carolina

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N.C. Gen. Stat. § 115C-106.3

Statutes current through the 2014 Regular Session

**General Statutes of North Carolina > CHAPTER 115C. ELEMENTARY AND SECONDARY EDUCATION
> SUBCHAPTER 04. EDUCATION PROGRAM > ARTICLE 9. EDUCATION OF CHILDREN WITH
DISABILITIES > PART 1A. GENERAL PROVISIONS**

§ 115C-106.3. Definitions

The following definitions apply in this Article:

- (1) "Child with a disability" means a child with at least one disability who because of that disability requires special education and related services.
- (2) "Disability" includes mental retardation; hearing impairment, including deafness; speech or language impairment; visual impairment, including blindness; serious emotional disturbance; orthopedic impairment; autism; traumatic brain injury; other health impairments, specific learning disability, or other disability as may be required to be included under IDEA. For a child ages three through seven, this term also includes developmental delay.
- (3) "Dispute" means a disagreement between the parties.
- (3a) "Educational services" means all of the following:
 - a. The necessary instructional hours per week in the form and format as determined by the child's IEP team and consistent with federal and State law. The instruction shall be delivered by an appropriately qualified teacher to the extent required by federal and State law, which requires a free appropriate public education and the opportunity for a sound basic education.
 - b. Related services included in the child's IEP.
 - c. Behavior intervention services to the extent required by federal law.
- (4) "Free appropriate public education" means special education and related services that:
 - a. Are provided at public expense, under public supervision and direction, and without charge;
 - b. Meet the standards of the State Board;
 - c. Include an appropriate preschool, elementary school, or secondary school education in the State; and
 - d. Are provided in conformity with an individualized education program.
- (5) "Hearing officers" include administrative law judges as defined in [G.S. 150B-2\(1\)](#) and hearing review officers.
- (5a) "Homebound instruction" means educational services provided to a student outside the school setting.
- (6) "IDEA" means The Individuals with Disabilities Education Improvement Act, [20 U.S.C. § 1400](#), et seq., (2004), as amended, and federal regulations adopted under this act.
- (7) "IEP Team" is as defined in IDEA.
- (8) "Individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, implemented, and revised consistent with IDEA and State law.
- (9) "Infant or toddler with a disability" is as defined in IDEA.
- (10) "Least restrictive environment" means to the maximum extent appropriate, children with disabilities are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

- (11) "Local educational agency" includes any of the following that provides special education and related services to children with disabilities:
- A local school administrative unit.
 - A charter school.
 - The Department of Health and Human Services.
 - The Division of Adult Correction of the Department of Public Safety.
 - The Division of Juvenile Justice of the Department of Public Safety.
 - Any other State agency or unit of local government.
- (12) "Mediation" means an informal process conducted by a mediator with the objective of helping parties voluntarily settle their dispute.
- (13) "Mediator" means a neutral person who acts to encourage and facilitate a resolution of a dispute.
- (14) "Parent" means:
- A natural, adoptive, or foster parent;
 - A guardian, but not the State if the child is a ward of the State;
 - An individual acting in the place of a natural or adoptive parent, including a grandparent, stepparent, or other relative, and with whom the child lives;
 - An individual who is legally responsible for the child's welfare; or
 - A surrogate if one is appointed under [G.S. 115C-109.2](#).
- (15) "Party" or "Parties" means the local educational agency or the parents, or both.
- (16) "Petition" means a request for a due process hearing as provided for under IDEA.
- (17) "Preschool child with a disability" means a child with one or more disabilities who meets all of the following criteria:
- Has reached his or her third birthday and whose parents have requested services from the public schools.
 - Is not eligible to enroll in public kindergarten.
 - Because of the disability, needs special education and related services in order to prepare the child to benefit from the educational programs provided by the public schools, beginning with kindergarten.
- (18) "Related services" is as defined in IDEA.
- (18a) "Residence" or "reside" means the place where a child with a disability is entitled to be enrolled in a North Carolina public school under [G.S. 115C-366](#) except for the age requirements of that section. This definition shall not apply to children with disabilities who were (i) enrolled in a particular local school administrative unit on the last day of school for the 2006-2007 school year, or (ii) enrolled in and attending a school in a particular local school administrative unit on August 1, 2007, for the 2007-2008 school year for as long as they live within and are continuously enrolled in that local school administrative unit.
- (19) "Rules" includes rules, policies, and procedures. Rules as defined in [G.S. 150B-2\(8a\)](#) shall be adopted in accordance with Article 2A of Chapter 150B of the General Statutes.
- (20) "Special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. The term includes instruction in physical education and instruction conducted in a classroom, the home, a hospital or institution, and other settings.

History

1977, c. 927, s. 1; 1981, c. 423, s. 1; 1983, c. 247, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 23, 24; 1985, c. 479, s. 26(a); 1985, c. 780, ss. 3, 4; 1989(Reg. Sess., 1990), c. 1003, s. 5; 1996, 2nd Ex. Sess., ch. 18, s. 18.24(b); [2006-69, s. 2](#); [2007-292, s. 1](#); [2007-429, s. 1](#); [2008-90, s. 1](#); [2011-145, s. 19.1\(h\)](#), (l).

General Statutes of North Carolina

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Statutes current through the 2014 Regular Session

**General Statutes of North Carolina > CHAPTER 115C. ELEMENTARY AND SECONDARY EDUCATION
> SUBCHAPTER 04. EDUCATION PROGRAM > ARTICLE 9C. SCHOOLS FOR STUDENTS WITH
VISUAL AND HEARING IMPAIRMENTS**

§ 115C-150.13. Rule making

- (a) The State Board of Education shall adopt rules necessary for the Department of Public Instruction to implement this Article, including, at a minimum, rules to address eligibility for admission criteria. In determining rules for admission criteria, the State Board of Education shall take into account the following factors:
- (1) State and federal laws.
 - (2) Optimal academic and communicative outcomes for the child.
 - (3) Parental input and choice.
 - (4) Recommendations in a child's Individualized Education Program (IEP).
- (b) Rules shall be adopted in accordance with Chapter 150B of the General Statutes.

History

[2013-247, s. 2.](#)

General Statutes of North Carolina

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N.C. Gen. Stat. § 115C-218.1

Statutes current through the 2014 Regular Session

General Statutes of North Carolina > CHAPTER 115C. ELEMENTARY AND SECONDARY EDUCATION
> SUBCHAPTER 04 . EDUCATION PROGRAM > ARTICLE 14A. CHARTER SCHOOLS

§ 115C-218.1. Eligible applicants; contents of applications; submission of applications for approval

- (a) Any nonprofit corporation seeking to establish a charter school may apply to establish a charter school. If the applicant seeks to convert a public school to a charter school, the application shall include a statement signed by a majority of the teachers and instructional support personnel currently employed at the school indicating that they favor the conversion and evidence that a significant number of parents of children enrolled in the school favor conversion.
- (b) The application shall contain at least the following information:
 - (1) A description of a program that implements one or more of the purposes in [G.S. 115C-218](#).
 - (2) A description of student achievement goals for the school's educational program and the method of demonstrating that students have attained the skills and knowledge specified for those student achievement goals.
 - (3) The governance structure of the school including the names of the initial members of the board of directors of the nonprofit, tax-exempt corporation and the process to be followed by the school to ensure parental involvement. A teacher employed by the board of directors to teach in the charter school may serve as a nonvoting member of the board of directors for the charter school.
 - (4) The local school administrative unit in which the school will be located.
 - (5) Admission policies and procedures.
 - (6) A proposed budget for the school and evidence that the financial plan for the school is economically sound.
 - (7) Requirements and procedures for program and financial audits.
 - (8) A description of how the school will comply with [G.S. 115C-218.20](#), [115C-218.25](#), [115C-218.30](#), [115C-218.40](#), [115C-218.45](#), [115C-218.50](#), [115C-218.55](#), [115C-218.60](#), [115C-218.65](#), [115C-218.70](#), [115C-218.75](#), [115C-218.80](#), [115C-218.85](#), and [115C-218.90](#).
 - (9) Types and amounts of insurance coverage, including bonding insurance for the principal officers of the school, to be obtained by the charter school.
 - (10) The term of the charter.
 - (11) The qualifications required for individuals employed by the school.
 - (12) The procedures by which students can be excluded from the charter school and returned to a public school. Notwithstanding any law to the contrary, any local board may refuse to admit any student who is suspended or expelled from a charter school due to actions that would lead to suspension or expulsion from a public school under [G.S. 115C-390.5](#) through [G.S. 115C-390.11](#) until the period of suspension or expulsion has expired.
 - (13) The number of students to be served, which number shall be at least 65, and the minimum number of teachers to be employed at the school, which number shall be at least three. However, the charter school may serve fewer than 65 students or employ fewer than three teachers if the application contains a compelling reason, such as the school would serve a geographically remote and small student population.
 - (14) Information regarding the facilities to be used by the school and the manner in which administrative services of the school are to be provided.

- (c) The State Board shall establish reasonable fees of no less than five hundred dollars (\$ 500.00) and no more than one thousand dollars (\$ 1,000) for initial and renewal charter applications, in accordance with Article 2A of Chapter 150B of the General Statutes. No application fee shall be refunded in the event the application is rejected or the charter is revoked.

History

1995 (Reg. Sess., 1996), c. 731, s. 2; [1997-430, s. 1](#); [2011-282, s. 8](#); [2013-355, s. 1\(b\)](#); [2014-101, ss. 1](#), 7.

General Statutes of North Carolina

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N.C. Gen. Stat. § 143A-44.1

Statutes current through the 2014 Regular Session

General Statutes of North Carolina > ***CHAPTER 143A. STATE GOVERNMENT REORGANIZATION***
> ***ARTICLE 5. DEPARTMENT OF PUBLIC INSTRUCTION***

§ 143A-44.1. Creation

There is hereby created a Department of Public Instruction. The head of the Department of Public Instruction is the State Board of Education. Any provision of [G.S. 143A-9](#) to the contrary notwithstanding, the appointment of the State Board of Education shall be as prescribed in Article IX, Section (4)(1) of the Constitution.

History

[1995, c. 72, s. 3](#); [2008-187, s. 24](#).

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[N.C. Gen. Stat. § 143B-30.2](#)

Statutes current through the 2014 Regular Session

General Statutes of North Carolina > *CHAPTER 143B. EXECUTIVE ORGANIZATION ACT OF 1973*
> *ARTICLE 1. GENERAL PROVISIONS* > *PART 3. RULES REVIEW COMMISSION*

§ 143B-30.2. Purpose of Commission

The Rules Review Commission reviews administrative rules in accordance with Chapter 150B of the General Statutes.

History

1985 (Reg. Sess., 1986), c. 1028, s. 32; 1987, c. 285, ss. 1-5; [1991, c. 418, s. 12](#).

General Statutes of North Carolina

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N.C. Gen. Stat. § 150B-1

Statutes current through the 2014 Regular Session

General Statutes of North Carolina > CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT > ARTICLE 1. GENERAL PROVISIONS

§ 150B-1. Policy and scope

- (a) **Purpose.** -- This Chapter establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.
- (b) **Rights.** -- This Chapter confers procedural rights.
- (c) **Full Exemptions.** -- This Chapter applies to every agency except:
- (1) The North Carolina National Guard in exercising its court-martial jurisdiction.
 - (2) The Department of Health and Human Services in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes.
 - (3) The Utilities Commission.
 - (4) Repealed by Session Laws 2011-287, s. 21(a), effective June 24, 2011, and applicable to rules adopted on or after that date.
 - (5) Repealed by Session Laws 2011-401, s. 1.10(a), effective November 1, 2011.
 - (6) The State Board of Elections in administering the HAVA Administrative Complaint Procedure of Article 8A of Chapter 163 of the General Statutes.
 - (7) The North Carolina State Lottery.
 - (8) [Expired June 30, 2012.]
- (d) **Exemptions from Rule Making.** -- Article 2A of this Chapter does not apply to the following:
- (1) The Commission.
 - (2) Repealed by Session Laws 2000-189, s. 14, effective July 1, 2000.
 - (3) Repealed by Session Laws 2001-474, s. 34, effective November 29, 2001.
 - (4) The Department of Revenue, with respect to the notice and hearing requirements contained in Part 2 of Article 2A. With respect to the Secretary of Revenue's authority to redetermine the State net taxable income of a corporation under [G.S. 105-130.5A](#), the Department is subject to the rule-making requirements of [G.S. 105-262.1](#).
 - (5) The North Carolina Global TransPark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
 - (6) The Division of Adult Correction of the Department of Public Safety, with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees.
 - (7) The State Health Plan for Teachers and State Employees in administering the provisions of Article 3B of Chapter 135 of the General Statutes.
 - (8) The North Carolina Federal Tax Reform Allocation Committee, with respect to the adoption of the annual qualified allocation plan required by [26 U.S.C. § 42\(m\)](#), and any agency designated by the Committee to the extent necessary to administer the annual qualified allocation plan.
 - (9) The Department of Health and Human Services in adopting new or amending existing medical coverage policies for the State Medicaid and NC Health Choice programs pursuant to [G.S. 108A-54.2](#).

- (10) The Economic Investment Committee in developing criteria for the Job Development Investment Grant Program under Part 2F of Article 10 of Chapter 143B of the General Statutes.
 - (11) The North Carolina State Ports Authority with respect to fees established pursuant to [G.S. 136-262\(a\)\(11\)](#).
 - (12) The Department of Commerce and the Economic Investment Committee in developing criteria and administering the Site Infrastructure Development Program under [G.S. 143B-437.02](#).
 - (13) The Department of Commerce and the Governor's Office in developing guidelines for the One North Carolina Fund under Part 2H of Article 10 of Chapter 143B of the General Statutes.
 - (14) Repealed by Session Laws 2011-145, s. 8.18(a), as amended by Session Laws 2011-391, s. 19, effective June 15, 2011.
 - (15) Repealed by Session Laws 2009-445, s. 41(b), effective August 7, 2009.
 - (16) The State Ethics Commission with respect to Chapter 138A and Chapter 120C of the General Statutes.
 - (17) The Department of Commerce in developing guidelines for the NC Green Business Fund under Part 2B of Article 10 of Chapter 143B of the General Statutes.
 - (18) The Department of Commerce and the Economic Investment Committee in developing criteria and administering the Job Maintenance and Capital Development Fund under [G.S. 143B-437.012](#).
 - (18a) The Department of Commerce in developing criteria and administering the Expanded Gas Products Service to Agriculture Fund under [G.S. 143B-437.020](#).
 - (18b) (*Effective January 1, 2015 and expires July 1, 2020*) The Department of Commerce in administering the Film and Entertainment Grant Fund under [G.S. 143B-437.02A](#).
 - (19) Repealed by Session Laws 2011-145, s. 8.18(a), as amended by Session Laws 2011-391, s. 19, effective June 15, 2011.
 - (20) The Department of Health and Human Services in implementing, operating, or overseeing new 1915(b)/(c) Medicaid Waiver programs or amendments to existing 1915(b)/(c) Medicaid Waiver programs.
 - (21) Reserved for future codification purposes.
 - (22) The Department of Health and Human Services with respect to the content of State Plans, State Plan Amendments, and Waivers approved by the Centers for Medicare and Medicaid Services (CMS) for the North Carolina Medicaid Program and the NC Health Choice program.
 - (23) The Department of Cultural Resources with respect to admission fees or related activity fees at historic sites and museums pursuant to [G.S. 121-7.3](#).
 - (24) Tryon Palace Commission with respect to admission fees or related activity fees pursuant to [G.S. 143B-71](#).
 - (25) U.S.S. Battleship Commission with respect to admission fees or related activity fees pursuant to [G.S. 143B-73](#).
 - (26) The Board of Agriculture in the Department of Agriculture and Consumer Services with respect to annual admission fees for the State Fair. The Board shall annually post the admission fee schedule on its Web site and provide notice of the fee schedule, along with a citation to this section, to all persons named on the mailing list maintained pursuant to [G.S. 150B-21.2\(d\)](#).
- (e) **Exemptions From Contested Case Provisions.** -- The contested case provisions of this Chapter apply to all agencies and all proceedings not expressly exempted from the Chapter. The contested case provisions of this Chapter do not apply to the following:
- (1) The Department of Health and Human Services and the Department of Environment and Natural Resources in complying with the procedural safeguards mandated by Section 680 of Part H of Public Law 99-457 as amended (Education of the Handicapped Act Amendments of 1986).

- (2) Repealed by Session Laws 1993, c. 501, s. 29.
- (3), (4) Repealed by Session Laws 2001-474, s. 35, effective November 29, 2001.
- (5) Hearings required pursuant to the Rehabilitation Act of 1973, (Public Law 93-122), as amended and federal regulations promulgated thereunder. [G.S. 150B-51\(a\)](#) is considered a contested case hearing provision that does not apply to these hearings.
- (6) Repealed by Session Laws 2007-491, s. 2, effective January 1, 2008.
- (7) The Division of Adult Correction of the Department of Public Safety.
- (8) The Department of Transportation, except as provided in [G.S. 136-29](#).
- (9) The North Carolina Occupational Safety and Health Review Commission.
- (10) The North Carolina Global TransPark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
- (11) Hearings that are provided by the Department of Health and Human Services regarding the eligibility and provision of services for eligible assaultive and violent children, as defined in [G.S. 122C-3\(13a\)](#), shall be conducted pursuant to the provisions outlined in G.S. 122C, Article 4, Part 7.
- (12) The State Health Plan for Teachers and State Employees respect to disputes involving the performance, terms, or conditions of a contract between the Plan and an entity under contract with the Plan.
- (13) The State Health Plan for Teachers and State Employees with respect to determinations by the Executive Administrator and Board of Trustees, the Plan's designated utilization review organization, or a self-funded health maintenance organization under contract with the Plan that an admission, availability of care, continued stay, or other health care service has been reviewed and, based upon the information provided, does not meet the Plan's requirements for medical necessity, appropriateness, health care setting, or level of care or effectiveness, and the requested service is therefore denied, reduced, or terminated.
- (14) The Department of Public Safety for hearings and appeals authorized under Chapter 20 of the General Statutes.
- (15) The Wildlife Resources Commission with respect to determinations of whether to authorize or terminate the authority of a person to sell licenses and permits as a license agent of the Wildlife Resources Commission.
- (16) Repealed by Session Laws 2011-399, s. 3, effective July 25, 2011.
- (17) The Department of Health and Human Services with respect to the review of North Carolina Health Choice Program determinations regarding delay, denial, reduction, suspension, or termination of health services, in whole or in part, including a determination about the type or level of services.
- (18) Hearings provided by the Department of Health and Human Services to decide appeals pertaining to adult care home resident discharges initiated by adult care homes under [G.S. 131D-4.8](#).
- (19) The Industrial Commission.
- (20) The Department of Commerce for hearings and appeals authorized under Chapter 96 of the General Statutes.
- (21) The Department of Health and Human Services for actions taken under [G.S. 122C-124.2](#).
- (f) **Exemption for the University of North Carolina.** -- Except as provided in [G.S. 143-135.3](#), no Article in this Chapter except Article 4 applies to The University of North Carolina.
- (g) **Exemption for the State Board of Community Colleges.** -- Except as provided in [G.S. 143-135.3](#), no Article in this Chapter except Article 4 applies to the State Board of Community Colleges.

History

1973, c. 1331, s. 1; 1975, c. 390; c. 716, s. 5; c. 721, s. 1; c. 742, s. 4; 1981, c. 614, s. 22; 1983, c. 147, s. 2; c. 927, s. 13; 1985, c. 746, ss. 1, 19; 1987, c. 112, s. 2; c. 335, s. 2; c. 536, s. 1; c. 847, s. 2; c. 850, s. 20; 1987 (Reg. Sess., 1988), c. 1082, s. 14; c. 1111, s. 9; [1989, c. 76, s. 29](#); [c. 168, s. 33](#); [c. 373, s. 2](#); [c. 538, s. 1](#); [c. 751, s. 7\(44\)](#); 1989 (Reg. Sess., 1990), c. 1004, s. 36; [1991, c. 103, s. 1](#); [c. 418, s. 2](#); [c. 477, s. 1](#); [c. 749, ss. 9](#), 10; 1991 (Reg. Sess., 1992), c. 1030, s. 46; [1993, c. 501, s. 29](#); 1993 (Reg. Sess., 1994), c. 777, ss. 4(j), 4(k); [1995, c. 249, s. 4](#); [c. 507, s. 27.8\(m\)](#); [1997-35, s. 2](#); [1997-278, s. 1](#); [1997-412, s. 8](#); [1997-443, ss. 11A.110](#), 11A.119(a); [2000-189, s. 14](#); [2001-192, s. 1](#); [2001-299, s. 1](#); [2001-395, s. 6\(c\)](#); [2001-424, ss. 6.20\(b\)](#), 21.20(c); [2001-446, s. 5\(d\)](#); [2001-474, ss. 34](#), 35; [2001-496, s. 8\(c\)](#); [2002-99, s. 7\(b\)](#); [2002-159, ss. 31.5\(b\)](#), 49; [2002-172, s. 2.6](#); [2002-190, s. 16](#); [2003-226, s. 17\(b\)](#); [2003-416, s. 2](#); [2003-435, 2nd Ex. Sess., s. 1.3](#); [2004-88, s. 1\(e\)](#); [2005-133, s. 10](#); [2005-276, s. 31.1\(ff\)](#); [2005-300, s. 1](#); [2005-344, s. 11.1](#); [2005-455, s. 3.3](#); [2006-66, ss. 12.8\(c\)](#), 8.10(d); [2006-201, s. 2\(a\)](#); [2007-323, ss. 13.2\(c\)](#), 28.22A(o); [2007-345, s. 12](#); [2007-491, s. 2](#); 2007-552, 1st. Ex. Sess., s. 3; [2008-107, s. 10.15A\(f\)](#); [2008-168, s. 5\(a\)](#); [2008-187, s. 26\(b\)](#); [2009-445, s. 41\(b\)](#); [2009-475, s. 4](#); [2009-523, s. 2\(a\)](#); [2010-70, s. 2](#); [2011-85, s. 2.11\(a\)](#); [2011-145, ss. 8.18\(a\)](#), (b), 14.6(j), 19.1(g), (h); [2011-264, s. 4](#); [2011-272, s. 5](#); [2011-287, s. 21\(a\)](#), (b); [2011-391, s. 19](#); [2011-399, ss. 2](#), 3; [2011-401, ss. 1.10\(a\)](#), (b); [2012-43, s. 3](#); [2013-85, s. 10](#); [2013-360, ss. 19.2\(d\)](#), 12H.6(c), 12H.9(c); [2014-100, ss. 13.2\(a\)](#), 15.13(b), 15.14B(b); [2014-103, s. 17](#).

General Statutes of North Carolina

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[N.C. Gen. Stat. § 150B-2](#)

Statutes current through the 2014 Regular Session

General Statutes of North Carolina > *CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT* > *ARTICLE 1. GENERAL PROVISIONS*

§ 150B-2. Definitions

As used in this Chapter,

- (1) "Administrative law judge" means a person appointed under [G.S. 7A-752](#), [7A-753](#), or [7A-757](#).
- (1a) "Agency" means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.
- (1b) "Adopt" means to take final action to create, amend, or repeal a rule.
- (1c) "Codifier of Rules" means the Chief Administrative Law Judge of the Office of Administrative Hearings or a designated representative of the Chief Administrative Law Judge.
- (1d) "Commission" means the Rules Review Commission.
- (2) "Contested case" means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. "Contested case" does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.
- (2a) Repealed by Session Laws 1991, c. 418, s. 3.
- (2b) "Hearing officer" means a person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.
- (3) "License" means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes and occupational licenses.
- (4) "Licensing" means any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. "Licensing" does not include controversies over whether an examination was fair or whether the applicant passed the examination.
- (4a) "Occupational license" means any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.
- (4b) "Occupational licensing agency" means any board, commission, committee or other agency of the State of North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within a particular profession, occupation or field of endeavor, and which is authorized to issue and revoke licenses. "Occupational licensing agency" does not include State agencies or departments which may as only a part of their regular function issue permits or licenses.
- (5) "Party" means any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.
- (6) "Person aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.
- (7) "Person" means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name.

- (7a) "Policy" means any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency which is intended and used purely to assist a person to comply with the law, such as a guidance document.
- (8) "Residence" means domicile or principal place of business.
- (8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in [G.S. 143A-11](#) or [143B-6](#), including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.
 - b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by [G.S. 143A-2](#) or [G.S. 143B-3](#), by an occupational licensing board, as defined by [G.S. 93B-1](#), or by the State Board of Elections.
 - c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - e. Statements of agency policy made in the context of another proceeding, including:
 - 1. Declaratory rulings under [G.S. 150B-4](#).
 - 2. Orders establishing or fixing rates or tariffs.
 - f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
 - g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.
 - h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
 - i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.
 - j. Establishment of the interest rate that applies to tax assessments under [G.S. 105-241.21](#) and the variable component of the excise tax on motor fuel under [G.S. 105-449.80](#).
 - k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in [G.S. 131E-176\(25\)](#), reviewed by the Commission for compliance with [G.S. 131E-176\(25\)](#), and approved by the Governor.
 - l. Standards adopted by the Office of Information Technology Services applied to information technology as defined by [G.S. 147-33.81](#).
- (8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.
- (8c) "Substantial evidence" means relevant evidence a reasonable mind might accept as adequate to support a conclusion.
- (9) Repealed by Session Laws 1991, c. 418, s. 3.

History

1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; [1991, c. 418, s. 3](#); [c. 477, ss. 3.1](#), 3.2, 9; [1995, c. 390, s. 29](#); [1996, 2nd Ex. Sess., c. 18, s. 7.10\(g\)](#); [1997-456, s. 27](#); [2003-229, s. 12](#); [2007-491, s. 44\(1\)b](#); [2011-13, s. 2](#); [2011-398, ss. 15](#), 61.2; [2013-188, s. 7](#); [2013-382, s. 9.1\(c\)](#); [2013-413, s. 1](#).

General Statutes of North Carolina

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N.C. Gen. Stat. § 150B-19

Statutes current through the 2014 Regular Session

General Statutes of North Carolina > **CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT** > **ARTICLE 2A. RULES** > **PART 1. GENERAL PROVISIONS**

§ 150B-19. Restrictions on what can be adopted as a rule

An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in [G.S. 150B-21.9\(a\)\(3\)](#).
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:
 - a. A service to a State, federal, or local governmental unit.
 - b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
 - c. A transcript of a public hearing.
 - d. A conference, workshop, or course.
 - e. Data processing services.
- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.
- (7) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.

History

1973, c. 1331, s. 1; 1985, c. 746, s. 1; [1991, c. 418, s. 1](#); [1996, 2nd Ex. Sess., c. 18, s. 7.10\(a\)](#); [2011-13, s. 1](#); [2011-398, s. 61.2](#).

General Statutes of North Carolina

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[N.C. Gen. Stat. § 150B-19.1](#)

Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT](#) > [ARTICLE 2A. RULES](#) > [PART 1. GENERAL PROVISIONS](#)

§ 150B-19.1. Requirements for agencies in the rule-making process

- (a) In developing and drafting rules for adoption in accordance with this Article, agencies shall adhere to the following principles:
 - (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
 - (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
 - (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
 - (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
 - (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by [G.S. 150B-21.2\(c\)](#).
 - (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.
- (b) Each agency subject to this Article shall conduct an annual review of its rules to identify existing rules that are unnecessary, unduly burdensome, or inconsistent with the principles set forth in subsection (a) of this section. The agency shall repeal any rule identified by this review.
- (c) Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:
 - (1) The text of a proposed rule.
 - (2) An explanation of the proposed rule and the reason for the proposed rule.
 - (3) The federal certification required by subsection (g) of this section.
 - (4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.
 - (5) Any fiscal note that has been prepared for the proposed rule.

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

- (d) Each agency shall determine whether its policies and programs overlap with the policies and programs of another agency. In the event two or more agencies' policies and programs overlap, the agencies shall coordinate the rules adopted by each agency to avoid unnecessary, unduly burdensome, or inconsistent rules.
- (e) Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with [G.S. 150B-21.2](#), the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.

- (f) If the agency determines that a proposed rule will have a substantial economic impact as defined in [G.S. 150B-21.4\(b1\)](#), the agency shall consider at least two alternatives to the proposed rule. The alternatives may have been identified by the agency or by members of the public.
- (g) Whenever an agency proposes a rule that is purported to implement a federal law, or required by or necessary for compliance with federal law, or on which the receipt of federal funds is conditioned, the agency shall:
 - (1) Prepare a certification identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons why the proposed rule is required by federal law. If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons for that opinion.
 - (2) Post the certification on the agency Web site in accordance with subsection (c) of this section.
 - (3) Maintain a copy of the federal law and provide to the Office of State Budget and Management the citation to the federal law requiring or pertaining to the proposed rule.
- (h) Repealed by Session Laws 2014-120, s. 6(a), effective September 18, 2014, and applicable to proposed rules published on or after that date.

History

[2011-398, s. 2](#); [2012-187, s. 3](#); [2013-143, s. 1.1](#); [2014-120, s. 6\(a\)](#).

General Statutes of North Carolina

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[N.C. Gen. Stat. § 150B-21.1](#)

Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT](#) > [ARTICLE 2A. RULES](#) > [PART 2. ADOPTION OF RULES](#)

§ 150B-21.1. Procedure for adopting a temporary rule

- (a) **Adoption.** -- An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of [G.S. 150B-21.2](#) would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:
- (1) A serious and unforeseen threat to the public health, safety, or welfare.
 - (2) The effective date of a recent act of the General Assembly or the United States Congress.
 - (3) A recent change in federal or State budgetary policy.
 - (4) A recent federal regulation.
 - (5) A recent court order.
 - (6) The need for a rule establishing review criteria as authorized by [G.S. 131E-183\(b\)](#) to complement or be made consistent with the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan, and the proposed rule and a notice of public hearing is submitted to the Codifier of Rules prior to the effective date of the Plan.
 - (7) The need for the Wildlife Resources Commission to establish any of the following:
 - a. No wake zones.
 - b. Hunting or fishing seasons, including provisions for manner of take or any other conditions required for the implementation of such season.
 - c. Hunting or fishing bag limits.
 - d. Management of public game lands as defined in [G.S. 113-129\(8a\)](#).
 - (8) The need for the Secretary of State to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes, to adopt uniform Statements of Policy that have been officially adopted by the North American Securities Administrators Association, Inc., for the purpose of promoting uniformity of state securities regulation, and to adopt rules governing the conduct of hearings pursuant to this Chapter.
 - (9) The need for the Commissioner of Insurance to implement the provisions of [G.S. 58-2-205](#).
 - (10) The need for the Chief Information Officer to implement the information technology procurement provisions of Article 3D of Chapter 147 of the General Statutes.
 - (11) The need for the State Board of Elections to adopt a temporary rule after prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical for one or more of the following:
 - a. In accordance with the provisions of [G.S. 163-22.2](#).
 - b. To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.
 - (12) The need for an agency to adopt a temporary rule to implement the provisions of any of the following acts until all rules necessary to implement the provisions of the act have become effective as either temporary or permanent rules:

- a. Repealed by Session Laws 2000-148, s. 5, effective July 1, 2002.
- b. Repealed by Session Laws 2000-69, s. 5, effective July 1, 2003.
- (13), (14) Reserved.
- (15) Expired pursuant to Session Laws 2002-164, s. 5, effective October 1, 2004.
- (16) Expired pursuant to Session Laws 2003-184, s. 3, effective July 1, 2005.
- (17) To maximize receipt of federal funds for the Medicaid or NC Health Choice programs within existing State appropriations, to reduce Medicaid or NC Health Choice expenditures, and to reduce Medicaid and NC Health Choice fraud and abuse.
- (a1) Recodified as subdivision (a)(16) of this section by Session Laws 2004-156, s. 1.
- (a2) A recent act, change, regulation, or order as used in subdivisions (2) through (5) of subsection (a) of this section means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission. Upon written request of the agency, the Commission may waive the 210-day requirement upon consideration of the degree of public benefit, whether the agency had control over the circumstances that required the requested waiver, notice to and opposition by the public, the need for the waiver, and previous requests for waivers submitted by the agency.
- (a3) Unless otherwise provided by law, the agency shall:
 - (1) At least 30 business days prior to adopting a temporary rule, submit the rule and a notice of public hearing to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule and the notice of public hearing on the Internet to be posted within five business days.
 - (2) At least 30 business days prior to adopting a temporary rule, notify persons on the mailing list maintained pursuant to [G.S. 150B-21.2\(d\)](#) and any other interested parties of its intent to adopt a temporary rule and of the public hearing.
 - (3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.
 - (4) Hold at least one public hearing on the proposed temporary rule no less than five days after the rule and notice have been published.
- (a4) An agency must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in [G.S. 150B-21.2](#) would be contrary to the public interest and why the immediate adoption of the rule is required. If the temporary rule establishes a new fee or increases an existing fee, the agency shall include in the written statement that it has complied with the requirements of [G.S. 12-3.1](#). The statement must be signed by the head of the agency adopting the temporary rule.
- (b) **Review.** -- When an agency adopts a temporary rule it must submit the rule and the agency's written statement of its findings of the need for the rule to the Rules Review Commission. Within 15 business days after receiving the proposed temporary rule, the Commission shall review the agency's written statement of findings of need for the rule and the rule to determine whether the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in [G.S. 150B-21.9](#). The Commission shall direct a member of its staff who is an attorney licensed to practice law in North Carolina to review the statement of findings of need and the rule. The staff member shall make a recommendation to the Commission, which must be approved by the Commission or its designee. The Commission's designee shall be a panel of at least three members of the Commission. In reviewing the statement, the Commission or its designee may consider any information submitted by the agency or another person. If the Commission or its designee finds that the statement meets the criteria listed in subsection (a) of this section and the rule meets the standards in [G.S. 150B-21.9](#), the Commission or its designee must approve the temporary rule and deliver the rule to the Codifier of Rules within two business days of approval. The Codifier of Rules must enter the rule into the North Carolina Administrative Code on the sixth business day following receipt from the Commission or its designee.

- (b1) If the Commission or its designee finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in [G.S. 150B-21.9](#), the Commission or its designee must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Commission or its designee must review the additional findings or new statement within five business days after the agency submits the additional findings or new statement. If the Commission or its designee again finds that the statement does not meet the criteria listed in subsection (a) of this section or that the rule does not meet the standards in [G.S. 150B-21.9](#), the Commission or its designee must immediately notify the head of the agency and return the rule to the agency.
- (b2) If an agency decides not to provide additional findings or submit a new statement when notified by the Commission or its designee that the agency's findings of need for a rule do not meet the required criteria or that the rule does not meet the required standards, the agency must notify the Commission or its designee of its decision. The Commission or its designee shall then return the rule to the agency. When the Commission returns a rule to an agency in accordance with this subsection, the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.
- (b3) Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of [G.S. 12-3.1](#), the Codifier of Rules shall not enter the rule into the Code.
- (c) **Standing.** -- A person aggrieved by a temporary rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in [G.S. 150B-21.9](#). The court shall not grant an ex parte temporary restraining order.
- (c1) Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.
- (d) **Effective Date and Expiration.** -- A temporary rule becomes effective on the date specified in [G.S. 150B-21.3](#). A temporary rule expires on the earliest of the following dates:
- (1) The date specified in the rule.
 - (2) The effective date of the permanent rule adopted to replace the temporary rule, if the Commission approves the permanent rule.
 - (3) The date the Commission returns to an agency a permanent rule the agency adopted to replace the temporary rule.
 - (4) The effective date of an act of the General Assembly that specifically disapproves a permanent rule adopted to replace the temporary rule.
 - (5) 270 days from the date the temporary rule was published in the North Carolina Register, unless the permanent rule adopted to replace the temporary rule has been submitted to the Commission.
- (e) **Publication.** -- When the Codifier of Rules enters a temporary rule in the North Carolina Administrative Code, the Codifier must publish the rule in the North Carolina Register.

History

1973, c. 1331, s. 1; 1981, c. 688, s. 12; 1981 (Reg. Sess., 1982), c. 1232, s. 1; 1983, c. 857; c. 927, ss. 4, 8; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), 1(8); 1987, c. 285, ss. 10-12; [1991, c. 418, s. 1](#); 1991 (Reg. Sess., 1992), c. 900, s. 149; [1993, c. 553, s. 54](#); [1995, c. 507, s. 27.8\(c\)](#); [1996, 2nd Ex. Sess., c. 18, ss. 7.10\(c\)](#), (d); [1997-403, ss. 1-3](#); [1998-127, s. 2](#); [1998-212, s. 26B\(h\)](#); [1999-434, s. 16](#); [1999-453, s. 5\(a\)](#); [2000-69, ss. 3, 5](#); [2000-148, ss. 4, 5](#); [2001](#)

[-126, s. 12](#); [2001-421, ss. 2.3](#), 5.3; [2001-424, ss. 27.17\(b\)](#), (c), 27.22(a), (b); [2001-487, s. 21\(g\)](#); [2002-97, ss. 2](#), 3; [2002-164, s. 4.6](#); [2003-184, s. 3](#); [2003-229, s. 2](#); [2003-413, ss. 27](#), 29; [2004-156, s. 1](#); [2011-398, s. 4](#); [2013-360, s. 12H.9\(d\)](#); [2013-413, s. 39](#).

General Statutes of North Carolina

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Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT](#) > [ARTICLE 2A. RULES](#) > [PART 2. ADOPTION OF RULES](#)

§ 150B-21.1A. Adoption of an emergency rule

- (a) **Adoption.** -- An agency may adopt an emergency rule without prior notice or hearing or upon any abbreviated notice or hearing the agency finds practical when it finds that adherence to the notice and hearing requirements of this Part would be contrary to the public interest and that the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety. When an agency adopts an emergency rule, it must simultaneously commence the process for adopting a temporary rule by submitting the rule to the Codifier of Rules for publication on the Internet in accordance with [G.S. 150B-21.1\(a3\)](#). The Department of Health and Human Services or the appropriate rule-making agency within the Department may adopt emergency rules in accordance with this section when a recent act of the General Assembly or the United States Congress or a recent change in federal regulations authorizes new or increased services or benefits for children and families and the emergency rule is necessary to implement the change in State or federal law.
- (b) **Review.** -- An agency must prepare a written statement of its findings of need for an emergency rule. The statement must be signed by the head of the agency adopting the rule. When an agency adopts an emergency rule, it must submit the rule and the agency's written statement of its findings of the need for the rule to the Codifier of Rules. Within two business days after an agency submits an emergency rule, the Codifier of Rules must review the agency's written statement of findings of need for the rule to determine whether the statement of need meets the criteria in subsection (a) of this section. In reviewing the statement, the Codifier of Rules may consider any information submitted by the agency or another person. If the Codifier of Rules finds that the statement meets the criteria, the Codifier of Rules must notify the head of the agency and enter the rule in the North Carolina Administrative Code on the sixth business day following approval by the Codifier of Rules.

If the Codifier of Rules finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency. The agency may supplement its statement of need with additional findings or submit a new statement. If the agency provides additional findings or submits a new statement, the Codifier of Rules must review the additional findings or new statement within one business day after the agency submits the additional findings or new statement. If the Codifier of Rules again finds that the statement does not meet the criteria in subsection (a) of this section, the Codifier of Rules must immediately notify the head of the agency.

If an agency decides not to provide additional findings or submit a new statement when notified by the Codifier of Rules that the agency's findings of need for a rule do not meet the required criteria, the agency must notify the Codifier of Rules of its decision. The Codifier of Rules must then enter the rule in the North Carolina Administrative Code on the sixth business day after receiving notice of the agency's decision. Notwithstanding any other provision of this subsection, if the agency has not complied with the provisions of [G.S. 12-3.1](#), the Codifier of Rules shall not enter the rule into the Code.

- (c) **Standing.** -- A person aggrieved by an emergency rule adopted by an agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes. In the action, the court shall determine whether the agency's written statement of findings of need for the rule meets the criteria listed in subsection (a) of this section and whether the rule meets the standards in [G.S. 150B-21.9](#). The court shall not grant an ex parte temporary restraining order.

Filing a petition for rule making or a request for a declaratory ruling with the agency that adopted the rule is not a prerequisite to filing an action under this subsection. A person who files an action for declaratory judgment under this subsection must serve a copy of the complaint on the agency that adopted the rule being contested, the Codifier of Rules, and the Commission.

- (d) **Effective Date and Expiration.** -- An emergency rule becomes effective on the date specified in [G.S. 150B-21.3](#). An emergency rule expires on the earliest of the following dates:
- (1) The date specified in the rule.
 - (2) The effective date of the temporary rule adopted to replace the emergency rule, if the Commission approves the temporary rule.
 - (3) The date the Commission returns to an agency a temporary rule the agency adopted to replace the emergency rule.
 - (4) Sixty days from the date the emergency rule was published in the North Carolina Register, unless the temporary rule adopted to replace the emergency rule has been submitted to the Commission.
- (e) **Publication.** -- When the Codifier of Rules enters an emergency rule in the North Carolina Administrative Code, the Codifier of Rules must publish the rule in the North Carolina Register.

History

[2003-229, s. 3.](#)

General Statutes of North Carolina

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Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT](#) > [ARTICLE 2A. RULES](#) > [PART 2. ADOPTION OF RULES](#)

§ 150B-21.2. Procedure for adopting a permanent rule

- (a) **Steps.** -- Before an agency adopts a permanent rule, the agency must comply with the requirements of [G.S. 150B-19.1](#), and it must take the following actions:
- (1) Publish a notice of text in the North Carolina Register.
 - (2) When required by [G.S. 150B-21.4](#), prepare or obtain a fiscal note for the proposed rule.
 - (3) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
 - (4) When required by subsection (e) of this section, hold a public hearing on the proposed rule after publication of the proposed text of the rule.
 - (5) Accept oral or written comments on the proposed rule as required by subsection (f) of this section.
- (b) Repealed by Session Laws 2003-229, s. 4, effective July 1, 2003.
- (c) **Notice of Text.** -- A notice of the proposed text of a rule must include all of the following:
- (1) The text of the proposed rule, unless the rule is a readoption without substantive changes to the existing rule proposed in accordance with [G.S. 150B-21.3A](#).
 - (2) A short explanation of the reason for the proposed rule.
 - (2a) A link to the agency's Web site containing the information required by [G.S. 150B-19.1\(c\)](#).
 - (3) A citation to the law that gives the agency the authority to adopt the rule.
 - (4) The proposed effective date of the rule.
 - (5) The date, time, and place of any public hearing scheduled on the rule.
 - (6) Instructions on how a person may demand a public hearing on a proposed rule if the notice does not schedule a public hearing on the proposed rule and subsection (e) of this section requires the agency to hold a public hearing on the proposed rule when requested to do so.
 - (7) The period of time during which and the person within the agency to whom written comments may be submitted on the proposed rule.
 - (8) If a fiscal note has been prepared for the rule, a statement that a copy of the fiscal note can be obtained from the agency.
 - (9) Repealed by Session Laws 2013-143, s. 1, effective June 19, 2013.
- (d) **Mailing List.** -- An agency must maintain a mailing list of persons who have requested notice of rule making. When an agency publishes in the North Carolina Register a notice of text of a proposed rule, it must mail a copy of the notice or text to each person on the mailing list who has requested notice on the subject matter described in the notice or the rule affected. An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.
- (e) **Hearing.** -- An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

- (f) **Comments.** -- An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.
- (g) **Adoption.** -- An agency shall not adopt a rule until the time for commenting on the proposed text of the rule has elapsed and shall not adopt a rule if more than 12 months have elapsed since the end of the time for commenting on the proposed text of the rule. Prior to adoption, an agency shall review any fiscal note that has been prepared for the proposed rule and consider any public comments received in connection with the proposed rule or the fiscal note. An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule for the time set in subsection (f) of this section.

An adopted rule differs substantially from a proposed rule if it does one or more of the following:

- (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
- (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
- (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

When an agency adopts a rule, it shall not take subsequent action on the rule without following the procedures in this Part. An agency must submit an adopted rule to the Rules Review Commission within 30 days of the agency's adoption of the rule.

- (h) **Explanation.** -- An agency must issue a concise written statement explaining why the agency adopted a rule if, within 15 days after the agency adopts the rule, a person asks the agency to do so. The explanation must state the principal reasons for and against adopting the rule and must discuss why the agency rejected any arguments made or considerations urged against the adoption of the rule. The agency must issue the explanation within 15 days after receipt of the request for an explanation.
- (i) **Record.** -- An agency must keep a record of a rule-making proceeding. The record must include all written comments received, a transcript or recording of any public hearing held on the rule, any fiscal note that has been prepared for the rule, and any written explanation made by the agency for adopting the rule.

History

1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 63; 1977, c. 915, s. 2; 1983, c. 927, ss. 3, 7; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(1), (7); 1987, c. 285, ss. 7-9; [1989, c. 5, s. 1](#); [1991, c. 418, s. 1](#); [1995, c. 507, s. 27.8\(d\)](#); [1996, 2nd Ex. Sess., c. 18, s. 7.10\(e\)](#); [2003-229, s. 4](#); [2011-398, s. 5](#); [2013-143, s. 1](#); [2013-413, s. 3\(a\)](#).

[N.C. Gen. Stat. § 150B-21.3](#)

Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT](#) > [ARTICLE 2A. RULES](#) > [PART 2. ADOPTION OF RULES](#)

§ 150B-21.3. Effective date of rules

- (a) **Temporary and Emergency Rules.** -- A temporary rule or an emergency rule becomes effective on the date the Codifier of Rules enters the rule in the North Carolina Administrative Code.
- (b) **Permanent Rule.** -- A permanent rule approved by the Commission becomes effective on the first day of the month following the month the rule is approved by the Commission, unless the Commission received written objections to the rule in accordance with subsection (b2) of this section, or unless the agency that adopted the rule specifies a later effective date.
- (b1) **Delayed Effective Dates.** -- If the Commission received written objections to the rule in accordance with subsection (b2) of this section, the rule becomes effective on the earlier of the thirty-first legislative day or the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Commission approved the rule, unless a different effective date applies under this section. If a bill that specifically disapproves the rule is introduced in either house of the General Assembly before the thirty-first legislative day of that session, the rule becomes effective on the earlier of either the day an unfavorable final action is taken on the bill or the day that session of the General Assembly adjourns without ratifying a bill that specifically disapproves the rule. If the agency adopting the rule specifies a later effective date than the date that would otherwise apply under this subsection, the later date applies. A permanent rule that is not approved by the Commission or that is specifically disapproved by a bill enacted into law before it becomes effective does not become effective.

A bill specifically disapproves a rule if it contains a provision that refers to the rule by appropriate North Carolina Administrative Code citation and states that the rule is disapproved. Notwithstanding any rule of either house of the General Assembly, any member of the General Assembly may introduce a bill during the first 30 legislative days of any regular session to disapprove a rule that has been approved by the Commission and that either has not become effective or has become effective by executive order under subsection (c) of this section.

- (b2) **Objection.** -- Any person who objects to the adoption of a permanent rule may submit written comments to the agency. If the objection is not resolved prior to adoption of the rule, a person may submit written objections to the Commission. If the Commission receives written objections from 10 or more persons, no later than 5:00 P.M. of the day following the day the Commission approves the rule, clearly requesting review by the legislature in accordance with instructions contained in the notice pursuant to [G.S. 150B-21.2\(c\)\(9\)](#), and the Commission approves the rule, the rule will become effective as provided in subsection (b1) of this section. The Commission shall notify the agency that the rule is subject to legislative disapproval on the day following the day it receives 10 or more written objections. When the requirements of this subsection have been met and a rule is subject to legislative disapproval, the agency may adopt the rule as a temporary rule if the rule would have met the criteria listed in [G.S. 150B-21.1\(a\)](#) at the time the notice of text for the permanent rule was published in the North Carolina Register. If the Commission receives objections from 10 or more persons clearly requesting review by the legislature, and the rule objected to is one of a group of related rules adopted by the agency at the same time, the agency that adopted the rule may cause any of the other rules in the group to become effective as provided in subsection (b1) of this section by submitting a written statement to that effect to the Commission before the other rules become effective.
- (c) **Executive Order Exception.** -- The Governor may, by executive order, make effective a permanent rule that has been approved by the Commission but the effective date of which has been delayed in accordance with subsection (b1) of this section upon finding that it is necessary that the rule become effective in order to protect public health, safety, or welfare. A rule made effective by executive order becomes effective on the date the order is issued or at a later date specified in the order. When the Codifier of Rules enters in the North Carolina Administrative Code a rule made effective by executive order, the entry must reflect this action.

A rule that is made effective by executive order remains in effect unless it is specifically disapproved by the General Assembly in a bill enacted into law on or before the day of adjournment of the regular session of the General Assembly that begins at least 25 days after the date the executive order is issued. A rule that is made effective by executive order and that is specifically disapproved by a bill enacted into law is repealed as of the date specified in the bill. If a rule that is made effective by executive order is not specifically disapproved by a bill enacted into law within the time set by this subsection, the Codifier of Rules must note this in the North Carolina Administrative Code.

(c1) Fees. -- Notwithstanding any other provision of this section, a rule that establishes a new fee or increases an existing fee shall not become effective until the agency has complied with the requirements of [G.S. 12-3.1](#).

(d) Legislative Day and Day of Adjournment. -- As used in this section:

- (1) A "legislative day" is a day on which either house of the General Assembly convenes in regular session.
- (2) The "day of adjournment" of a regular session held in an odd-numbered year is the day the General Assembly adjourns by joint resolution or by operation of law for more than 30 days.
- (3) The "day of adjournment" of a regular session held in an even-numbered year is the day the General Assembly adjourns sine die.

(e) OSHA Standard. -- A permanent rule concerning an occupational safety and health standard that is adopted by the Occupational Safety and Health Division of the Department of Labor and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor becomes effective on the date the Division delivers the rule to the Codifier of Rules, unless the Division specifies a later effective date. If the Division specifies a later effective date, the rule becomes effective on that date.

(f) Technical Change. -- A permanent rule for which no notice or hearing is required under [G.S. 150B-21.5\(a\)\(1\)](#) through (a)(5) or [G.S. 150B-21.5\(b\)](#) becomes effective on the first day of the month following the month the rule is approved by the Rules Review Commission.

History

[1991, c. 418, s. 1](#); [1995, c. 507, s. 27.8\(e\)](#); 1995 (Reg. Sess., 1996), c. 742, s. 43; [1996, 2nd Ex. Sess., c. 18, s. 7.10\(f\)](#); [1997-34, s. 3](#); [2001-487, s. 80\(b\)](#); [2002-97, s. 5](#); [2003-229, s. 5](#); [2004-156, ss. 2, 3](#); [2012-194, s. 66.5\(b\)](#).

[N.C. Gen. Stat. § 150B-21.8](#)

Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT](#) > [ARTICLE 2A. RULES](#) > [PART 3. REVIEW BY COMMISSION](#)

§ 150B-21.8. Review of rule by Commission

- (a) **Emergency Rule.** -- The Commission does not review an emergency rule.
- (b) **Temporary and Permanent Rules.** -- An agency must submit temporary and permanent rules adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code. The Commission reviews a temporary or permanent rule in accordance with the standards in [G.S. 150B-21.9](#) and follows the procedure in this Part in its review of a rule.
- (c) **Scope.** -- When the Commission reviews an amendment to a permanent rule, it may review the entire rule that is being amended. The procedure in [G.S. 150B-21.12](#) applies when the Commission objects to a part of a permanent rule that is within its scope of review but is not changed by a rule amendment.
- (d) **Judicial Review.** -- When the Commission returns a permanent rule to an agency in accordance with [G.S. 150B-21.12\(d\)](#), the agency may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.

History

[1991, c. 418, s. 1](#); [2003-229, s. 8](#).

General Statutes of North Carolina

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[N.C. Gen. Stat. § 150B-21.9](#)

Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT](#) > [ARTICLE 2A. RULES](#) > [PART 3. REVIEW BY COMMISSION](#)

§ 150B-21.9. Standards and timetable for review by Commission

(a) **Standards.** -- The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

- (a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.
- (b) **Timetable.** -- The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in [G.S. 150B-21.1](#).

History

[1991, c. 418, s. 1](#); [1995, c. 507, s. 27.8\(f\)](#); [2000-140, s. 93.1\(a\)](#); [2001-424, s. 12.2\(b\)](#); [2003-229, s. 9](#).

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Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT](#) > [ARTICLE 2A. RULES](#) > [PART 3. REVIEW BY COMMISSION](#)

§ 150B-21.12. Procedure when Commission objects to a permanent rule

- (a) **Action.** -- When the Commission objects to a permanent rule, it must send the agency that adopted the rule a written statement of the objection and the reason for the objection. The agency that adopted the rule must take one of the following actions:
- (1) Change the rule to satisfy the Commission's objection and submit the revised rule to the Commission.
 - (2) Submit a written response to the Commission indicating that the agency has decided not to change the rule.
- (b) **Time Limit.** -- An agency that is not a board or commission must take one of the actions listed in subsection (a) of this section within 30 days after receiving the Commission's statement of objection. A board or commission must take one of these actions within 30 days after receiving the Commission's statement of objection or within 10 days after the board or commission's next regularly scheduled meeting, whichever comes later.
- (c) **Changes.** -- When an agency changes a rule in response to an objection by the Commission, the Commission must determine whether the change satisfies the Commission's objection. If it does, the Commission must approve the rule. If it does not, the Commission must send the agency a written statement of the Commission's continued objection and the reason for the continued objection. The Commission must also determine whether the change is substantial. In making this determination, the Commission shall use the standards set forth in [G.S. 150B-21.2\(g\)](#). If the change is substantial, the revised rule shall be published and reviewed in accordance with the procedure set forth in [G.S. 150B-21.1\(a3\)](#) and (b).
- (d) **Return of Rule.** -- A rule to which the Commission has objected remains under review by the Commission until the agency that adopted the rule decides not to satisfy the Commission's objection and makes a written request to the Commission to return the rule to the agency. When the Commission returns a rule to which it has objected, it must notify the Codifier of Rules of its action. If the rule that is returned would have increased or decreased expenditures or revenues of a unit of local government, the Commission must also notify the Governor of its action and must send a copy of the record of the Commission's review of the rule to the Governor. The record of review consists of the rule, the Commission's letter of objection to the rule, the agency's written response to the Commission's letter, and any other relevant documents before the Commission when it decided to object to the rule.

Regulatory Reform

History

[1991, c. 418, s. 1](#); [1995, c. 415, s. 5](#); [c. 507, s. 27.8\(h\)](#), (y); [2003-229, s. 10](#); [2011-291, s. 2.60](#); [2011-398, s. 8](#).

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[N.C. Gen. Stat. § 150B-21.17](#)

Statutes current through the 2014 Regular Session

[General Statutes of North Carolina](#) > [CHAPTER 150B. ADMINISTRATIVE PROCEDURE ACT](#) > [ARTICLE 2A. RULES](#) > [PART 4. PUBLICATION OF CODE AND REGISTER](#)

§ 150B-21.17. North Carolina Register

- (a) **Content.** -- The Codifier of Rules must publish the North Carolina Register. The North Carolina Register must be published at least two times a month and must contain the following:
- (1) Temporary rules entered in the North Carolina Administrative Code.
 - (1a) The text of proposed rules and the text of permanent rules approved by the Commission.
 - (1b) Emergency rules entered into the North Carolina Administrative Code.
 - (2) Repealed by Session Laws 2011-398, s. 10, effective October 1, 2011, and applicable to rules adopted on or after that date
 - (3) Executive orders of the Governor.
 - (4) Final decision letters from the United States Attorney General concerning changes in laws that affect voting in a jurisdiction subject to section 5 of the Voting Rights Act of 1965, as required by [G.S. 120-30.9H](#).
 - (5) Repealed by Session Laws 2011-330, s. 33(c), effective June 27, 2011, and by Session Laws 2011-398, s. 10, effective October 1, 2011, and applicable to rules adopted on or after that date.
 - (6) Other information the Codifier determines to be helpful to the public.
- (b) **Form.** -- When an agency publishes notice in the North Carolina Register of the proposed text of a new rule, the Codifier of Rules must publish the complete text of the proposed new rule. In publishing the text of a proposed new rule, the Codifier must indicate the rule is new by underlining the proposed text of the rule.

When an agency publishes notice in the North Carolina Register of the proposed text of an amendment to an existing rule, the Codifier must publish the complete text of the rule that is being amended unless the Codifier determines that publication of the complete text of the rule being amended is not necessary to enable the reader to understand the proposed amendment. In publishing the text of a proposed amendment to a rule, the Codifier must indicate deleted text with overstrikes and added text with underlines.

When an agency publishes notice in the North Carolina Register of the proposed repeal of an existing rule, the Codifier must publish the complete text of the rule the agency proposes to repeal unless the Codifier determines that publication of the complete text is impractical. In publishing the text of a rule the agency proposes to repeal, the Codifier must indicate the rule is to be repealed.

- (c) The Codifier may authorize and license the private indexing, marketing, sales, reproduction, and distribution of the Register.

History

[1991, c. 418, s. 1](#); [1995, c. 507, s. 27.8\(k\)](#); [2001-141, s. 6](#); [2001-421, s. 1.4](#); [2003-229, s. 11](#); [2006-66, s. 18.1](#); [2011-330, s. 33\(c\)](#); [2011-398, s. 10](#).

16 N.C.A.C. 1A.0106

Current with rules received through October 8, 2015

North Carolina Administrative Code > **TITLE 16. DEPARTMENT OF PUBLIC EDUCATION** >
CHAPTER 1. DEPARTMENTAL RULES > **SUBCHAPTER 1A. ORGANIZATIONAL RULES**

.0106 PETITIONS FOR RULE-MAKING

- (a) Any person wishing to submit a petition requesting the adoption, amendment or repeal of a rule by the State Board of Education shall address a petition to Superintendent of Public Instruction, 301 North Wilmington Street, Raleigh, North Carolina 27601-2825. The container of the petition shall clearly bear the notation: RULEMAKING PETITION RE: and then the subject area.
- (b) The petition must contain the following information:
 - (1) an indication of the subject area to which the petition is directed;
 - (2) either a draft of the proposed rule or a summary of its contents;
 - (3) reasons for proposal;
 - (4) effect on existing rules or orders;
 - (5) any data supporting the proposal;
 - (6) effect of the proposed rule on existing practices in the area involved, including cost factors;
 - (7) names or a description of those most likely to be affected by the proposed rule; and
 - (8) name and address of petitioner.
- (c) The Superintendent will transmit the petition to the State Board of Education within 60 days after receiving the petition. The State Board makes the decision whether to grant or deny the petition.

Statutory Authority

Statutory Authority

[G.S. 150B-20;](#)

History

History Note:

Eff. July 1, 1993.

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16 N.C.A.C. 6D.0306

Current with rules received through October 8, 2015

North Carolina Administrative Code > TITLE 16. DEPARTMENT OF PUBLIC EDUCATION > CHAPTER 6. ELEMENTARY AND SECONDARY EDUCATION > SUBCHAPTER 6D. INSTRUCTION > SECTION .0300. TESTING PROGRAMS

.0306 TESTING CODE OF ETHICS

- (a) This Rule shall apply to all public school employees who are involved in the state testing program.
- (b) The superintendent or superintendent's designee shall develop local policies and procedures to ensure maximum test security in coordination with the policies and procedures developed by the test publisher. The principal shall ensure test security within the school building.
 - (1) The principal shall store test materials in a secure, locked area. The principal shall allow test materials to be distributed immediately prior to the test administration. Before each test administration, the building level test coordinator shall accurately count and distribute test materials. Immediately after each test administration, the building level test coordinator shall collect, count, and return all test materials to the secure, locked storage area.
 - (2) "Access" to test materials by school personnel means handling the materials but does not include reviewing tests or analyzing test items. The superintendent or superintendent's designee shall designate the personnel who are authorized to have access to test materials.
 - (3) Persons who have access to secure test materials shall not use those materials for personal gain.
 - (4) No person may copy, reproduce, or paraphrase in any manner or for any reason the test materials without the express written consent of the test publisher.
 - (5) The superintendent or superintendent's designee shall instruct personnel who are responsible for the testing program in testing administration procedures. This instruction shall include test administrations that require procedural modifications and shall emphasize the need to follow the directions outlined by the test publisher.
 - (6) Any person who learns of any breach of security, loss of materials, failure to account for materials, or any other deviation from required security procedures shall immediately report that information to the principal, building level test coordinator, school system test coordinator, and state level test coordinator.
- (c) Preparation for testing.
 - (1) The superintendent shall ensure that school system test coordinators:
 - (A) secure necessary materials;
 - (B) plan and implement training for building level test coordinators, test administrators, and proctors;
 - (C) ensure that each building level test coordinator and test administrator is trained in the implementation of procedural modifications used during test administrations; and
 - (D) in conjunction with program administrators, ensure that the need for test modifications is documented and that modifications are limited to the specific need.
 - (2) The principal shall ensure that building level test coordinators:
 - (A) maintain test material security and accountability of test materials;
 - (B) identify and train personnel, proctors, and backup personnel for test administrations; and
 - (C) encourage a positive atmosphere for testing.
 - (3) Test administrators shall be school personnel who have professional training in education and the state testing program.

- (4) Teachers shall provide instruction that meets or exceeds the standard course of study to meet the needs of the specific students in the class. Teachers may help students improve test-taking skills by:
 - (A) helping students become familiar with test formats using curricular content;
 - (B) teaching students test-taking strategies and providing practice sessions;
 - (C) helping students learn ways of preparing to take tests; and
 - (D) using resource materials such as test questions from test item banks, testlets and linking documents in instruction and test preparation.
- (d) Test administration.
 - (1) The superintendent or superintendent's designee shall:
 - (A) assure that each school establishes procedures to ensure that all test administrators comply with test publisher guidelines;
 - (B) inform the local board of education of any breach of this code of ethics; and
 - (C) inform building level administrators of their responsibilities.
 - (2) The principal shall:
 - (A) assure that school personnel know the content of state and local testing policies;
 - (B) implement the school system's testing policies and procedures and establish any needed school policies and procedures to assure that all eligible students are tested fairly;
 - (C) assign trained proctors to test administrations; and
 - (D) report all testing irregularities to the school system test coordinator.
 - (3) Test administrators and proctors shall:
 - (A) administer tests according to the directions in the administration manual and any subsequent updates developed by the test publisher;
 - (B) administer tests to all eligible students;
 - (C) report all testing irregularities to the school system test coordinator; and
 - (D) provide a positive test-taking climate.
 - (4) Proctors shall serve as additional monitors to help the test administrator assure that testing occurs fairly.
- (e) Scoring. The school system test coordinator shall:
 - (1) ensure that each test is scored according to the procedures and guidelines defined for the test by the test publisher;
 - (2) maintain quality control during the entire scoring process, which consists of handling and editing documents, scanning answer documents, and producing electronic files and reports. Quality control shall address at a minimum accuracy and scoring consistency;
 - (3) maintain security of tests and data files at all times, including:
 - (A) protecting the confidentiality of students at all times when publicizing test results; and
 - (B) maintaining test security of answer keys and item-specific scoring rubrics.
- (f) Analysis and reporting. Educators shall use test scores appropriately. This means that the educator recognizes that a test score is only one piece of information and must be interpreted together with other scores and indicators. Test data help educators understand educational patterns and practices. The superintendent shall ensure that school personnel analyze and report test data ethically and within the limitations described in this Paragraph.

- (1) Educators shall release test scores to students, parents, legal guardians, teachers, and the media with interpretive materials as needed.
- (2) Staff development relating to testing must enable personnel to respond knowledgeably to questions related to testing, including the tests, scores, scoring procedures, and other interpretive materials.
- (3) Items and associated materials on a secure test shall not be in the public domain. Only items that are within the public domain may be used for item analysis.
- (4) Educators shall maintain the confidentiality of individual students. Publicizing test scores that contain the names of individual students is unethical.
- (5) Data analysis of test scores for decision-making purposes shall be based upon:
 - (A) disaggregation of data based upon student demographics and other collected variables;
 - (B) examination of grading practices in relation to test scores; and
 - (C) examination of growth trends and goal summary reports for state-mandated tests.
- (g) Unethical testing practices include, but are not limited to, the following practices:
 - (1) encouraging students to be absent the day of testing;
 - (2) encouraging students not to do their best because of the purpose of the test;
 - (3) using secure test items or modified secure test items for instruction;
 - (4) changing student responses at any time;
 - (5) interpreting, explaining, or paraphrasing the test directions or the test items;
 - (6) reclassifying students solely for the purpose of avoiding state testing;
 - (7) not testing all eligible students;
 - (8) failing to provide needed modifications during testing, if available;
 - (9) modifying scoring programs including answer keys, equating files, and lookup tables;
 - (10) modifying student records solely for the purpose of raising test scores;
 - (11) using a single test score to make individual decisions; and
 - (12) misleading the public concerning the results and interpretations of test data.
- (h) In the event of a violation of this Rule, the SBE may, in accordance with the contested case provisions of G.S. 150B, impose any one or more of the following sanctions:
 - (1) withhold ABCs incentive awards from individuals or from all eligible staff in a school;
 - (2) file a civil action against the person or persons responsible for the violation for copyright infringement or for any other available cause of action;
 - (3) seek criminal prosecution of the person or persons responsible for the violation; and
 - (4) in accordance with the provisions of [16 NCAC 6C .0312](#), suspend or revoke the professional license of the person or persons responsible for the violation.

Statutory Authority

Authority

[G.S. 115C-12\(9\)](#)c.; 115C-81(b)(4);

History

History Note:

Amended Eff. July 1, 2000.

NORTH CAROLINA ADMINISTRATIVE CODE

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