

2006

**JOINT LEGISLATIVE
ADMINISTRATIVE
PROCEDURE
OVERSIGHT
COMMITTEE**

MINUTES

**JOINT LEGISLATIVE
ADMINISTRATIVE PROCEDURE
OVERSIGHT COMMITTEE**

2005-2006

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Representative Melanie Wade Goodwin, Co-Chair

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North Carolina General Assembly
Joint Legislative Administrative Procedure Oversight Committee

G.S. 120-70.100

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2005-2006

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CHAPTER 150B
OF THE
GENERAL STATUTES OF NORTH CAROLINA

[The following excerpt contains the statutory provisions of the Administrative Procedure Act as amended by House Bill 874 effective 6/22/2005; Senate Bill 622 effective 7/1/2005; Senate Bill 1126 effective 1/1/2006 - OAH Revised 10/4/2005]

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) The Industrial Commission.
- (5) The Employment Security Commission.
- (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.

(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- (2) Repealed by Session Laws 2000-189, s. 14 effective July 1, 2000.
- (3) Repealed by Session Laws 2001-474, s. 34 effective November 29, 2001.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.
- (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 Department of Correction, with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees.
- (7) The North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in administering the provisions of Parts 2, 3, 4, and 5 of Article 3 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 under the State Medicaid Program.
- (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. 143B-454(a)(11).
- (12) Reserved.
- (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.

(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, effective July 23, 1993.
- (3) Repealed by Session Laws 2001-474, s. 35, effective November 29, 2001.
- (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) The Department of Revenue.
- (7) The Department of Correction.
- (8) The Department of Transportation, except as provided in G.S. 136-29.
- (9) ~~The Occupational Safety and Health Review Board.~~ 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(13aa) shall be conducted pursuant to the provisions outlined in G.S. 122C, Article 4, Part 7.

(12) The North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan with 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 Teachers' and State Employees' Comprehensive Major Medical Plan 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 Crime Control and 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.

(f) [Effective until December 31, 2006] 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.

(f) [Effective December 31, 2006] Exemption from all but Judicial Review. -- No Article in this Chapter except Article 4 applies to The University of North Carolina.

§ 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, effective October 1, 1991.

(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. This subdivision does not permit an agency that makes a final decision, or an officer or employee of the agency, to petition for initial judicial review of that decision.

(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.

(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 interpretive 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 Personnel Commission.
- j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 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.

(8b) "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, effective October 1, 1991.

§ 150B-3. Special provisions on licensing.

(a) When an applicant or a licensee makes a timely and sufficient application for issuance or renewal of a license or occupational license, including the payment of any required license fee, the existing license or occupational license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license or occupational license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending a license or occupational license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of any license other than an

occupational license, the agency shall give notice to the licensee, pursuant to the provisions of G.S. 150B-23. Before the commencement of such proceedings involving an occupational license, the agency shall give notice pursuant to the provisions of G.S. 150B-38. In either case, the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license or occupational license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license or occupational license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license.

(d) This section does not apply to the following:

- (1) Revocations of occupational licenses based solely on a court order of child support delinquency or a Department of Health and Human Services determination of child support delinquency issued pursuant to G.S. 110-142, 110-142.1, 110-142.2.
- (2) Refusal to renew an occupational license pursuant to G.S. 87-10.1, 87-22.2, 87-44.2 or 89C-18.1, based solely on a Department of Revenue determination that the licensee owes a delinquent income tax debt.

§ 150B-4. Declaratory rulings.

(a) On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

(b) Repealed by Session Laws 1997-34 s. 1 effective April 23, 1997.

§§ 150B-5 through 150B-8: Reserved for future codification purposes.

**Article 2.
Rule Making.**

§§ 150B-9 through 150B-16: Repealed by Session Laws 1991, c. 481, s. 5, effective October 1, 1991.

§ 150B-17: Recodified as § 150B-4 by Session Laws 1991, c. 418, s. 4, effective October 1, 1991.

Article 2A. — — —

Rules.

Part 1. General Provisions.

§ 150B-18. Scope and effect.

This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article.

§ 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.

§ 150B-20. Petitioning an agency to adopt a rule.

(a) **Petition.** -- A person may petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption. A person may submit written comments with a rule-making petition. If a rule-making petition requests the agency to create or amend a rule, the person must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change. Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

(b) **Time.** -- An agency must grant or deny a rule-making petition submitted to it within 30 days after the date the rule-making petition is submitted, unless the agency is a board or commission. If the agency is a board or commission, it must grant or deny a rule-making petition within 120 days after the date the rule-making petition is submitted.

(c) **Action.** -- If an agency denies a rule-making petition, it must send the person who submitted the petition a written statement of the reasons for denying the petition. If an agency

grants a rule-making petition, it must inform the person who submitted the rule-making petition of its decision and must initiate rule-making proceedings. When an agency grants a rule-making petition, the notice of text it publishes in the North Carolina Register may state that the agency is initiating rule-making as the result of a rule-making petition and state the name of the person who submitted the rule-making petition. If the rule-making petition requested the creation or amendment of a rule, the notice of text the agency publishes may set out the text of the requested rule change submitted with the rule-making petition and state whether the agency endorses the proposed text.

(d) **Review.** -- Denial of a rule-making petition is a final agency decision and is subject to judicial review under Article 4 of this Chapter. Failure of an agency to grant or deny a rule-making petition within the time limits set in subsection (b) is a denial of the rule-making petition.

(e) Repealed by Session Laws 1996, Second Extra Session, c. 18, s. 7.10(b).

§ 150B-21. Agency must designate rule-making coordinator; duties of coordinator.

(a) Each agency must designate one or more rule-making coordinators to oversee the agency's rule-making functions. The coordinator shall serve as the liaison between the agency, other agencies, units of local government, and the public in the rule-making process. The coordinator shall report directly to the agency head.

(b) The rule-making coordinator shall be responsible for the following:

- (1) Preparing notices of public hearings.
- (2) Coordinating access to the agency's rules.
- (3) Screening all proposed rule actions prior to publication in the North Carolina Register to assure that an accurate fiscal note has been completed as required by G.S. 150B-21.4(b).
- (4) Consulting with the North Carolina Association of County Commissioners and the North Carolina League of Municipalities to determine which local governments would be affected by any proposed rule action.
- (5) Providing the North Carolina Association of County Commissioners and the North Carolina League of Municipalities with copies of all fiscal notes required by G.S. 150B-21.4(b), prior to publication in the North Carolina Register of the proposed text of a permanent rule change.
- (6) Coordinating the submission of proposed rules to the Governor as provided by G.S. 150B-21.26.

(c) At the earliest point in the rule-making process and in consultation with the North Carolina Association of County Commissioners, the North Carolina League of Municipalities, and with samples of county managers or city managers, as appropriate, the rule-making coordinator shall lead the agency's efforts in the development and drafting of any rules or rule changes that could:

- (1) Require any unit of local government, including a county, city, school administrative unit, or other local entity funded by or through a unit of local government to carry out additional or modified responsibilities;

- (2) Increase the cost of providing or delivering a public service funded in whole or in part by any unit of local government; or
- (3) Otherwise affect the expenditures or revenues of a unit of local government.

(d) The rule-making coordinator shall send to the Office of State Budget and Management for compilation a copy of each final fiscal note prepared pursuant to G.S. 150B-21.4(b).

(e) The rule-making coordinator shall compile a schedule of the administrative rules and amendments expected to be proposed during the next fiscal year. The coordinator shall provide a copy of the schedule to Office of State Budget and Management in a manner proposed by that Office.

(f) 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 rule-making coordinator shall:

- (1) Attach to the proposed rule a certificate prepared by the rule-making coordinator identifying the federal law requiring adoption of the proposed rule. The certification shall contain a statement setting forth the reasons for why the proposed rule is required by 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. No comment or opinion shall be included in the certification with regard to the merits of the proposed rule; and
- (2) The rule-making coordinator shall maintain a copy of the federal law and shall provide to the Office of State Budget and Management for compilation the citation to the federal law requiring or pertaining to the proposed rule.

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.
- 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 Election 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, Ch. 148, s.5, effective July 1, 2002.
- b. Repealed by Session Laws 2000, Ch. 69, s.5 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 2004-156, s. 1, effective July 13, 2004.

(a1) Recodified as subdivisoin (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, at least 30 business days prior to adopting a temporary rule, the agency shall:

- (1) 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) 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 day 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. 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.

(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.

§ 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 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.

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

(a) Steps. -- Before an agency adopts a permanent rule, 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 Ch. 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 Ch. 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.
- (2) A short explanation of the reason for the proposed rule.
- (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 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) The procedure by which a person can object to a proposed rule and the requirements for subjecting a proposed rule to the legislative review process.

(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.

An agency may hold a public hearing on a proposed rule 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 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. 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, and any written explanation made by the agency for adopting the rule.

§ 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 ratified by the General Assembly 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 ratified 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 ratified by the General Assembly 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 ratified by the General Assembly 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 action, 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 a 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 for more than 10 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.

§ 150B-21.4. Fiscal notes on rules.

(a) State Funds. -- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would require the expenditure or distribution of funds subject to the Executive Budget Act, Article 1 of Chapter 143, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Director of the Budget and obtain certification from the Director that the funds that would be required by the proposed rule change are available. The fiscal note must state the amount of funds that would be expended or distributed as a result of the proposed rule change and explain how the amount was computed. The Director of the Budget must certify a proposed rule change if funds are available to cover the expenditure or distribution required by the proposed rule change.

(a1) DOT Analyses. -- In addition to the requirements of subsection (a) of this section, any agency that adopts a rule affecting environmental permitting of Department of Transportation projects shall conduct an analysis to determine if the rule will result in an increased cost to the Department of Transportation. The analysis shall be conducted and submitted to the Board of Transportation before the agency publishes the proposed text of the rule change in the North Carolina Register. The agency shall consider any recommendations offered by the Board of Transportation prior to adopting the rule. Once a rule subject to this subsection is adopted, the Board of Transportation may submit any objection to the rule it may have to the Rules Review Commission. If the Rules Review Commission receives an objection to a rule from the Board of Transportation no later than 5:00 P.M. of the day following the day the Commission approves the rule, then the rule shall only become effective as provided in G.S. 150B-21.3(b1).

(b) Local Funds. -- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, it must submit the text of the proposed rule change and a fiscal note on the proposed rule change to the Office of the Governor as provided by G.S. 150B-21.26, the Fiscal Research Division of the General Assembly, the Office of State Budget and Management the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities. The fiscal note must state the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and must explain how the amount was computed.

(b1) Substantial Economic Impact. -- Before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would have a substantial economic

impact and that is not identical to a federal regulation that the agency is required to adopt, the agency must obtain a fiscal note for the proposed rule change from the Office of State Budget and Management or prepare a fiscal note for the proposed rule change and have the note approved by that Office. If an agency requests Office of State Budget and Management to prepare a fiscal note for a proposed rule change, that Office must prepare the note within 90 days after receiving a written request for the note. If the Office of State Budget and Management fails to prepare a fiscal note within this time period, the agency proposing the rule change may prepare a fiscal note. A fiscal note prepared in this circumstance does not require approval of the Office of State Budget and Management.

If an agency prepares the required fiscal note, the agency must submit the note to the Office of State Budget and Management for review. The Office of State Budget and Management must review the fiscal note within 14 days after it is submitted and either approve the note or inform the agency in writing of the reasons why it does not approve the fiscal note. After addressing these reasons, the agency may submit the revised fiscal note to that Office for its review. If an agency is not sure whether a proposed rule change would have a substantial economic impact, the agency may ask the Office of State Budget and Management to determine whether the proposed rule change has a substantial economic impact.

As used in this subsection, the term "substantial economic impact" means an aggregate financial impact on all persons affected of at least three million dollars (\$3,000,000) in a 12-month period.

(b2)Content. -- A fiscal note required by subsection (b1) of this section must contain the following:

- (1) A description of the persons who would be affected by the proposed rule change.
- (2) A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.
- (3) A description of the purpose and benefits of the proposed rule change.
- (4) An explanation of how the estimate of expenditures was computed.

(c) Errors. -- An erroneous fiscal note prepared in good faith does not affect the validity of a rule.

§ 150B-21.5. Circumstances when notice and rule-making hearing not required.

(a) Amendment. -- An agency is not required to publish a notice of text in the North Carolina Register or hold a public hearing when it proposes to amend a rule to do one of the following:

- (1) Reletter or renumber the rule or subparts of the rule.
- (2) Substitute one name for another when an organization or position is renamed.
- (3) Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
- (4) Change information that is readily available to the public, such as an address or a telephone number.
- (5) Correct a typographical error in the North Carolina Administrative Code.

- (6) Change a rule in response to a request or an objection by the Commission, unless the Commission determines that the change is substantial.

(b) Repeal. -- An agency is not required to publish a notice of text in the North Carolina Register or hold a public hearing when it proposes to repeal a rule as a result of any of the following:

- (1) The law under which the rule was adopted is repealed.
- (2) The law under which the rule was adopted or the rule itself is declared unconstitutional.
- (3) The rule is declared to be in excess of the agency's statutory authority.

(c) OSHA Standard. -- The Occupational Safety and Health Division of the Department of Labor is not required to publish a notice of text in the North Carolina Register or hold a public hearing when it proposes to adopt a rule that concerns an occupational safety and health standard and is identical to a federal regulation promulgated by the Secretary of the United States Department of Labor. The Occupational Safety and Health Division is not required to submit to the Commission for review a rule for which notice and hearing is not required under this subsection.

(d) State Building Code. -- The Building Code Council is not required to publish a notice of text in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The Building Code Council is required to publish a notice in the North Carolina Register when it proposes to adopt a rule that concerns the North Carolina State Building Code. The notice must include all of the following:

- (1) A statement of the subject matter of the proposed rule making.
- (2) A short explanation of the reason for the proposed action.
- (3) A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule making.
- (4) The person to whom questions or written comments may be submitted on the subject matter of the proposed rule making.

The Building Code Council is required to submit to the Commission for review a rule for which notice of text is not required under this subsection. In adopting a rule, the Council shall comply with the procedural requirements of G.S. 150B-21.3.

§ 150B-21.6. Incorporating material in a rule by reference.

An agency may incorporate the following material by reference in a rule without repeating the text of the referenced material:

- (1) Another rule or part of a rule adopted by the agency.
- (2) All or part of a code, standard, or regulation adopted by another agency, the federal government, or a generally recognized organization or association.
- (3) Repealed by Session Law 1997-34, s 5, effective April 30, 1997

In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify

in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.

A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(b) is a statement that the rule does not include subsequent amendments and editions of the referenced material. A statement in a rule that a rule incorporates material by reference in accordance with former G.S. 150B-14(c) is a statement that the rule includes subsequent amendments and editions of the referenced material.

§ 150B-21.7. Effect of transfer of duties or termination of agency on rules.

When a law that authorizes an agency to adopt a rule is repealed and another law gives the same or another agency substantially the same authority to adopt a rule, the rule remains in effect until the agency amends or repeals the rule. When a law that authorizes an agency to adopt a rule is repealed and another law does not give the same or another agency substantially the same authority to adopt a rule, a rule adopted under the repealed law is repealed as of the date the law is repealed.

When an executive order abolishes part or all of an agency and transfers a function of that agency to another agency, a rule concerning the transferred function remains in effect until the agency to which the function is transferred amends or repeals the rule. When an executive order abolishes part or all of an agency and does not transfer a function of that agency to another agency, a rule concerning a function abolished by the executive order is repealed as of the effective date of the executive order.

The Director of Fiscal Research of the General Assembly must notify the Codifier of Rules when a rule is repealed under this section. When notified of a rule repealed under this section, the Codifier of Rules must enter the repeal of the rule in the North Carolina Administrative Code.

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.

§ 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.

§ 150B-21.10. Commission action on permanent rule.

At the first meeting at which a permanent rule is before the Commission for review, the Commission must take one of the following actions:

- (1) Approve the rule, if the Commission determines that the rule meets the standards for review.
- (2) Object to the rule, if the Commission determines that the rule does not meet the standards for review.
- (3) Extend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review.

In reviewing a new rule or an amendment to an existing rule, the Commission may request an agency to make technical changes to the rule and may condition its approval of the rule on the agency's making the requested technical changes.

§ 150B-21.11. Procedure when Commission approves permanent rule.

When the Commission approves a permanent rule, it must notify the agency that adopted the rule of the Commission's approval, deliver the approved rule to the Codifier of Rules, and include the text of the approved rule and a summary of the rule in its next report to the Joint Legislative Administrative Procedure Oversight Committee.

If the approved rule will increase or decrease expenditures or revenues of a unit of local government, the Commission must also notify the Governor of the Commission's approval of the

rule and deliver a copy of the approved rule to the Governor by the end of the month in which the Commission approved the rule.

§ 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 and must send a copy of the record of the Commission's review of the rule to the Joint Legislative Administrative Procedure Oversight Committee in its next report to that Committee. 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.

§ 150B-21.13. Procedure when Commission extends period for review of permanent rule.

When the Commission extends the period for review of a permanent rule, it must notify the agency that adopted the rule of the extension and the reason for the extension. After the Commission extends the period for review of a rule, it may call a public hearing on the rule. Within 70 days after extending the period for review of a rule, the Commission must decide whether

to approve the rule, object to the rule, or call a public hearing on the rule.

§ 150B-21.14. Public hearing on a rule.

The Commission may call a public hearing on a rule when it extends the period for review of the rule. At the request of an agency, the Commission may call a public hearing on a rule that is not before it for review. Calling a public hearing on a rule not already before the Commission for review places the rule before the Commission for review. When the Commission decides to call a public hearing on a rule, it must publish notice of the public hearing in the North Carolina Register.

After a public hearing on a rule, the Commission must approve the rule or object to the rule in accordance with the standards and procedures in this Part. The Commission must make its decision of whether to approve or object to the rule within 70 days after the public hearing.

§ 150B-21.15: Repealed by Session Laws 1995, c. 507, s. 27.8(i), effective December 1, 1995.

§ 150B-21.16. Report to Joint Legislative Administrative Procedure Oversight Committee.

The Commission must make monthly reports to the Joint Legislative Administrative Procedure Oversight Committee. The reports are due by the last day of the month. A report must include the rules approved by the Commission at its meeting held in the month in which the report is due and the rules the Commission returned to agencies during that month after the Commission objected to the rule. A report must include any other information requested by the Joint Legislative Administrative Procedure Oversight Committee. When the Commission sends a report to the Joint Legislative Administrative Procedure Oversight Committee, the Commission must send a copy of the report to the Codifier of 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) Notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165.
- (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) Orders of the Tax Review Board issued under G.S. 105-241.2.
- (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.

§ 150B-21.18. North Carolina Administrative Code.

The Codifier of Rules must compile all rules into a Code known as the North Carolina Administrative Code. The format and indexing of the Code must conform as nearly as practical to the format and indexing of the North Carolina General Statutes. The Codifier must publish printed copies of the Code and may publish the Code in other forms. The Codifier must keep the Code current by publishing the Code in a loose-leaf format and periodically providing new pages to be substituted for outdated pages, by publishing the Code in volumes and periodically publishing cumulative supplements, or by another means. The Codifier may authorize and license the private indexing, marketing, sales, reproduction, and distribution of the Code. The Codifier must keep superseded rules.

§ 150B-21.19. Requirements for including rule in Code.

To be acceptable for inclusion in the North Carolina Administrative Code, a rule must:

- (1) Cite the law under which the rule is adopted.
- (2) Be signed by the head of the agency or the rule-making coordinator for the agency that adopted the rule.
- (3) Be in the physical form specified by the Codifier of Rules.
- (4) Have been approved by the Commission, if the rule is a permanent rule.
- (5) Have complied with the provisions of G.S. 12-3.1, if the rule establishes a new fee or increases an existing fee.

§ 150B-21.20. Codifier's authority to revise form of rules.

(a) Authority. -- After consulting with the agency that adopted the rule, the Codifier of Rules may revise the form of a rule submitted for inclusion in the North Carolina Administrative Code within 10 business days after the rule is submitted to do one or more of the following:

- (1) Rearrange the order of the rule in the Code or the order of the subsections, subdivisions, or other subparts of the rule.
- (2) Provide a catch line or heading for the rule or revise the catch line or heading of the rule.
- (3) Reletter or renumber the rule or the subparts of the rule in accordance with a uniform system.

(4) Rearrange definitions and lists.

(5) Make other changes in arrangement or in form that do not change the substance of the rule and are necessary or desirable for a clear and orderly arrangement of the rule.

(6) Omit from the published rule a map, a diagram, an illustration, a chart, or other graphic material, if the Codifier of Rules determines that the Office of Administrative Hearings does not have the capability to publish the material or that publication of the material is not practicable. When the Codifier of Rules omits graphic material from the published rule, the Codifier must insert a reference to the omitted material and information on how to obtain a copy of the omitted material.

(b) Effect. -- Revision of a rule by the Codifier of Rules under this section does not affect the effective date of the rule or require the agency to readopt or resubmit the rule. When the Codifier of Rules revises the form of a rule, the Codifier of Rules must send the agency that adopted the rule a copy of the revised rule. The revised rule is the official rule, unless the rule was revised under subdivision (a)(6) of this section to omit graphic material. When a rule is revised under that subdivision, the official rule is the published text of the rule plus the graphic material that was not published.

§ 150B-21.21. Publication of rules of North Carolina State Bar, Building Code Council, and exempt agencies.

(a) State Bar. -- The North Carolina State Bar must submit a rule adopted or approved by it and entered in the minutes of the North Carolina Supreme Court to the Codifier of Rules for inclusion in the North Carolina Administrative Code. The State Bar must submit a rule within 30 days after it is entered in the minutes of the Supreme Court. The Codifier of Rules must compile, make available for public inspection, and publish a rule included in the North Carolina Administrative Code under this subsection in the same manner as other rules in the Code.

(a1) Building Code Council. -- The Building Code Council shall publish the North Carolina State Building Code as provided in G.S. 143-138(g). The Codifier of Rules is not required to publish the North Carolina State Building Code in the North Carolina Administrative Code.

(b) Exempt Agencies. -- Notwithstanding G.S. 150B-1, the North Carolina Utilities Commission must submit to the Codifier of Rules those rules of the Utilities Commission that are published from time to time in the publication titled "North Carolina Utilities Laws and Regulations." The Utilities Commission must submit a rule required to be included in the Code within 30 days after it is adopted.

Notwithstanding G.S. 150B-1, an agency other than the Utilities Commission that is exempted from this Article by that statute must submit a temporary or permanent rule adopted by it to the Codifier of Rules for inclusion in the North Carolina Administrative Code. These exempt agencies must submit a rule to the Codifier of Rules within 30 days after adopting the rule.

(c) Publication. -- A rule submitted to the Codifier of Rules under this section must be in the physical form specified by the Codifier of Rules. The Codifier of Rules must compile, make available for public inspection, and publish a rule submitted under this section in the same manner as other rules in the North Carolina Administrative Code.

§ 150B-21.22. Effect of inclusion in Code.

Official or judicial notice can be taken of a rule in the North Carolina Administrative Code and shall be taken when appropriate.

§ 150B-21.23. Rule publication manual.

The Codifier of Rules must publish a manual that sets out the form and method for publishing a notice of rule-making proceedings and a notice of text in the North Carolina Register and for filing a rule in the North Carolina Administrative Code.

§ 150B-21.24. Free copies of Register and Code.

(a) Register. -- The Codifier of Rules shall make available the North Carolina Register on the Internet at no charge. Upon request the Codifier shall provide a free copy of the current volume of the Register to any person who receives a free copy of the North Carolina Administrative Code or any member of the General Assembly.

(b) Code. -- The Codifier of Rules shall make available the North Carolina Administrative Code on the Internet at no charge. The Codifier shall distribute copies of the North Carolina Administrative Code as soon after publication as practical, without charge, to the following:

- (1) One copy to the board of commissioners of each county that specifically request a printed copy to be placed at the county clerk of court's office or at another place selected by the board of commissioners. The Codifier of Rules is not required to provide a copy of the Administrative Code to any board of county commissioners unless a request is made.
- (2) One copy to the Commission.
- (3) One copy to the Clerk of the Supreme Court and to the Clerk of the Court of Appeals of North Carolina.
- (4) One copy to the Supreme Court Library and one copy to the library of the Court of Appeals.
- (5) One copy to the Administrative Office of the Courts.
- (6) One copy to the Governor.
- (7) One copy to the Legislative Services Commission for the use of the General Assembly.
- (8) Repealed by Session Laws 2002-97, s. 1, effective August 29 2002.
- (9) One Copy to the Division of State Library of the Department of Cultural Resources pursuant to G.S. 125-11.7.

§ 150B-21.25. Paid copies of Register and Code.

A person who is not entitled to a free copy of the North Carolina Administrative Code or North Carolina Register may obtain a copy by paying a fee set by the Codifier of Rules. The Codifier must set separate fees for the North Carolina Register and the North Carolina Administrative Code in amounts that cover publication, copying, and mailing costs. All monies received under this section must be credited to the General Fund.

Part 5. Rules Affecting Local Governments.

§ 150B-21.26. Governor to conduct preliminary review of certain administrative rules.

(a) Preliminary Review. -- At least 30 days before an agency publishes in the North Carolina Register the proposed text of a permanent rule change that would affect the expenditures or revenues of a unit of local government, the agency must submit all of the following to the Governor for preliminary review:

- (1) The text of the proposed rule change.
- (2) A short explanation of the reason for the proposed change.
- (3) A fiscal note stating the amount by which the proposed rule change would increase or decrease expenditures or revenues of a unit of local government and explaining how the amount was computed.

(b) Scope. -- The Governor's preliminary review of a proposed permanent rule change that would affect the expenditures or revenues of a unit of local government shall include consideration of the following:

- (1) The agency's explanation of the reason for the proposed change.
- (2) Any unanticipated effects of the proposed change on local government budgets.
- (3) The potential costs of the proposed change weighed against the potential risks to the public of not taking the proposed change.

§ 150B-21.27. Minimizing the effects of rules on local budgets.

In adopting permanent rules that would increase or decrease the expenditures or revenues of a unit of local government, the agency shall consider the timing for implementation of the proposed rule as part of the preparation of the fiscal note required by G.S. 150B-21.4(b). If the computation of costs in a fiscal note indicates that the proposed rule change will disrupt the budget process as set out in the Local Government Budget and Fiscal Control Act, Article 3 of Chapter 159 of the General Statutes, the agency shall specify the effective date of the change as July 1 following the date the change would otherwise become effective under G.S. 150B-21.3.

§ 150B-21.28. Role of the Office of State Budget and Management.

The Office of State Budget and Management shall:

- (1) Compile an annual summary of the projected fiscal impact on units of local government of State administrative rules adopted during the preceding fiscal year.
- (2) Compile from information provided by each agency schedules of anticipated rule actions for the upcoming fiscal year.
- (3) Provide the Governor, the General Assembly, the North Carolina Association of County Commissioners, and the North Carolina League of Municipalities with a copy of the annual summary and schedules by no later than March 1 of each year.

Article 3.

Administrative Hearings.

§ 150B-22. Settlement; contested case.

It is the policy of this State that any 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, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through

informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

§ 150B-23. Commencement; assignment of administrative law judge; hearing required; notice; intervention.

(a) A contested case shall be commenced by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party or a representative of the party and, if filed by a party other than an agency, shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency:

- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

A local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies may commence a contested case under this Article in the same manner as any other petitioner. The case shall be conducted in the same manner as other contested cases under this Article, except that the State Personnel Commission shall enter final decisions only in cases in which it is found that the employee, applicant, or former employee has been subjected to discrimination prohibited by Article 6 of Chapter 126 of the General Statutes or in any case where a binding decision is required by applicable federal standards. In these cases, the State Personnel Commission's decision shall be binding on the local appointing authority. In all other cases, the final decision shall be made by the applicable appointing authority.

(a1) Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 1022, s. 1(9)(1) effective July 15, 1986.

(a2) An administrative law judge assigned to a contested case may require a party to the case to file a prehearing statement. A party's prehearing statement must be served on all other parties to the contested case.

(b) The parties to a contested case shall be given a notice of hearing not less than 15 days before the hearing by the Office of Administrative Hearings. If prehearing statements have been filed in the case, the notice shall state the date, hour, and place of the hearing. If prehearing statements have not been filed in the case, the notice shall state the date, hour, place, and nature of the hearing, shall list the particular sections of the statutes and rules involved, and shall give a short and plain statement of the factual allegations.

(c) Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the delivery date appearing on the return receipt. If giving of

notice cannot be accomplished either personally or by certified mail, notice shall then be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) Any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24. In addition, any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.

(e) All hearings under this Chapter shall be open to the public. Hearings shall be conducted in an impartial manner. Hearings shall be conducted according to the procedures set out in this Article, except to the extent and in the particulars that specific hearing procedures and time standards are governed by another statute.

(f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency by personal delivery or by the placing of the notice in an official depository of the United States Postal Service wrapped in a wrapper addressed to the person at the latest address given by the person to the agency. The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. When no informal settlement request has been received by the agency prior to issuance of the notice, any subsequent informal settlement request shall not suspend the time limitation for the filing of a petition for a contested case hearing.

§ 150B-23.1. Mediated settlement conferences.

(a) Purpose. -- This section authorizes a mediation program in the Office of Administrative Hearings in which the chief administrative law judge may require the parties in a contested case to attend a prehearing settlement conference conducted by a mediator. The purpose of the program is to determine whether a system of mediated settlement conferences may make the operation of the Office of Administrative Hearings more efficient, less costly, and more satisfying to the parties.

(b) Definitions. -- The following definitions apply in this section:

- (1) Mediated settlement conference. -- A conference ordered by the chief administrative law judge involving the parties to a contested case and conducted by a mediator prior to a contested case hearing.
- (2) Mediator. -- A neutral person who acts to encourage and facilitate a resolution of a contested case but who does not make a decision on the merits of the contested case.

(c) Conference. -- The chief administrative law judge may order a mediated settlement conference for all or any part of a contested case to which an administrative law judge is assigned to preside. All aspects of the mediated settlement conference shall be conducted insofar as possible in accordance with the rules adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(d) Attendance. -- The parties to a contested case in which a mediated settlement conference is ordered, their attorneys, and

other persons having authority to settle the parties' claims shall attend the settlement conference unless excused by the presiding administrative law judge.

(e) Mediator. -- The parties shall have the right to stipulate to a mediator. Upon the failure of the parties to agree within a time limit established by the presiding administrative law judge, a mediator shall be appointed by the presiding administrative law judge.

(f) Sanctions. -- Upon failure of a party or a party's attorney to attend a mediated settlement conference ordered under this section, the presiding administrative law judge may impose any sanction authorized by G.S. 150B-33(b)(8) or (10).

(g) Standards. -- Mediators authorized to conduct mediated settlement conferences under this section shall comply with the standards adopted by the Supreme Court for the court-ordered mediation pilot program under G.S. 7A-38.

(h) Immunity. -- A mediator acting pursuant to this section shall have judicial immunity in the same manner and to the same extent as a judge of the General Court of Justice.

(i) Costs. -- Costs of a mediated settlement conference shall be paid one share by the petitioner, one share by the respondent, and an equal share by any intervenor, unless otherwise apportioned by the administrative law judge.

(j) Inadmissibility of Negotiations. -- All conduct or communications made during a mediated settlement conference are presumed to be made in compromise negotiations and shall be governed by Rule 408 of the North Carolina Rules of Evidence.

(k) Right to Hearing. -- Nothing in this section restricts the right to a contested case hearing.

§ 150B-24. Venue of hearing.

(a) The hearing of a contested case shall be conducted:

- (1) In the county in this State in which any person whose property or rights are the subject matter of the hearing maintains his residence;
- (2) In the county where the agency maintains its principal office if the property or rights that are the subject matter of the hearing do not affect any person or if the subject matter of the hearing is the property or rights of residents of more than one county; or
- (3) In any county determined by the administrative law judge in his discretion to promote the ends of justice or better serve the convenience of witnesses.

(b) Any person whose property or rights are the subject matter of the hearing waives his objection to venue by proceeding in the hearing.

§ 150B-25. Conduct of hearing; answer.

(a) If a party fails to appear in a contested case after proper service of notice, and if no adjournment or continuance is granted, the administrative law judge may proceed with the hearing in the absence of the party.

(b) Repealed by Session Laws 1991, c. 35, s. 2, effective October 1, 1991.

(c) The parties shall be given an opportunity to present arguments on issues of law and policy and an opportunity to present evidence on issues of fact.

(d) A party may cross-examine any witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. Any party may submit rebuttal evidence.

§ 150B-26. Consolidation.

When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending, the Director of the Office of Administrative Hearings may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

§ 150B-27. Subpoena.

After the commencement of a contested case, subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. In addition to the methods of service in G.S. 1A-1, Rule 45, a State law enforcement officer may serve a subpoena on behalf of an agency that is a party to the contested case by any method by which a sheriff may serve a subpoena under that Rule. Upon a motion, the administrative law judge may quash a subpoena if, upon a hearing, the administrative law judge finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed.

Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

§ 150B-28. Depositions and discovery.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in contested cases may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) On a request for identifiable agency records, with respect to material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall promptly make the records available to a party.

§ 150B-29. Rules of evidence.

(a) In all contested cases, irrelevant, immaterial and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence available shall be admitted. On the judge's own motion, an administrative law judge may exclude evidence that is inadmissible under this section. The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence. It shall not be necessary for a party or his attorney to object at the hearing to evidence in order to preserve the right to object to its consideration by the administrative law judge in making a decision, by the agency in making a final decision, or by the court on judicial review.

(b) Evidence in a contested case, including records and documents, shall be offered and made a part of the record. Factual information or evidence not made a part of the record shall not be considered in the determination of the case, except

as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

§ 150B-30. Official notice.

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument.

§ 150B-31. Stipulations.

(a) The parties in a contested case may, by a stipulation in writing filed with the administrative law judge, agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable.

(b) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

§ 150B-32. Designation of administrative law judge.

(a) The Director of the Office of Administrative Hearings shall assign himself or another administrative law judge to preside over a contested case.

(a1) Repealed by Session Laws 1985 (Reg. Session 1986), c. 222, s. 1(15), effective July 15, 1986.

(b) On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of an administrative law judge, the administrative law judge shall determine the matter as a part of the record in the case, and this determination shall be subject to judicial review at the conclusion of the proceeding.

(c) When an administrative law judge is disqualified or it is impracticable for him to continue the hearing, the Director shall assign another administrative law judge to continue with the case unless it is shown that substantial prejudice to any party will result, in which event a new hearing shall be held or the case dismissed without prejudice.

§ 150B-33. Powers of administrative law judge.

(a) An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

(b) An administrative law judge may:

- (1) Administer oaths and affirmations;
- (2) Sign, issue, and rule on subpoenas in accordance with G.S. 150B-27 and G.S. 1A-1, Rule 45;
- (3) Provide for the taking of testimony by deposition and rule on all objections to discovery in accordance with G.S. 1A-1, the Rules of Civil Procedure;

(3a) Rule on all prehearing motions that are authorized by G.S. 1A-1, the Rules of Civil Procedure;

(4) Regulate the course of the hearings, including discovery, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;

(5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties;

(6) Stay the contested action by the agency pending the outcome of the case, upon such terms as he deems proper, and subject to the provisions of G.S. 1A-1, Rule 65;

(7) Determine whether the hearing shall be recorded by a stenographer or by an electronic device; and

(8) Enter an order returnable in the General Court of Justice, Superior Court Division, to show cause why the person should not be held in contempt. The Court shall have the power to impose punishment as for contempt for any act which would constitute direct or indirect contempt if the act occurred in an action pending in Superior Court.

(9) Determine that a rule as applied in a particular case is void because (1) it is not within the statutory authority of the agency, (2) is not clear and unambiguous to persons it is intended to direct, guide, or assist, or (3) is not reasonably necessary to enable the agency to fulfill a duty delegated to it by the General Assembly.

(10) Impose the sanctions provided for in G.S. 1A-1 or Chapter 3 of Title 26 of the North Carolina Administrative Code for noncompliance with applicable procedural rules.

(11) Order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.

(12) Except as provided in G.S. 150B-36(d), accept a remanded case from an agency only when a claim for relief has been raised in the petition, and the decision of the administrative law judge makes no findings of fact or conclusions of law regarding the claim for relief, and the agency requests that the administrative law judge make findings of fact and conclusions of law as to the specific claim for relief. The administrative law judge may refuse to accept a remand if there is a sufficient record to allow the agency to make a final decision.

§ 150B-34. Decision of administrative law judge.

(a) Except as provided in G.S. 150B-36(c), and subsection (c) of this section, in each contested case the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a final decision in accordance with G.S. 150B-36. The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency. All references in this Chapter to the

administrative law judge's decision shall include orders entered pursuant to G.S. 150B-36(c).

(b) Repealed by Session Laws 1991, c. 35, s. 6, effective October 1, 1991.

(c) Notwithstanding subsection (a) of this section, in cases arising under Article 9 of Chapter 131E of the General Statutes, the administrative law judge shall make a recommended decision or order that contains findings of fact and conclusions of law. A final decision shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. The final agency decision shall recite and address all of the facts set forth in the recommended decision. For each finding of fact in the recommended decision not adopted by the agency, the agency shall state the specific reason, based on the evidence, for not adopting the findings of fact and the agency's findings shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31. The provisions of G.S. 150B-36(b), (b1), (b2), (b3), and (d), and G.S. 150B-51 do not apply to cases decided under this subsection.

(d) Except for the exemptions contained in G.S. 150B-1(c) and (e), and subsection (c) of this section, the provisions of this section regarding the decision of the administrative law judge shall apply only to agencies subject to Article 3 of this Chapter, notwithstanding any other provisions to the contrary relating to recommended decisions by administrative law judges.

§ 150B-35. No ex parte communication; exceptions.

Unless required for disposition of an ex parte matter authorized by law, neither the administrative law judge assigned to a contested case nor a member or employee of the agency making a final decision in the case may communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate.

§ 150B-36. Final decision.

(a) Before the agency makes a final decision, it shall give each party an opportunity to file exceptions to the decision made by the administrative law judge, and to present written arguments to those in the agency who will make the final decision or order. If a party files in good faith a timely and sufficient affidavit of personal bias or other reason for disqualification of a member of the agency making the final decision, the agency shall determine the matter as a part of the record in the case, and the determination is subject to judicial review at the conclusion of the case.

(b) Except as provided in G.S. 150B-34(c) or subsection (d) of this section, a final decision in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. The agency shall adopt each finding of fact contained in the administrative law judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency and each finding of fact made by the agency that is not contained in the administrative law judge's decision, the agency shall follow the procedures set forth in subsections (b1) and (b2) of this section.

(b1) For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the following:

- (1) The reasons for not adopting the findings of fact.
- (2) The evidence in the record relied upon by the agency in not adopting the finding of fact contained in the administrative law judge's decision.

Any finding of fact not specifically rejected as required by this subsection shall be deemed accepted for purposes of judicial review of the final decision pursuant to Article 4 of this Chapter.

(b2) For each finding of fact made by the agency that is not contained in the administrative law judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact. Any new finding of fact made by the agency shall be supported by a preponderance of the admissible evidence in the record. The agency shall not make any new finding of fact that is inconsistent with a finding of fact contained in the administrative law judge's decision unless the finding of fact in the administrative law judge's decision is not adopted as required by subsection (b1) of this section.

(b3) Except as provided in G.S. 150B-34(c), the agency shall adopt the decision of the administrative law judge unless the agency demonstrates that the decision of the administrative law judge is clearly contrary to the preponderance of the admissible evidence in the record. If the agency does not adopt the administrative law judge's decision as its final decision, the agency shall set forth its reasoning for the final decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the agency. The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision. A copy of the decision shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency, and a copy shall be furnished to his attorney of record and the Office of Administrative Hearings.

(c) The following decisions made by administrative law judges in contested cases are final decisions appealable directly to superior court under Article 4 of this Chapter:

- (1) A determination that the Office of Administrative Hearings lacks jurisdiction.
- (2) An order entered pursuant to the authority in G.S. 7A-759(e).
- (3) An order entered pursuant to a written prehearing motion that either dismisses the contested case for failure of the petitioner to prosecute or grants the relief requested when a party does not comply with procedural requirements.
- (4) An order entered pursuant to a prehearing motion to dismiss the contested case in accordance with G.S. 1A-1, Rule 12(b) when the order disposes of all issues in the contested case.

(d) An administrative law judge may grant judgment on the pleadings, pursuant to a motion made in accordance with G.S. 1A-1, Rule 12(c), or summary judgment, pursuant to a motion made in accordance with G.S. 1A-1, Rule 56, that disposes of all issues in the contested case. Notwithstanding subsection (b) of this section, a decision granting a motion for judgment on the pleadings or summary judgment need not include findings of fact or conclusions of law, except as determined by the administrative law judge to be required or allowed by G.S. 1A-1, Rules 12(c) or Rule 56. For any decision by the administrative law judge granting judgment on the pleadings or summary judgment that

disposes of all issues in the contested case, the agency shall make a final decision. If the agency does not adopt the administrative law judge's decision, it shall set forth the basis for failing to adopt the decision and shall remand the case to the administrative law judge for hearing. The party aggrieved by the agency's decision shall be entitled to immediate judicial review of the decision under Article 4 of this Chapter.

§ 150B-37. Official record.

(a) In a contested case, the Office of Administrative Hearings shall prepare an official record of the case that includes:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose; and
- (5) Repealed by Session Laws 1987, c. 878, s. 25, effective August 14, 1987.
- (6) The administrative law judge's decision or order.

(b) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests, and said transcript or part thereof shall be added to the official record as an exhibit.

(c) The Office of Administrative Hearings shall forward a copy of the official record to the agency making the final decision and shall forward a copy of the administrative law judge's decision to each party.

Article 3A.

Other Administrative Hearings.

§ 150B-38. Scope; hearing required; notice; venue.

(a) The provisions of this Article shall apply to:

- (1) Occupational licensing agencies.
- (2) The State Banking Commission, the Commissioner of Banks, and the Credit Union Division of the Department of Commerce.
- (3) The Department of Insurance and the Commissioner of Insurance.
- (4) The State Chief Information Officer in the administration of the provisions of Article 3D of Chapter 147 of the General Statutes.
- (5) The North Carolina State Building Code Council.

(b) Prior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hearing without undue delay and notice not less than 15 days before the hearing. Notice to the parties shall include:

- (1) A statement of the date, hour, place, and nature of the hearing;
- (2) A reference to the particular sections of the statutes and rules involved; and
- (3) A short and plain statement of the facts alleged.

(c) Notice shall be given personally or by certified mail. If given by certified mail, notice shall be deemed to have been given on the delivery date appearing on the return receipt. If notice cannot be given personally or by certified mail, then

notice shall be given in the manner provided in G.S. 1A-1, Rule 4(j1).

(d) A party who has been served with a notice of hearing may file a written response with the agency. If a written response is filed, a copy of the response must be mailed to all other parties not less than 10 days before the date set for the hearing.

(e) All hearings conducted under this Article shall be open to the public. A hearing conducted by the agency shall be held in the county where the agency maintains its principal office. A hearing conducted for the agency by an administrative law judge requested under G.S. 150B-40 shall be held in a county in this State where any person whose property or rights are the subject matter of the hearing resides. If a different venue would promote the ends of justice or better serve the convenience of witnesses, the agency or the administrative law judge may designate another county. A person whose property or rights are the subject matter of the hearing waives his objection to venue if he proceeds in the hearing.

(f) Any person may petition to become a party by filing with the agency or hearing officer a motion to intervene in the manner provided by G.S. 1A-1, Rule 24. In addition, any person interested in a contested case under this Article may intervene and participate to the extent deemed appropriate by the agency hearing officer.

(g) When contested cases involving a common question of law or fact or multiple proceedings involving the same or related parties are pending before an agency, the agency may order a joint hearing of any matters at issue in the cases, order the cases consolidated, or make other orders to reduce costs or delay in the proceedings.

(h) Every agency shall adopt rules governing the conduct of hearings that are consistent with the provisions of this Article.

§ 150B-39. Depositions; discovery; subpoenas.

(a) A deposition may be used in lieu of other evidence when taken in compliance with the Rules of Civil Procedure, G.S. 1A-1. Parties in a contested case may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1.

(b) Upon a request for an identifiable agency record involving a material fact in a contested case, the agency shall promptly provide the record to a party, unless the record relates solely to the agency's internal procedures or is exempt from disclosure by law.

(c) In preparation for, or in the conduct of, a contested case subpoenas may be issued and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the agency may quash a subpoena if, upon a hearing, the agency finds that the evidence, the production of which is required, does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Witness fees shall be paid by the party requesting the subpoena to subpoenaed witnesses in accordance with G.S. 7A-314. However, State officials or employees who are subpoenaed shall not be entitled to any witness fees, but they shall receive their normal salary and they shall not be required to take any annual leave for the witness days. Travel expenses of State officials or employees who are subpoenaed shall be reimbursed as provided in G.S. 138-6.

§ 150B-40. Conduct of hearing; presiding officer; ex parte communication.

(a) Hearings shall be conducted in a fair and impartial manner. At the hearing, the agency and the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for the use of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

If a party fails to appear in a contested case after he has been given proper notice, the agency may continue the hearing or proceed with the hearing and make its decision in the absence of the party.

(b) Except as provided under subsection (e) of this section, hearings under this Article shall be conducted by a majority of the agency. An agency shall designate one or more of its members to preside at the hearing. If a party files in good faith a timely and sufficient affidavit of the personal bias or other reason for disqualification of any member of the agency, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. If a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer shall be assigned to continue with the case, except that if assignment of a new presiding officer will cause substantial prejudice to any party, a new hearing shall be held or the case dismissed without prejudice.

(c) The presiding officer may:

- (1) Administer oaths and affirmations;
- (2) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence;
- (3) Provide for the taking of testimony by deposition;
- (4) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents;
- (5) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties; and
- (6) Apply to any judge of the superior court resident in the district or presiding at a term of court in the county where a hearing is pending for an order to show cause why any person should not be held in contempt of the agency and its processes, and the court shall have the power to impose punishment as for contempt for acts which would constitute direct or indirect contempt if the acts occurred in an action pending in superior court.

(d) Unless required for disposition of an ex parte matter authorized by law, a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case under this Article shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or

prosecuting functions in connection with the case under consideration or a factually-related case. This section does not apply to an agency employee or party representative with professional training in accounting, actuarial science, economics or financial analysis insofar as the case involves financial practices or conditions.

(e) When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing of a contested case under this Article. Upon receipt of the application, the Director shall, without undue delay, assign an administrative law judge to hear the case.

The provisions of this Article, rather than the provisions of Article 3, shall govern a contested case in which the agency requests an administrative law judge from the Office of Administrative Hearings.

The administrative law judge assigned to hear a contested case under this Article shall sit in place of the agency and shall have the authority of the presiding officer in a contested case under this Article. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact and proposed conclusions of law.

An administrative law judge shall stay any contested case under this Article on motion of an agency which is a party to the contested case, if the agency shows by supporting affidavits that it is engaged in other litigation or administrative proceedings, by whatever name called, with or before a federal agency, and this other litigation or administrative proceedings will determine the position, in whole or in part, of the agency in the contested case. At the conclusion of the other litigation or administrative proceedings, the contested case shall proceed and be determined as expeditiously as possible.

The agency may make its final decision only after the administrative law judge's proposal for decision is served on the parties, and an opportunity is given to each party to file exceptions and proposed findings of fact and to present oral and written arguments to the agency.

§ 150B-41. Evidence; stipulations; official notice.

(a) In all contested cases, irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed; but, when evidence is not reasonably available under such rules to show relevant facts, they may be shown by the most reliable and substantial evidence available. It shall not be necessary for a party or his attorney to object to evidence at the hearing in order to preserve the right to object to its consideration by the agency in reaching its decision, or by the court of judicial review.

(b) Evidence in a contested case, including records and documents shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under G.S. 150B-30. Documentary evidence may be received in the form of a copy or excerpt or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original if available.

(c) The parties in a contested case under this Article by a stipulation in writing filed with the agency may agree upon any

fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties should agree upon facts when practicable. Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties.

(d) Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument. An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it.

§ 150B-42. Final agency decision; official record.

(a) After compliance with the provisions of G.S. 150B-40(e), if applicable, and review of the official record, as defined in subsection (b) of this section, an agency shall make a written final decision or order in a contested case. The decision or order shall include findings of fact and conclusions of law. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and shall be supported by substantial evidence admissible under G.S. 150B-41. A copy of the decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to his attorney of record.

(b) An agency shall prepare an official record of a hearing that shall include:

- (1) Notices, pleadings, motions, and intermediate rulings;
- (2) Questions and offers of proof, objections, and rulings thereon;
- (3) Evidence presented;
- (4) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose;
- (5) Proposed findings and exceptions; and
- (6) Any decision, opinion, order, or report by the officer presiding at the hearing and by the agency.

(c) Proceedings at which oral evidence is presented shall be recorded, but need not be transcribed unless requested by a party. Each party shall bear the cost of the transcript or part thereof or copy of said transcript or part thereof which said party requests.

**Article 4.
Judicial Review.**

150B-43. Right to judicial review.

Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by

another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

§ 150B-44. Right to judicial intervention when decision unreasonably delayed.

Unreasonable delay on the part of any agency or administrative law judge in taking any required action shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency or administrative law judge. An agency that is subject to Article 3 of this Chapter and is not a board or commission has 60 days from the day it receives the official record in a contested case from the Office of Administrative Hearings to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 60 days. An agency that is subject to Article 3 of this Chapter and is a board or commission has 60 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 60 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 60 days. If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's decision as the agency's final decision. Failure of an agency subject to Article 3A of this Chapter to make a final decision within 120 days of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or, if the case was heard by an administrative law judge, by the administrative law judge.

§ 150B-45. Procedure for seeking review; waiver.

To obtain judicial review of a final decision under this Article, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides.

The person seeking review must file the petition within 30 days after the person is served with a written copy of the decision. A person who fails to file a petition within the required time waives the right to judicial review under this Article. For good cause shown, however, the superior court may accept an untimely petition.

§ 150B-46. Contents of petition; copies served on all parties; intervention.

The petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks. Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings. Names and addresses of such parties shall be furnished to the petitioner by the agency upon request. Any party to the administrative proceeding is a party to the review proceedings unless the party withdraws by notifying the court of the withdrawal and serving the other parties with notice of the withdrawal. Other parties to the proceeding may file a response to the petition within 30 days of service. Parties,

including agencies, may state exceptions to the decision or procedure and what relief is sought in the response.

Any person aggrieved may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24.

§ 150B-47. Records filed with clerk of superior court; contents of records; costs.

Within 30 days after receipt of the copy of the petition for review, or within such additional time as the court may allow, the agency that made the final decision in the contested case shall transmit to the reviewing court the original or a certified copy of the official record in the contested case under review together with: (i) any exceptions, proposed findings of fact, or written arguments submitted to the agency in accordance with G.S. 150B-36(a); and (ii) the agency's final decision or order. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

§ 150B-48. Stay of decision.

At any time before or during the review proceeding, the person aggrieved may apply to the reviewing court for an order staying the operation of the administrative decision pending the outcome of the review. The court may grant or deny the stay in its discretion upon such terms as it deems proper and subject to the provisions of G.S. 1A-1, Rule 65.

§ 150B-49. New evidence.

An aggrieved person who files a petition in the superior court may apply to the court to present additional evidence. If the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. If an administrative law judge did not make a decision in the case, the court shall remand the case to the agency that conducted the administrative hearing. After hearing the evidence, the agency may affirm or modify its previous findings of fact and final decision. If an administrative law judge made a decision in the case, the court shall remand the case to the administrative law judge. After hearing the evidence, the administrative law judge may affirm or modify his previous findings of fact and decision. The administrative law judge shall forward a copy of his decision to the agency that made the final decision, which in turn may affirm or modify its previous findings of fact and final decision. The additional evidence and any affirmation or modification of a decision of the administrative law judge or final decision shall be made part of the official record.

§ 150B-50. Review by superior court without jury.

The review by a superior court of agency decisions under this Chapter shall be conducted by the court without a jury.

§ 150B-51. Scope and standard of review.

(a) In reviewing a final decision in a contested case in which an administrative law judge made a recommended decision and the State Personnel Commission made an advisory decision in accordance with G.S. 126-37(b1), the court shall make two initial determinations. First, the court shall determine whether the applicable appointing authority heard new evidence after receiving the recommended decision. If the court determines that the applicable appointing authority heard new evidence, the

court shall reverse the decision or remand the case to the applicable appointing authority to enter a decision in accordance with the evidence in the official record. Second, if the applicable appointing authority did not adopt the recommended decision, the court shall determine whether the applicable appointing authority's decision states the specific reasons why the applicable appointing authority did not adopt the recommended decision. If the court determines that the applicable appointing authority did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the case to the applicable appointing authority to enter the specific reasons.

(a1) In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency adopted the administrative law judge's decision, the court shall determine whether the agency heard new evidence after receiving the decision. If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record. The court shall also determine whether the agency specifically rejected findings of fact contained in the administrative law judge's decision in the manner provided by G.S. 150B-36(b1) and made findings of fact in accordance with G.S. 150B-36(b2). If the court determines that the agency failed to follow the procedure set forth in G.S. 150B-36, the court may take appropriate action under subsection (b) of this section.

(b) Except as provided in subsection (c) of this section, in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

(c) In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court shall review the official record, de novo, and shall make findings of fact and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decisions. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record. The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under G.S. 150B-36(b1), 150B-36(b2), or 150B-36(b3), or reverse or modify the final decision for the

agency's failure to provide the explanations; and may take any other action allowed by law.

(d) In reviewing a final agency decision allowing judgment on the pleadings or summary judgment, or in reviewing an agency decision that does not adopt an administrative law judge's decision allowing judgment on the pleadings or summary judgment pursuant to G.S. 150B-36(d), the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. If the order of the court does not fully adjudicate the case, the court shall remand the case to the administrative law judge for such further proceedings as are just.

§ 150B-52. Appeal; stay of court's decision.

A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in G.S. 7A-27. The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under G.S. 150B-51(c), the court's findings of fact shall be upheld if supported by substantial evidence. Pending the outcome of an appeal, an appealing party may apply to the court that issued the judgment under appeal for a stay of that judgment or a stay of the administrative decision that is the subject of the appeal, as appropriate.

§§ 150B-53 through 150B-57: Reserved for future codification purposes.

Article 5.

Publication of Administrative Rules.

§§ 150B-58 through 150B-64: Repealed by Session Laws 1991, c. 418, s. 5, effective October 1, 1991.

Article 12K.

Joint Legislative Administrative Procedure Oversight Committee.

§ 120-70.100. Creation and membership of Joint Legislative Administrative Procedure Oversight Committee.

(a) The Joint Legislative Administrative Procedure Oversight Committee is established. The Committee consists of 16 members as follows:

- (1) Eight members of the Senate appointed by the President Pro Tempore of the Senate, at least three of whom are members of the minority party.
- (2) Eight members of the House of Representatives appointed by the Speaker of the House of Representatives, at least three of whom are members of the minority party.

(b) Members of the Committee shall serve a term of two years beginning on January 15 of each odd-numbered year. Members may complete a term of service on the Committee even if they do not seek reelection or are not reelected to the General Assembly, but resignation or removal from service in the General Assembly constitutes resignation or removal from service on the Committee. A member continues to serve until the member's successor is appointed. A vacancy shall be filled within 30 days by the officer who made the original appointment. (1995, c. 507, s. 27.8(a).)

§ 120-70.101. Purpose and powers of Committee.

The Joint Legislative Administrative Procedure Oversight Committee has the following powers and duties:

- (1) To review rules to which the Rules Review Commission has objected to determine if statutory changes are needed to enable the agency to fulfill the intent of the General Assembly.
- (2) To receive reports prepared by the Rules Review Commission containing the text and a summary of each rule approved by the Commission.
- (3) To prepare a notebook that contains the administrative rules that have been approved by the Rules Review Commission and reported to the Committee and to notify each member of the General Assembly of the availability of the notebook.
- (4) To review State regulatory programs to determine if the programs overlap, have conflicting goals, or could be simplified and still achieve the purpose of the regulation.
- (5) To review existing rules to determine if the rules are necessary or if the rules can be streamlined.
- (6) To review the rule-making process to determine if the procedures for adopting rules give the public adequate notice of and information about proposed rules.
- (7) To review any other concerns about administrative law to determine if statutory changes are needed.
- (8) To report to the General Assembly from time to time concerning the Committee's activities and any recommendations for statutory changes. (1995, c. 507, s. 27.8(a); 1996, 2nd Ex. Sess., c. 18, s. 7.10(h).)

§ 120-70.102. Organization of Committee.

(a) The President Pro Tempore of the Senate and the Speaker of the House of

Representatives shall each designate a cochair of the Joint Legislative Administrative Procedure Oversight Committee. The Committee shall meet at least once a quarter and may meet at other times upon the joint call of the cochairs.

(b) A quorum of the Committee is nine members. No action may be taken except by a majority vote at a meeting at which a quorum is present. While in the discharge of its official duties, the Committee has the powers of a joint committee under G.S. 120-19 and G.S. 120-19.1 through G.S. 120-19.4.

(c) Members of the Committee receive subsistence and travel expenses as provided in G.S. 120-3.1. The Committee may contract for consultants or hire employees in accordance with G.S. 120-32.02. The Committee may meet in the Legislative Building or the Legislative Office Building upon the approval of the Legislative Services Commission. The Legislative Services Commission, through the Legislative Services Officer, shall assign professional staff to assist the Committee in its work. Upon the direction of the Legislative Services Commission, the Supervisors of Clerks of the Senate and of the House of Representatives shall assign clerical staff to the Committee. The expenses for clerical employees shall be paid by the Committee. (1995, c. 507, s. 27.8(a); 1996, 2nd Ex. Sess., c. 18, s. 8(l).)

§ 120-70.103. Exercise of duty to maintain a notebook of approved rules.

With the approval of the Legislative Services Commission, the Joint Legislative Administrative Procedure Oversight Committee may delegate to the Legislative Library the duty to maintain a notebook containing rules approved by the Rules Review Commission. Whether the notebook is maintained by the Committee or by the Legislative Library, rules shall be filed in the notebook in accordance with the numbering system used in the North Carolina Administrative Code. (1995, c. 507, s. 27.8(a).)

§ 120-70.104. Reserved for future codification purposes.
codification purposes.

**JOINT LEGISLATIVE
ADMINISTRATIVE PROCEDURE
OVERSIGHT COMMITTEE**

January 12, 2006
10:00 a.m. – Room 544
MINUTES

The Joint Legislative Administrative Procedure Oversight Committee met on Thursday, January 12, 2006 in Room 544 of the Legislative Office Building. Members present included: Sen. Nesbitt, Sen. Kerr, Sen. Purcell, Sen. Stevens, Rep. Bell, Rep. Jones, Rep. Melanie Wade Goodwin, Rep. Gibson, Rep. Ross, and Rep. Stiller.

Senator Nesbitt called the meeting to order and welcomed committee members, staff, and guests. He gave a brief history of how the committee came into existence and the importance of its charge. As a legislative committee, he said that the Administrative Procedure LOC has no authority to veto anything in the Executive branch, but it is a way to slow the process down so that a problem with an agency adopting a disputed rule can be dealt with, if necessary, through legislation.

Next on the agenda was approval of the budget. Sen. Nesbitt entertained a motion to adopt the budget, Sen. Purcell so moved, and the motion passed

The third agenda item was the review of the Committee Charge, which is Article 12K or chapter 120 – Authorizing Legislation.

Fourth on the Agenda was an Orientation Session. Karen Cochrane-Brown, Committee Co-Counsel, was recognized to give the committee an overview of the Administrative Procedure Act. (*See copy of Rule-Making Under the APA (Attachment I).*)

Ms. Cochrane-Brown said that administrative law governs the interaction of the public and various agencies in state government. It is rooted, essentially, in the principles of “due process” in the Constitution and requires that government give the public notice and an opportunity to be heard before it takes action against them.

The North Carolina Administrative Procedure Act (APA) was first enacted in 1974 and went into effect in 1976. It was then *Chapter 150A*. During the mid 80s, *Chapter 150A* was repealed and re-written as *Chapter 150B*. That is the law that the General Assembly has been building on since that point in time.

The main feature of the APA, from its inception, was that it provided a uniform procedure for the adoption, amendment, or repeal of rules, including the requirement of public notice and public participation.

There were also uniform procedures established for administrative hearings and the procedures established resembled what was in existence at the time, primarily for licensing boards. Over the years that process has undergone some change, as has the

rule-making process. But basically, those were the main features from the beginning and they have persisted throughout the history of this law.

Ms. Cochrane-Brown said that the APA has always been controversial. Concerns arise from the tension between the Legislative and Executive branches of government in maintaining the proper balance in the separation of powers.

Ms. Cochrane-Brown then discussed the structure of the APA.

Article 1 of the APA includes the “Policy and Scope” which sets out the exemptions to the law. **Art. 1** also includes key definitions (G.S. 150B-2).

Important definitions to note include:

- **AGENCY-APA** only applies to state agencies, it does not apply to the legislature, the judiciary, and it does not apply to local government, and
- **RULE** - Anything that an agency does that interprets or implements a state statute, a federal statute or a federal regulation, including the creation of a fee. *(See Page 12 of Attachment II).*

Within that definition, the APA includes a number of things that are not rules. These are basically things that don’t apply to the public at large. These include: budget guidelines, internal memoranda of agencies, and specifications of how specific things must be done.

Article 2A of the APA defines the process for rule-making. Note that a rule is not valid unless it is adopted in substantial compliance with **Article 2A** of the APA. There are also exemptions from Rule-Making, either entirely, or for some aspect of what they are required to do. *(For a list of exemptions from Rule-Making, see page 4 of Attachment I).*

Article 3 of the APA deal with the Administrative Hearing process, which is the contested case procedure. A person bringing a contested case must establish that an agency has deprived him of a property interest by either exceeding its authority, acting erroneously, failing to use proper procedure, acting arbitrarily or capriciously, or failing to act as required by law. There are exemptions from Contested Case Provisions *(See Page 5 of Attachment I).*

Under **Article 3**, an Administrative Law Judge (ALJ) conducts a trial-type hearing using the same rules of evidence that are applicable in the General Courts of Justice in North Carolina. After the hearing the ALJ makes a decision based on the evidence and the law. The decision is presumed to be right unless the agency can find specific places in the record where the ALJ erred and the agency must specifically refer to those when it makes its final decision. The transcript and the ALJ’s decision are returned to the agency that originally made the decision and that agency makes the final decision in the case. Then, that decision is subject to judicial review. Under judicial review, there is no longer a preference in favor of the agency, as there used to be. If an agency reaches a decision that is different than the ALJ, the Superior Court could, on its own, hold a trial de novo and determine what the facts are and what the law is on the case.

Article 3A of the APA relates to specific enumerated agencies that have a different contested case process. These include: occupational licensing boards, the Department of Insurance, the Banking Commission and the Credit Union Commission. These agencies, under the APA, are allowed to create their own administrative hearing process. However, these have to contain some of the same protections that **Article 3** guarantees on cases that are heard by ALJs. These cases can also be appealed to the Superior Court.

Article 4 of the APA provides the provisions for judicial review. Before a person can seek court review of a matter, they must be aggrieved by a final decision, and must have exhausted all administrative remedies. Trial court's decisions in administrative cases are reviewable by the Court of Appeals in the same manner as any other civil case.

When Ms. Cochrane-Brown concluded the overview of the Administrative Procedure Act, she began to explain the rule-making process. There are three different rules in the APA rule-making process:

- Permanent rules - *For Steps in Adopting a Permanent Rule see Page 19 of Attachment II. Also, refer to flow charts on the last three pages of Attachment II.*

A permanent rule must be approved by the Rules Review Commission (RRC) before it can go into effect and becomes effective on the first day of the month following the month the rule is approved, unless the RRC receives written objections to the rule. If the RRC receives written objections from 10 or more people clearly requesting legislative review, then the rule cannot become effective before the 30th legislative day of the next regular session of the General Assembly. A rule can be delayed until the end of Session, if legislation has been introduced to disapprove that rule.

Rep. Stiller asked about disapproval of a permanent rule. He wondered if that happened, would the agency adopt a temporary rule. Then, if the end result is the rule is not going to be allowed, would the agency have to go back and make changes to the rule that the public found objectionable?

Ms. Cochrane-Brown said that was correct. The temporary rule would stay in effect only until either a permanent rule is adopted or permanently disapproved by a bill.

Rep. Jones was concerned about agencies being exempt from the Administrative Procedure Act. He was also concerned that the "Executive Order Exception" granting the Governor the power to make effective a permanent rule, was infringing on the separation of power in the legislative and executive branch.

Ms. Cochrane-Brown said that was a very narrow exception included in the 1995 amendment to the APA, at which time, all rules had to wait until the legislature went into session. It was a limited circumstance wherein if the rule had been approved by the RRC, but subject to the delay period, and if the governor found that there was a pressing need during the interim to make that rule effective immediately, he could use that Executive

Order. Ms. Cochrane-Brown said she did not believe that the "Exception" has ever been used.

Sen. Nesbitt told the committee that nothing in the APA was meant to block the governor and he felt it was appropriate that the Executive branch have this authority.

There was discussion about bills introduced to delay a rule, when no action was taken on the bill. Ms. Cochrane-Brown said that the bill is alive until the legislature adjourns. There was also discussion about a bill not meeting the cross-over deadline. Ms. Cochrane-Brown told the committee that the APA specifically provides that the bill is eligible for consideration until the end of session.

Sen. Stevens noted that there was an exemption for OSHA standards, and wondered if there were other exemptions for other state agencies that are, in essence, carrying out federal regulations or laws such as the EPA, DEHNR, Dept. of Emergency Management and FEMA.

Ms. Cochrane-Brown said that she was not aware of such exemptions and that if it were a federal rule that was being followed, then there would be no need for a rule. But if incorporating it into state policy then, yes, there would need to be a rule.

- Temporary rules - *For Steps in Adopting a Temporary Rule see Page 32 of Attachment II.*

In 2003 temporary rule making was made substantially more difficult. HB 1151 streamlined the process with a goal of eliminating incentives for agencies to seek exemptions and to seek temporary rule-making authority. That bill made temporary rule-making more difficult by making the process longer, one that requires notice, public hearing and review in a similar manner as required under permanent rule-making.

- Emergency rules - *Created by enactment of HB 1151 (2003) – limited for real emergencies, where the rule needs to go into effect quickly when even the temporary rule-making process would take too long. These rules do not require the notice and hearing that permanent and temporary rules require and only lasts for 60 days. (For Steps in Adopting an Emergency Rule, see Page 37 of Attachment II.)*

When Ms. Cochrane-Brown had concluded her comments about rule-making, discussion followed.

Rep. Jones asked what defines an "emergency" for an Emergency rule to be implemented. Ms. Cochrane-Brown cited the statute, which says "A serious or unseen threat to public health or safety." Another situation in the statute for which an Emergency rule is authorized is for DHHS. If the Department feels that it is necessary to provide a new or increased benefit to children and families, or if there is something enacted by the federal government and DHHS has to adopt rules in order to implement it

in the state, then it can use an Emergency rule for that limited purpose. But it could not use an Emergency rule to decrease a benefit.

Sen. Stevens said that last session there was a situation where the statute would set a fee limit, the agency would still have to come to Governmental Operations (Gov Ops), even though the fee was within that limit. There was talk about changing that requirement. Sen. Stevens wondered if that had been changed.

Ms. Cochrane-Brown said the problem was that Gov Ops wasn't meeting regularly and agencies were running into the problem of not being able to have their rules entered into the Code. This committee made a recommendation last session that that law be amended to ease that. The requirement is still there, but if Gov Ops does not meet within ninety days after the agency files the Notice of Text and requests of Gov Ops that they meet to consult, the rule can go into effect in any event. When the agency sends its request for a consultation, it has to specifically state its statutory basis for the rule, the need for the rule, what it is the agency is doing and why. Because of issues of separation of power, Gov Ops can't stop a fee increase, but can consult and make recommendations to the agency.

Sen. Nesbitt said this would not be a problem if the legislature set the fees. He said the General Assembly started putting limits and eventually gave up control over fees.

After members were given the opportunity to introduce themselves, Karen Cochrane-Brown was recognized to explain Agenda Item #5, the proposed Dental Board rules regarding examination and licensure of dental hygienists. (*See Attachment II*)

Bobby White, Chief Operating Officer with the NC Board of Dental Examiners, was recognized. He told the committee that if the Board's proposed rules were adopted, the total cost for a Dental Hygienist to be examined and licensed would be \$775 \$75 for the license and \$700 for the examination and that, currently, the cost is \$170.

He referred the committee to NC Institute of Medicine Task Force on Dental Care Access Report to the NCGA. (*See Attachment III, Page 1*) Some of those recommendations were aimed directly at the NC State Board of Dental Examiners focusing on what the Board could do to improve access to dental care to the citizens of North Carolina.

He referred the committee to *Recommendation #11 (Attachment III)*. That recommendation, coming from the General Assembly through the Institute of Medicine to the NC State Board of Dental Examiners, mandated that the Board examine other regional examinations to determine if these ensure the same level of professional competence required to pass the NC clinical examination. The last sentence in *Recommendation #11* says, "If the Board finds these exams to be comparable, procedures should be developed for accepting these examinations as a basis for North Carolina licensure in the year following this determination." Mr. White said that has occurred.

Mr. White said that North Carolina, along with several other states in the southeast, has been an independent state offering its own exam that is good only in the state. Nationally, there are several other states that have joined into regional entities. These

entities have outside testing agencies that offer a dental and dental hygiene exam for students graduating in those states. There are five of these nationally and up until now, the Board has been reluctant to join one of these regional bodies primarily because four of these regions would require that the Board abdicate its testing authority to the agency. That changed with the inception of the CITA Corporation.

Mr. White said the Board believed that it should not abdicate its testing authority so the CITA organization has places on its Board so that NC Dental Board members will have a voice in the continuing oversight and development of the dental and dental hygiene exams. Board members are of the opinion that the "hands on" experience with the exam is critical to protecting the health and safety of the citizens of North Carolina. He said Board members on CITA are calibrated, they can act as graders, floor monitors, and they can take other positions of importance while the exams are being offered. He believes that this national exam will become a reality in the near future and the Board wants North Carolina to be "on board" when that exam finally comes to fruition. Though CITA is a new and growing organization, because of the type and nature of this exam, it will gain wider acceptance throughout the nation.

Mr. White said it is his understanding that the issue before the committee is, "Does the dental board have the authority, under the current statutes, to delegate the dental hygiene exam to a third party?" The Board, he said, is moving forward on the belief that such authority exists. Mr. White told the members that when the Board thought that it could implement *Recommendation #11*, it did a careful study of the statutes and believed that the Dental statute did not authorize the Board with appropriate authority to begin to accept an outside third-party exam. However, the dental hygiene statute is written completely differently and the Board felt that the statute itself grants that authority.

He assured the members that the Board had no desire to be adversarial to the committee and saw his roll as providing information and facts. He said the Board's job is to follow the will and wisdom of the committee.

Rep. Ross said it was her understating that if the rule is adopted, everybody will take the new exam, as opposed to taking the NC exam. She asked why the Board did not consider the option of having two exams: One for hygienists that want to work in North Carolina and the other regional exam for those who wished to have the option of staying in North Carolina or relocating to another state.

Mr. White said that is something that could be considered.

Rep. Jones told Mr. White that as he interpreted the statute, the authority to do what the Board is proposing would rest upon whether the Board is going to administer the exam.

Mr. White said the agency (CITA) would be administering the exam, however, their Board members would be a part of that administration process.

Rep. Bell asked Mr. White if any consideration had been given to auxiliary expenses such as travel to the testing site and possibly an overnight stay.

Mr. White said that had not been considered, but those costs would be the same even if this rule is not adopted.

Sen. Stevens was concerned about precedent that might be created if this rule is approved.

Sen. Purcell wondered if the fee of \$700 could be increased, or was that the maximum that could be charged.

Mr. White said he would have to defer to the outside agency for that cost. He said there are currently five of these nationally and all of them charge between \$650 to \$700 for a regional exam.

Sen. Nesbitt said, obviously the General Assembly chose to control how much this fee would be. It was set, and said, "not to exceed." Through the procedure the Board is proposing, the General Assembly would give up that control and the fee would then be determined by the testing agency. He felt like the rule is violating the intent of the statute.

Sen. Kerr asked if the Board was going to get completely out of testing. He didn't want the state to lose that authority to an outside, maybe out-of-state, agency. He also asked if the North Carolina Dental Society endorsed the Board's plan.

Mr. White referred to William Potter who spoke on behalf of the NC Dental Society. He said the Dental Society and the NC Dental Hygienist Society have been involved in this transitional period. Nationally, he said there is a trend to go to a national exam for uniformity, mobility, and other things. The Institute of Medicine has directed the Board to look into this and that is what is happening. The NC Dental Society, because it is more involved in dental issues, has been before the General Assembly asking for the specific authority in the dental statute. In working with the Board it was determined that the authority to determine the type of dental hygienist exam was in the statute. He added that because of pressures from the Institute of Medicine and the Department of Health and Human Services to try to encourage increased numbers of dentists and dental hygienists, one of the ways that the Board has done that is to keep the cost of dental hygiene exam artificially low. The Board of Dental Examiners cannot conduct a Dental Hygienist exam for \$170 each. The actual cost is much higher and has been supplemented by other revenues of the Board. In the past, the only way that an out-of-state hygienist could be licensed in NC was to take the State exam. The theory was that a low fee might attract more hygienists to North Carolina. Now, with the already implemented change of "license by credentials," that is no longer important. Mr. Potter said that the Dental Society supports the Board's actions.

Rep. Ross pointed out that the Board could raise the fee for the hygiene exam to as much as \$350 and wondered why that had not been a consideration.

Mr. White said that was certainly a possibility. He wanted the committee to know that the Board was taking this action due to developments nationally, and it would be extremely difficult for North Carolina to stand alone without any kind of mobility for its

dental hygienists. He felt that if the State offers its own exam, the issues of "access to care" would not be addressed.

Rep. Ross pointed out that if the hygienists only take the state exam, then North Carolina gets to keep them.

Mr. White talked about a "scholarship fund" that has been created by the Board to help students with financial needs, and added that the Hygienist Society and Dental Society are in favor of this.

Sen. Nesbitt said that obviously the concern here is the cost, that \$700 is a lot of money and that may be a factor in keeping hygienists out of the state.

The issue was displaced until the next meeting.

Judge Julian Mann, Chief Administrative Law Judge and Director of the Office of Administrative Hearings, was recognized by Sen. Nesbitt.

Judge Mann said he became a part of this process when he began practicing law in 1974 but assumed the position with OAH in 1989. The Administrative Procedure Act originally was procedures governing independent agencies in rule-making and then in contested cases. Contested cases really came out of one or two US Supreme Court decisions: *Goldberg vs. Kelly* and *Matthews vs. Eldridge* and forced many states to establish uniform procedures for all administrative contested case actions that involved property. Most of the cases that are involved in the Hearings Division do involve some form of property interest.

He said the Office of Administrative Hearings has three divisions. The Rules and Rule-making Division, is one that the General Assembly needs to have the most oversight over because it is tantamount to lawmaking and it occurs outside the Constitutional authority of the Legislative branch of government. The Office also has a division that deals with civil rights and conducts investigations and is a deferral agency from the EEOC for state employees. There is also the Hearings Division, where the Administrative Law Judges are housed.

Judge Mann recognized Camille Winston, Deputy Director of the Agency, Molly Masech who is with the Rules Division, Joe Deluca and Bobby Bryant, legal staff to the RRC, and Judge Sammie Chess who is the Resident Administrative Law Judge in High Point and in Guilford County.

Judge Mann commended an Article to committee which he had written entitled – "Striving for Efficiency in Administrative Litigation: North Carolina's Office of Administrative Hearings." The article is a Law Review article and involves "delay reduction." (*See Attachment IV*)

Judge Mann said that in the administrative procedure, delay is the one thing that can create more problems, in any judicial system, but particularly in administrative law. A contested case can take up to five years for finality. Judge Mann said he is concerned

about the Hearing Division and its ability to maintain delay reduction with the rise in contested case petitions. (*See Charts in Attachment IV*) These petitions or cases are escalating rapidly. Judge Mann said that when he came to the OAH in 1989 there were nine ALJs. The Chief Judge was primarily a manager and not a presider. Now that has been changed. The Office is down to eight ALJs and his role is to be in dockets, all over the state, not only in general administrative law situations, but also in special education cases which are taking an enormous amount of the time in the Office of Administrative Hearings.

Judge Mann showed the committee photos of his office space at the OAH and said that all divisions were going to have to abandon the space that they are located in on Blount Street because the building has been sold by the State of North Carolina. He speculated on the amount of time they have left in the building and said they were facing some very restrictive problems. He was also concerned about security problems.

The Judge directed the committee's attention to the chart "Contested Case Petitions Withdrawn or Settled" and wanted members to note the escalating settlement rate in cases from 2001 to 2005. He said this increase was not all attributable to the amendments made to the APA in 2000, but a large part of it can be attributed to strengthening the balance that was given to the ALJs at that time.

Judge Mann read the policy statement from *150B.22* "It is the policy of this state that any dispute between an agency and another person that involves that person's rights, duties or privileges, including licensing or the levy of monetary penalties, should be settled through informal procedures."

He said this has gone largely unnoticed over the years, but he feels is one of the highest statements that has been put in the statute under the heading of "The Public Policy of the State." This means that it is elevated to one of the highest provisions found in the statute and it simply says the citizens and the agencies that regulate them should not be put in conflict unless it is absolutely necessary. He would like to see that policy even further implemented.

Judge Mann said that he mentioned in the article that North Carolina's OAH is compared to the ABA Time Standards for delay reduction. This is the only national standard for courts. It says that 90 percent of all civil cases should be settled, tried or otherwise concluded within twelve months of the date of case filing. This has been the standard for a long time throughout the United States. He said that there were only a few courts in the United States that meet that standard, but it is an important standard for the OAH because of the extra emphasis that delay can cause in hardships to those that are going through the Office. He said that it is becoming increasingly difficult for them to address delay reduction when their caseload has expanded by 1000 cases and they have one less Administrative Law Judge and no Trial Court Administrator that can monitor cases that go through the system.

Judge Mann said that in preparing to move into new facilities, they cannot establish their court system in agencies where they hear cases. It needs to be a neutral venue.

The OAH is having more difficulty getting into Courthouses because of increased pressure on those courthouses, and the Judge said they were also having difficulty getting into spaces that he deemed secure. He referred to the article in his handout, which he recently wrote, entitled "Ten Security Measures for Administrative Hearings." He said he had not found any analysis of problems for administrative hearings, but now there is a lot of emphasis placed on security in judicial buildings after so many dreadful things have happened to judges and court officials.

Judge Mann commended his handout to the committee, the last page of which contains "Proposed Corrective Action."

Senator Nesbitt thanked Judge Mann and recommended to the members that they take time to read the opinion written by Judge Mann. From the statistics he presented the number of cases has gone up and more cases have been settled, but they also show that since 1990, the Office of Administrative Hearings has lost three positions. Sen. Nesbitt said that over the last few years, there hasn't been enough funding to address this and that it is up to the committee to help to see that OAH gets the manpower it needs.

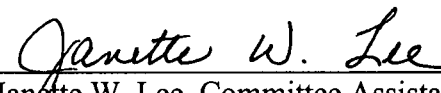
Rep. Stiller agreed and asked if the OAH budget was a line-item in the budget. Judge Mann said that the OAH is an executive branch agency, funded like other state agencies.

Rep. Jones wondered if there was a state model where all or most state agencies must go through Administrative Process? Judge Mann mentioned Maryland, Florida, Tennessee, Texas, and Michigan, and said he felt that Florida and Texas were the most instructive models.

There being no further business, the meeting adjourned at 12:25 p.m.



Senator Martin L. Nesbitt, Presiding



Janette W. Lee, Committee Assistant

RULE-MAKING UNDER THE APA

*Orientation for Members of the
Joint Legislative Administrative Procedure Oversight
Committee*

Thursday, January 12, 2006

EDITED BY: KAREN COCHRANE BROWN
RESEARCH DIVISION
REV: JANUARY 2006

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PURPOSE OF THE ADMINISTRATIVE PROCEDURE ACT

G.S. 150B

The purpose of the Administrative Procedure Act is to establish a uniform system of administrative rule-making and adjudicatory procedures for State agencies. These procedures ensure that the functions of rule-making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

THE APA INCLUDES

ARTICLE 1

GENERAL PROVISIONS

- Policy & Scope (including exemptions)
- Definitions
- Special Provisions on Licensing
- Declaratory Rulings

ARTICLE 2A

RULE-MAKING

- Restrictions on What Can Be Adopted As a Rule
- Petitioning an Agency to Adopt a Rule
- Adoption of Emergency, Temporary & Permanent Rules
- Effective Dates of Rules
- Fiscal Notes for Rules - State, Local, and Substantial Economic Impact
- Governor's Preliminary Review of Rules affecting Local Government
- Minimizing the Effects of Rules on Local Budgets
- Incorporating Material By Reference
- Rules Review Commission Review of Rules
- Publication of the *North Carolina Register* and the *North Carolina Administrative Code*

ARTICLE 3

ADMINISTRATIVE HEARINGS

- Contested Case Procedures

ARTICLE 3A

OTHER ADMINISTRATIVE HEARINGS

ARTICLE 4

JUDICIAL REVIEW

WHICH AGENCIES ARE COVERED BY THE APA?

◆ The APA does *not* apply to

- Legislative Branch
- Judicial Branch
- Local Governments

◆ The APA applies to all state departments, agencies, and boards *except* those listed below:

- Full Exemptions (G.S. 150B-1(c))
 - NC National Guard in exercising its court-martial jurisdiction.
 - Department of Health and Human Services in exercising its authority over the Camp Butner reservation.
 - The Utilities Commission.
 - The Industrial Commission.
 - The Employment Security Commission.

- The State Board of Elections in administering the HAVA Administrative Complaint Procedure.
- The NC State Lottery.

• **Exemptions from Rule-Making (Article 2A) (G.S. 150B-1(d))**

- The Rules Review Commission.
- The Department of Revenue, *with respect to the notice and hearing requirements.*
- The NC Global Transpark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
- The Department of Correction with respect to matters related solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees.
- The NC Teachers' and State Employees' Comprehensive Major Medical Plan in administering the provisions of Parts 2, 3, 4, & 5 of Article 3 of Chapter 135 of the General Statutes.
- The NC Federal Tax Reform Allocation Committee with respect to adoption of the annual qualified allocation plan.

- The Department of Health and Human Services in adopting new or amending existing medical coverage policies under the State Medicaid Program.
- The Economic Investment Committee in developing criteria for the Job Development Investment Grant Program.
- The NC Ports Authority with respect to the establishment of fees.

• **Exemptions from Contested Case Provisions (Article 3)**
(G.S. 150B-1(e))

- The Department of Health and Human Services and the Department of Environment and Natural Resources in complying with the mandates of the Federal Education of the Handicapped Act Amendments of 1986.
- Hearings required by the Rehabilitation Act of 1973.
- The Department of Revenue.
- The Department of Correction.
- The Department of Transportation, except as provided in G.S. 136-29.
- The Occupational Safety and Health Review Board.

- The NC Global Transpark Authority with respect to the acquisition, construction, operation, or use, including fees or charges, of any portion of a cargo airport complex.
- 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.
- The NC Teachers' and State Employees' Comprehensive Major Medical Plan with respect to disputes involving the performance, terms, or conditions of a contract between the Plan and a entity under contract with the Plan.
- The Teachers' and State Employees' Comprehensive Major Medical Plan with respect to determinations that an admission, availability of care, continued stay, or other health care service does not meet the Plan's requirement for medical necessity, appropriateness, and the requested service is therefore denied, reduced or terminated.
- The Department of Crime Control and Public Safety for hearings and appeals authorized under Chapter 20.
- The Wildlife Resources Commission for determinations of whether to authorize or terminate authority for a person to act as a license agent.

- **Exemption for The University of North Carolina** (*G.S. 150B-1(f)*)
 - Except as provided for in G.S. 143-135.3, the University of North Carolina is exempt from the APA *except* for Article 4, Judicial Review. (*The exception for G.S. 143-135.3 applies until December 31, 2006.*)

- **OSHA Standards**

- When the Occupational Safety and Health Division of the Department of Labor proposes to adopt a rule concerning an occupational safety and health standard that is identical to a federal regulation promulgated by the Secretary of the US Department of Labor, it is *not* required to:
 - Publish a notice of text;
 - Conduct a public hearing; or
 - Submit the rule to the Rules Review Commission for review and approval. (*G.S. 150B-21.5(c)*)

Rules adopted pursuant to this section become effective on the date the Department delivers the rules to the Codifier of Rules (OAH) or at a later date specified by the Division. (G.S. 150B-21.3(e))

- **State Building Code**

The Building Code Council is not required to publish a notice of text in the NC Register when it proposes to adopt a rule that concerns the State Building Code, but the Council must publish a notice including the following:

- A statement of the subject matter of the proposed rule.
- A short explanation of the reason for the proposed action.
- A citation to the law that gives the agency the authority to adopt a rule on the subject matter of the proposed rule.
- The person to whom questions or written comments may be submitted. (G.S. 150B-21.5(d))

- **Additional Exemptions Not Contained in G.S. 150B**

(Please note, this may not be an all inclusive list.)

- Pursuant to **G.S. 115C-17**, the **State Board of Education**, for the purpose of rules directly related to the implementation of the ABC's Plan, is not subject to the following provisions of the APA:

- Delayed effective dates.
- Opportunity for legislative review and disapproval.
- Determination of whether or not a rule has Substantial Economic Impact.

- Pursuant to **G.S. 115C-296(a1)**, the **State Board of Education** is exempt from Article 2A of the APA (Rule-making) for the purposes of teacher certification policy.

- Pursuant to **G.S. 115D-80**, **local boards of trustees for community colleges** are exempt from Chapter 150B. (Note: The State Board of Community Colleges is *not* exempt.)

- Pursuant to **G.S. 163-132.5B** the **State Board of Elections** is exempt with regard to precinct boundaries (Article 12A of Chapter 163 of the General Statutes).

KEY DEFINITIONS IN RULE-MAKING (G.S. 150B-2)

- ◆ **AGENCY** means an agency or an officer in the executive branch of government of NC 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 local government in the executive branch. A unit of local government is *not* an agency.
- ◆ **ADOPT** means to take final action to create, amend, or repeal a rule.
- ◆ **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.
- ◆ **CONTESTED CASE** means an administrative proceeding 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 rule-making, declaratory rulings, or the award or denial of a scholarship, grant, or loan.

◆ **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 “rule” does *not* include the following:

- Statements concerning only the internal management of an agency or group of agencies within the same principal office or department, 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.*
- Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, by an occupational licensing board, or by the State Board of Elections.
- *Nonbinding* interpretive statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

- A form, the contents or substantive requirements of which are prescribed by rule or statute.
- Statements of agency policy made in the context of another proceeding, including:
 - Declaratory rulings under G.S. 150B-4
 - Orders establishing or fixing rates or tariffs
- Requirements communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.
- 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.
- Scientific, architectural, or engineering standards, forms, or procedures, including, design criteria and construction standards used to construct or maintain highways, bridges, or ferries.
- Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Personnel Commission.

- Establishment of the interest rate that applies to tax assessments under G.S. 105-241.1 and the variable component of the excise tax on motor fuel under G.S. 105-449.80.
- The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing, reviewed by the Rules Review Commission, and approved by the Governor.

Additional definitions may be found under G.S. 150B-2.



THE RULE-MAKING PROCESS: KEY PLAYERS

◆ AGENCIES

- Adopt, amend, and repeal rules.
- Prepare fiscal notes.
- Certify which rules are required by federal law.
- Accept public comment.
- Hold public hearings.
- Respond to petitions for rule-making submitted by the public.
- Consult with NC League of Municipalities and the NC Association of County Commissioners to determine which local governments would be affected by proposed rules and provide the League and Association with copies of pertinent fiscal notes.
- Maintain interested party mailing list.

◆ OFFICE OF ADMINISTRATIVE HEARINGS (OAH)

- Publishes the *North Carolina Register (NCR)* of proposed rules.

- Publishes the *North Carolina Administrative Code (NCAC)* of enacted rules.
- Reviews agencies' findings of need for emergency rules.
- Holds administrative hearings.

◆ **OFFICE OF STATE BUDGET & MANAGEMENT (OSBM)**

- Reviews fiscal notes and Substantial Economic Impact statements prepared by agencies and certifies State fund availability.
- Prepares Substantial Economic Impact statements, if requested to do so by the agency.
- Compiles an annual summary of the projected fiscal impact of rules on local government that were adopted during the preceding fiscal year.
- Compiles a schedule of anticipated rule actions by State agencies for the upcoming fiscal year.

◆ **RULES REVIEW COMMISSION (RRC)**

- Reviews agency rules after the rules are adopted by the agency.

- Reviews agencies findings of need and proposed temporary rules.
- Accepts requests for legislative review of rules.
- Provides monthly reports to the Joint Legislative Administrative Procedure Oversight Committee.
- Forwards approved rules to the Office of Administrative Hearings for entry into the *North Carolina Administrative Code*.

◆ PUBLIC

- May submit written and oral comments on agency proposed rules.
- May petition agencies to amend, adopt, or repeal rules.

◆ JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE

- Reviews permanent rules adopted by agencies.
- Reviews rules to which the Rules Review Commission has objected.
- Responds to citizen concerns regarding agency rules.
- Prepares a notebook containing rules approved by the RRC and notifies each member of the availability of the notebook.

- Reviews State regulatory programs, existing rules, and the rule-making process.
- Reports to the General Assembly concerning the Committee's activities and any recommendations for statutory changes.

◆ GENERAL ASSEMBLY

- In cases in which ten or more written requests for legislative review have been received by the RRC, any member has the opportunity to introduce a bill to disapprove a permanent rule approved by the RRC within the first 30 days of the next regular legislative session.

◆ GOVERNOR

- Conducts a preliminary review of proposed permanent rules that would affect the expenditures or revenues of local government.
- Enacts rules, approved by the RRC, by Executive Order upon finding that it is necessary that the rules become effective in order to protect the public health, safety, or welfare, if the effective date is delayed for legislative review.



THE RULE-MAKING PROCESS: STEPS IN ADOPTING A PERMANENT RULE

STEP 1:

PUBLICATION OF THE NOTICE OF TEXT The agency must publish a *Notice of Text* in the NCR which contains:

- The text of the proposed rule.
- An explanation of the reason for proposed action.
- Citation to the law giving the agency authority to adopt the rule.
- The proposed effective date.
- The date, time, and place of any public hearing that has been scheduled.
- Instructions on how to demand a public hearing if one is not scheduled.
- The period of time during which and the person to whom written comments may be submitted.
- Notice of where a fiscal note may be obtained if one has been prepared.

- The procedure by which a person can object to a proposed rule and the requirements for subjecting the rule to the legislative review process. (G.S. 150B-21.2(c))

The agency must accept public comment for at least **60 days**.
(G.S. 150B-21.2(f))

STEP 2:

FEDERAL CERTIFICATION (IF NECESSARY) Whenever an agency proposes a rule that is necessary to implement or comply with federal law, the agency must attach a certificate to the proposed rule which:

- Identifies the federal law requiring the adoption of the proposed rule.
- Contains a statement setting forth the reasons why the proposed rule is required by federal law.
- Identify any part of the proposed rule which is *not* required by federal law or which exceeds the requirements of federal law.
(G.S. 150B-21(f))

STEP 3:

PREPARATION OF FISCAL NOTE Before publishing the proposed text of a rule, the agency must determine whether or not the rule has State fiscal impact, local fiscal impact, or substantial economic impact.

State Fiscal Impact: If the proposed rule affects the expenditures or distribution of State funds subject to the Executive Budget Act, the agency must submit the proposed rule and fiscal note to OSBM and obtain certification that the required funds are available.

(G.S. 150B-21.4(a))

DOT Analyses: If the proposed rule affects environmental permitting of a DOT project, the agency must conduct a cost analysis and submit it to the Board of Transportation. If the Board of Transportation submits an objection to the rule and the RRC approves the rule, the rule will be subject to legislative review before becoming effective.

Local Fiscal Impact: If the proposed rule affects the expenditures or revenues of local government, the agency must submit the

proposed rule and fiscal note to the Governor, the Fiscal Research Division, OSBM, the NC Association of County Commissioners, and the NC League of Municipalities. (G.S. 150B-21.4(b))

The Governor must review the rule for the following:

- The agency's explanation for the reason for the proposed change.
- Any unanticipated effects of the proposed change on local government budgets.
- The potential costs of the proposed change weighed against the potential risks to the public of not taking the proposed change. (G.S. 150B-21.26)

Substantial Economic Impact: Before publishing the proposed text of a rule, either the agency or OSBM must determine whether or not the rule has a substantial economic impact. (G.S. 150B-21.4(b1))

"Substantial economic impact" means an aggregate financial impact on all persons of at least \$3,000,000 in a 12-month period.

A substantial economic impact fiscal note must contain the following:

- A description of the persons who would be affected by the proposed rule change.
- A description of the types of expenditures that persons affected by the proposed rule change would have to make to comply with the rule and an estimate of these expenditures.
- A description of the purpose and benefits of the proposed rule change.
- An explanation of how the estimate of expenditures was computed.

(G.S. 150B-21.4(b2))

If the agency requests OSBM to prepare the substantial economic impact fiscal note, OSBM must prepare the note within 90 days.

STEP 4:

ADOPTION OF THE RULE

An agency may *not* adopt a rule

- Until the time for commenting on the proposed text has elapsed.

- If more than 12 months have elapsed since the end of the comment period.
- That differs substantially from the proposed text published in the *NC Register*. 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 published in the *NC Register*, could not have reasonably 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.

(G.S. 150B-21.2(g))

STEP 5:

REVIEW BY THE RULES REVIEW COMMISSION (RRC)

Permanent rules which have been adopted by agencies are reviewed by the Rules Review Commission. In reviewing permanent rules, the RRC must determine that:

- The rule is within the statutory authority delegated to the agency by the General Assembly.
- The rule is clear and unambiguous.
- The rule is reasonably necessary to implement or interpret an enactment of the General Assembly, or of the Congress, or a regulation of a federal agency. The RRC must consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- The rule was adopted in accordance with the APA.

The RRC may not consider questions relating to the quality or efficacy of the rule, but is restricted to the statutory standards noted above.

The Rules Review Commission reviews the *entire* rule, not just the portion being amended.

(G.S. 150B-21.8 - 21.9)

RRC Approval of a Permanent Rule: When the RRC approves a permanent rule, a copy of the rule is forwarded to the Joint Legislative Administrative Procedure Oversight Committee and the Office of Administrative Hearings.

(G.S. 150B-21.11)

RRC Objection to a Permanent Rule: If the RRC objects to a permanent rule, the agency must:

- Change the rule to satisfy the objection and re-submit the rule to the RRC.
- Submit a written response to the RRC indicating that the agency has decided not to change the rule.

A rule to which the RRC has objected remains under review until the agency decides not to satisfy the objection at which time the rule is returned to the agency. (G.S. 150B-21.12)

A permanent rule *must* be approved by the Rules Review Commission before it can go into effect. (G.S. 150B-21.3(b))

STEP 6:

RULES BECOME EFFECTIVE

Effective Dates of Rules (G.S. 150B-21.3(b))

- Permanent rules approved by RRC become effective on the first day of the month following the month the rule is approved by the RRC, unless the RRC receives written objections to the rule.
- If the RRC receives written objections from 10 or more people clearly requesting legislative review, then the rule cannot become effective before the 31st legislative day of the next regular session of the General Assembly. (G.S. 150B-21.2(b1 & (b2)).

Bills to Disapprove Permanent Rules to Which Objections Have Been Filed (G.S. 150B-21.3(b2))

- Prior to the 31st legislative day, any member may introduce a bill to disapprove a rule.
- If a bill is introduced to disapprove a rule, the rule cannot become effective until:

- An unfavorable action is taken on the bill or
- The General Assembly adjourns without ratifying the bill.
- A permanent rule that is specifically disapproved by a bill ratified by the General Assembly *cannot* become effective.

Executive Order Exception (G.S. 150B-21.3(c))

- The Governor may, by Executive Order, make effective a permanent rule that has been approved by RRC upon finding that it is necessary for the rule to become effective to protect the public health, safety, or welfare, if the effective date is delayed for legislative review.
- A rule made effective by Executive Order is still subject to legislative review and disapproval.

Fees

- A rule that establishes a new fee or increases an existing fee cannot become effective until the agency has consulted with the Joint Legislative Commission on Governmental Operations. If the Commission does not meet within 90 days of receiving a request for consultation from the agency, including a detailed explanation of the need for the fee, the consultation requirement is deemed satisfied. (*G.S. 12-3.1 and G.S. 150B-21.3(c1)*)

CIRCUMSTANCES WHEN NOTICE OF TEXT, FISCAL NOTES, & PUBLIC HEARINGS ARE NOT REQUIRED

Agencies are *not* required to publish a notice of text, prepare a fiscal note, or hold a public hearing in the following circumstances:

- **Amending rules to do one of the following:**

- Reletter or renumber the rule.
 - Substitute one name for another when an organization or position is renamed.
 - Correct a citation in the rule to another rule or law when the citation has become inaccurate since the rule was adopted because of the repeal or renumbering of the cited rule or law.
 - Change information that is readily available to the public, such as an address or telephone number.
 - Correct a typographical error in the *North Carolina Administrative Code*.
 - Change a rule in response to a request or an objection by the Rules Review Commission, unless the Commission determines that the change is substantial. (G.S. 150B-21.5(a))
-
- **Repealing rules in the following circumstances:**
 - The law under which the rule was adopted is repealed.
 - The rule itself is declared unconstitutional.
 - The rule is declared in excess of the agency's statutory authority. (G.S. 150B-21.5(b))

- These rules *are* subject to review and approval by the Rules Review Commission.

- These rules become effective on the first day of the month following approval by the Rules Review Commission, *except* for those rules changed in response to a request or objection by the Rules Review Commission. Those rules follow the effective dates for rules under G.S. 150B-21. (G.S. 150B-21.3(f))

THE RULE-MAKING PROCESS: STEPS IN ADOPTING A TEMPORARY RULE

STEP 1:

ADOPTION An agency may adopt a temporary rule without prior notice or upon any abbreviated notice or hearing the agency finds practical when the agency finds that adherence to the notice and hearing requirements of permanent rule-making would be contrary to the public interest *and* the rule is required by one or more of the following:

- A serious and unforeseen threat to the public health, safety, or welfare.
- The effective date of a recent act of the General Assembly or Congress.
- A recent change in federal or State budgetary policy.
- A recent federal regulation.
- A recent court order.

- The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.
- The need for the Wildlife Resources Commission to adopt a temporary rule to establish any of the following:
 1. No wake zones
 2. Hunting or fishing seasons
 3. Hunting or fishing bag limits
 4. Management of public game lands.
- The need for the Secretary of State to adopt temporary rules to implement the certification technology provisions of Article 11A of Chapter 66 of the General Statutes (Electronic Commerce in Government).
- The Commissioner of Insurance may adopt temporary rules to implement the provisions of G.S. 58-2-205 (CPA Audits of Financial Statements).
- The need for the Chief Information Officer to implement the information technology procurement provisions.

- The need for the State Board of Elections to adopt temporary rules after prior notice or hearing or upon any abbreviated notice or hearing in the following circumstances:
 - In accordance with G.S. 163-22.2 (This statute governs the Board's authority to adopt temporary rules if any portion of the State's election laws or an election is held unconstitutional or invalid.)
 - To implement any provisions of state or federal law for which the State Board of Elections has been authorized to adopt rules.
 - The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections or the elections process.
- The need for the Department of Health and Human Services to adopt temporary rules concerning the placement of individuals in licensed mental health facilities and the enrollment of providers of services to such individuals in the Medicaid program.

"Recent" is defined as an act, change, regulation, or order occurring no more than 210 days prior to the submission of the rule to RRC.

Process At least 30 days prior to adoption, the agency must:

- Submit the temporary rule and notice of public hearing for publication on OAH's website. (OAH must publish on website within 5 business days.)
- Notify interested parties.
- Accept written comments on the rule for at least 15 business days prior to adoption.
- Hold at least one public hearing. (G.S. 150B-21.1(a3))

STEP 2:

REVIEW When an agency adopts a temporary rule it must submit the rule and a statement of findings of need for the rule to the RRC. The full Commission or a panel of 3 members must review the rule within 15 business days. In reviewing the rule, the Commission uses the same statutory criteria applied to permanent rules (*See Step 5 in Adopting Permanent Rules*).

If the rule is approved, OAH must enter the rule into the Administrative Code within 2 business days. (G.S. 150B-21.1(b))

STEP 3: **EFFECTIVE DATE AND EXPIRATION OF TEMPORARY RULES**

A temporary rule becomes effective when it is entered into the Administrative Code.

A temporary rule expires on the *earliest* of the following dates:

- The date specified in the rule.
- The effective date of the permanent rule adopted to replace the temporary rule, if the RRC approves the permanent rule.
- The date RRC returns the permanent rule to the agency
- The effective date of an act of the General Assembly that specifically disapproves the permanent rule.
- 270 days from the date the rule was published in the NCR, *unless* the permanent rule has been submitted to RRC. (G.S. 150B-21.1(d))

THE RULE-MAKING PROCESS: STEPS IN ADOPTING AN EMERGENCY RULE

STEP 1:

ADOPTION

An agency may adopt an emergency rule without prior notice or upon any abbreviated notice or hearing the agency finds practical when the agency finds that adherence to the notice and hearing requirements of permanent rule-making would be contrary to the public interest *and* the immediate adoption of the rule is required by *a serious and unforeseen threat to public health or safety*. The agency must simultaneously commence the process for adopting a temporary rule.

The Department of Health and Human Services may adopt emergency rules when a recent act of the General Assembly or the Congress or a recent change in federal regulations authorizes new or increased services or benefits for children and families and the rule is necessary to implement the change. (G. S. 150B-21.1A(a))

STEP 2:

REVIEW OF AGENCY FINDINGS BY THE CODIFIER OF RULES

When an agency adopts an emergency rule, it must submit the rule and statement indicating why the rule must become effective immediately to the Office of Administrative Hearings (Codifier of Rules) for review. The Codifier of Rules must review the rule within 2 business days.

Approval: If the Codifier approves the agency's need for the emergency rule, the rule will be entered in the *North Carolina Administrative Code (NCAC)*.

Objection: If the Codifier objects to the agency's need for the emergency rule, the agency may revise and resubmit its findings.

If the agency decides *not* to revise its findings, the agency may file the rule over the objection of the Codifier. The Codifier must then enter the emergency rule into the NCAC. (G.S. 150B-21.1A(b))

STEP 3:

RULE BECOMES EFFECTIVE

- An emergency rule becomes effective when it is entered in the NC Administrative Code. The Codifier must enter the rule in the Code on the 6th business day after it has been approved or the agency has decided to adopt the emergency rule over the objection of the Codifier.

(G.S. 150B-21.3(a) & G.S. 150B-21.1A(b))

STEP 4:

EXPIRATION OF EMERGENCY RULES

- An emergency rule expires on the earliest of the following dates:
 - The date specified in the rule.
 - The effective date of a temporary rule adopted to replace the emergency rule, if it is approved by the RRC.
 - The date the RRC returns a temporary rule to the agency, which was adopted to replace the emergency rule.

- Sixty days from the date the emergency rule was published in the *NC Register*, unless the temporary rule has been submitted to the RRC.

PUBLIC PARTICIPATION IN THE RULE-MAKING PROCESS

◆ PETITIONING AN AGENCY TO ADOPT A RULE (G.S. 150B-20)

- **Public's Responsibilities:** Any person may petition an agency to adopt a rule by:
 - Submitting a petition to the agency requesting the rule change, along with any written comments, if desired.
 - Including the proposed text of the requested rule change if the petition requests the creation of a new rule or the amendment of an existing rule.
 - Including a statement of the effect of the requested rule change.
- **Agency's Responsibilities:**
 - Establish by rule the agency's procedures for considering a petition.
 - Must grant or deny a rule-making petition within **30 days** after the petition is submitted, *unless* the agency is a board or commission. If

the agency is a board or commission, it must grant or deny the petition within **120 days** after the petition is submitted.

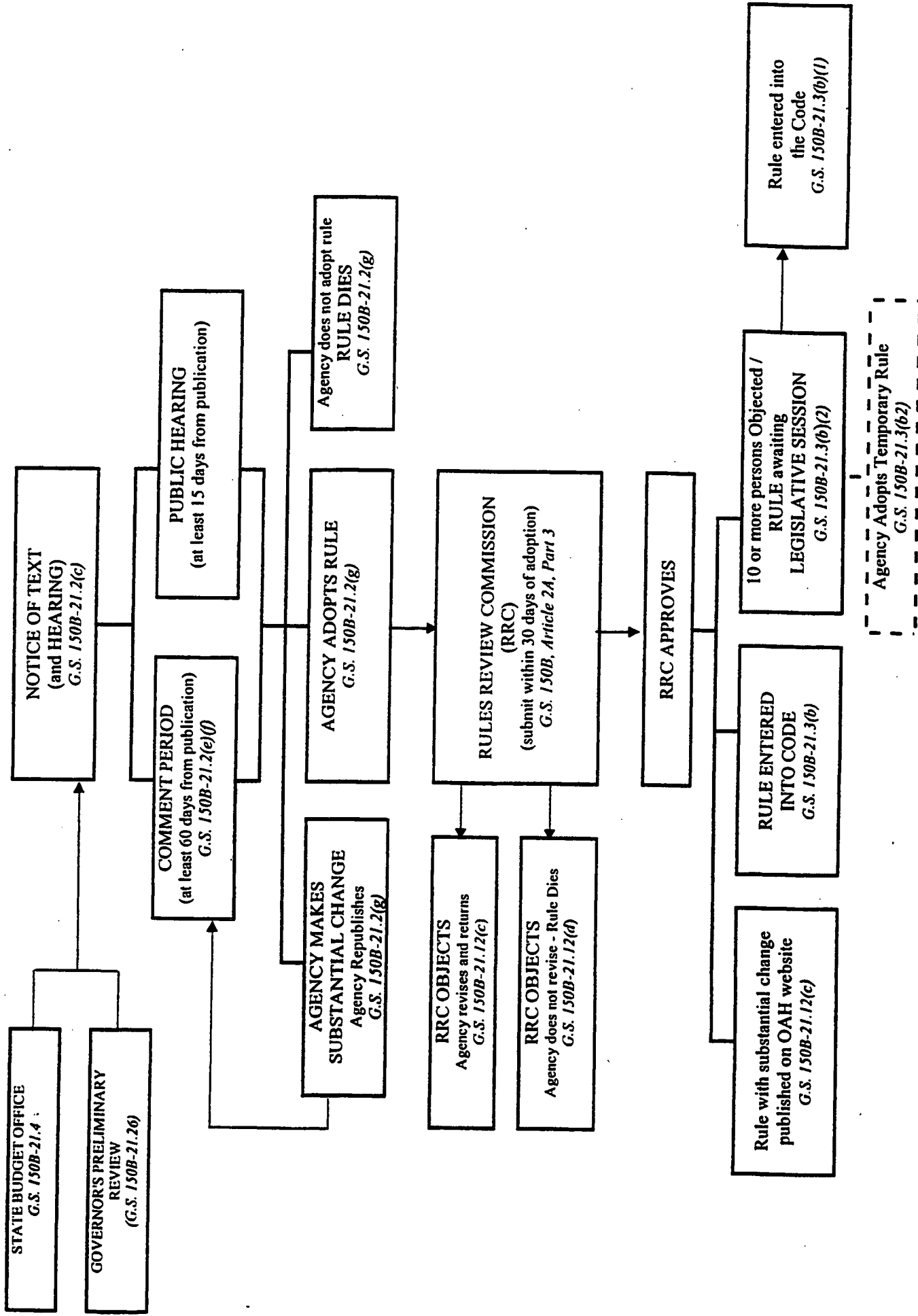
- Failure to grant or deny a rule-making petition within the time limits above constitutes a denial of the petition.
- If the agency **denies** the rule-making petition, it must send the petitioner a written statement of the reasons for denying the petition.
- If the agency **grants** the rule-making petition, it must inform the petitioner and initiate rule-making proceedings.
- **Review of Denial of a Rule-making Petition:** An agency's denial of a rule-making petition is considered a final agency decision and is subject to judicial review under Article 4 of Chapter 150B.

WHERE TO FIND AGENCY RULES:

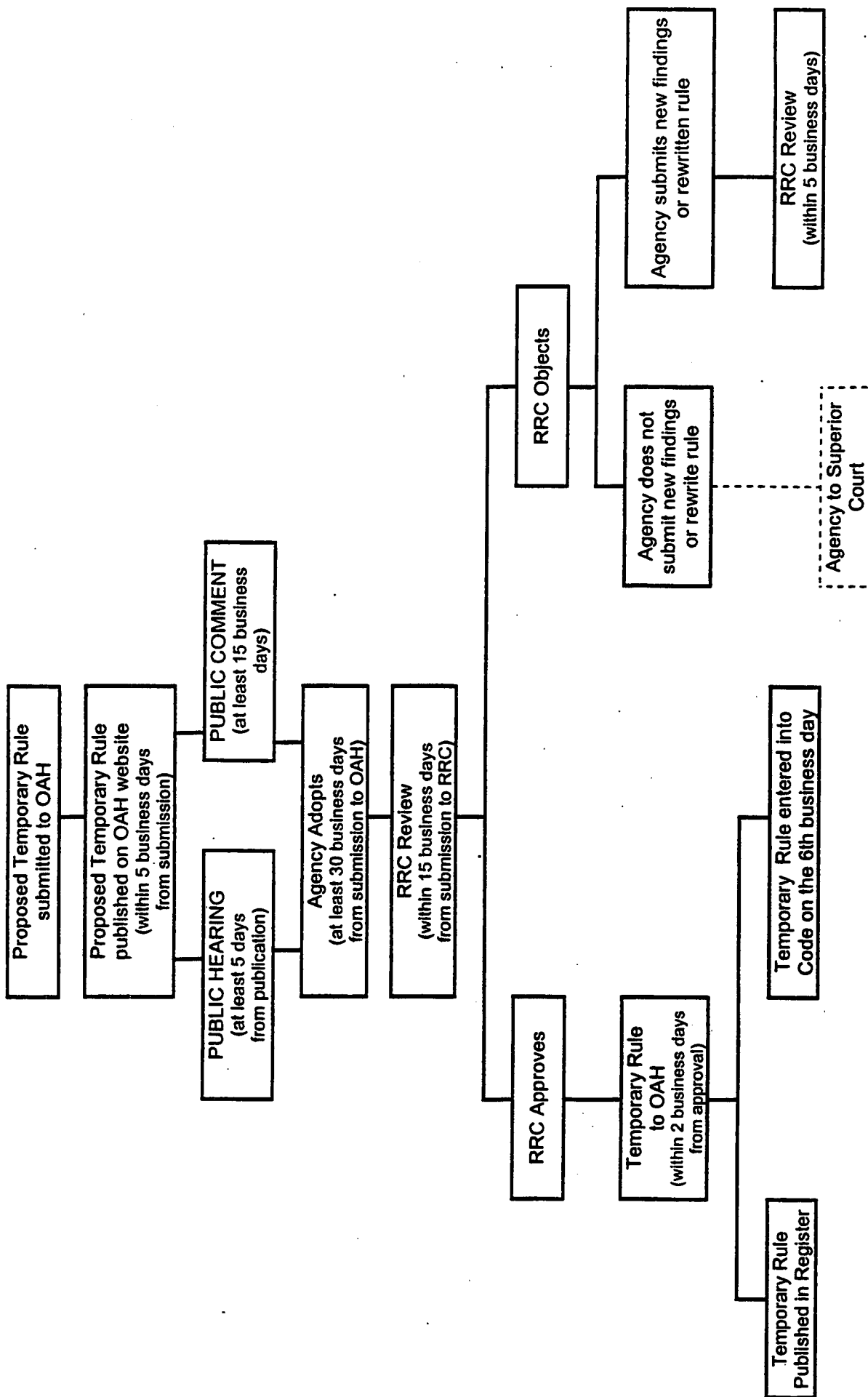
- The *North Carolina Register* is published twice monthly and contains the following information regarding rule-making:
 - Temporary rules recently adopted by agencies and entered into the NCAC.

- Dates, times, and places of public hearings on proposed permanent rules.
- Proposed text of permanent rules.
- Actions by the Rules Review Commission.
- Cumulative index of proposed rules.
- The *North Carolina Administrative Code* contains the following:
 - Permanent rules.
 - Temporary rules which are in effect.
 - Emergency rules which are in effect.
- The Codifier of Rules must make the *NC Register* and *NC Administrative Code* available on the Internet at no charge. Upon request, free copies of the *Register* and the *Code* are provided to the board of county commissioners in each county and are placed either at the clerk's office or at another place selected by the board of commissioners. (G.S. 150B-21.24)
The *NC Register* and *NC Administrative Code* can be found on the NC Office of Administrative Hearings website at:
<http://www.oah.state.nc.us/>

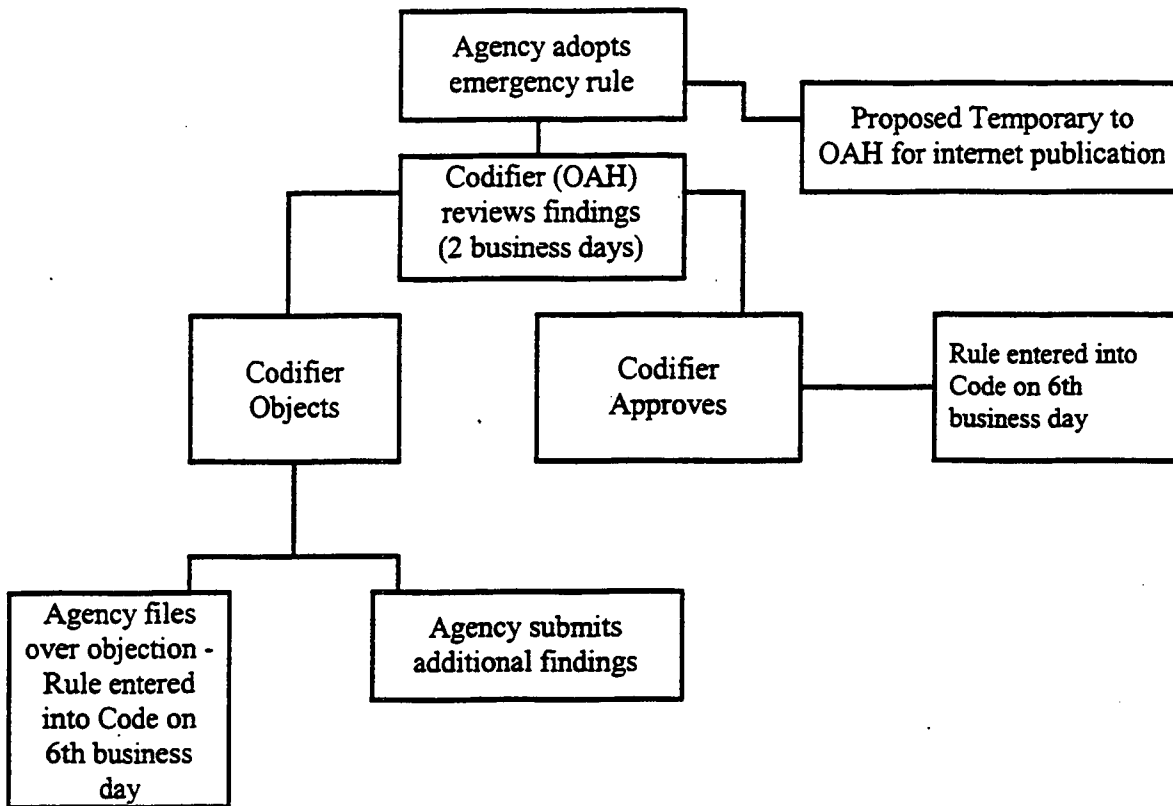
PERMANENT RULEMAKING PROCESS



TEMPORARY RULEMAKING
(G.S. 150B-21.1)



EMERGENCY RULEMAKING
(G.S. 150B-21.1A)



Emergency 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 approved 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.

JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE **OVERSIGHT COMMITTEE**

AGENDA ITEM # 5

PROPOSED DENTAL BOARD RULES REGARDING EXAMINATION AND **LICENSURE OF DENTAL HYGIENISTS**

Issue:

Whether the NC Board of Dental Examiners has authority to adopt rules directing applicants for the dental hygiene licensing exam to comply with all requirements of a Board approved outside testing agency, including the payment of fees set by the testing agency, if the fees exceed the statutory amount the Board is authorized to charge.

Background:

Several members of the General Assembly have received complaints about rules recently proposed by the Dental Board. **These rules are still in the rulemaking process and have not yet been adopted by the Board.** The relevant facts are as follows:

- On December 15, 2005, the Board filed a Notice of Text to amend rules relating to the licensure of dental hygienists. A public hearing was held on January 5, 2006, and the public comment period extends until February 13, 2006.
- The Notice states that the reason for the proposed action is to allow the Board to administer its own dental hygiene licensure examination or to accept the results of other Board approved regional or third party clinical examinations.
- Currently, the Board administers a written exam and a clinical exam. The fee for the exams is currently \$170.00.
- The proposed rules provide that, *"in order to fulfill the clinical examination component for dental hygiene licensure, the Board shall accept passing scores from Board approved testing agencies which administer reliable, accurate and valid examinations and allow for Board representation and input in the examination development and administration . . . The applicant shall comply with all requirements of such testing agency in applying for and taking the examination, including paying all applicable fees as set by the testing agency."* (21 NCAC 16C .0303)
- The proposed rules also amend the fee section to provide that the \$170.00 fee applies only to examinations conducted by the Board. The proposed rule also adds a new \$75.00 fee for license application processing. (21 NCAC 16M .0102)
- The Board has contracted with the Council of Interstate Testing Agencies (CITA) to conduct the clinical exam for dental hygienists in June 2006. CITA was founded in July 2005. The President of the CITA Board of Directors is a

former NC Dental Board member and current part-time employee of the NC Dental Board. The membership of CITA's Board of Directors includes the current president of the NC Board of Dental Examiners.

- According to its website, CITA's examination fee will be \$700.00 and must be paid at the time of application. This fee is not referenced in the Dental Board's proposed rules.

Analysis:

The NC Dental Hygiene Act governs the licensure of dental hygienists. G.S. 90-224(b) authorizes the Board to establish rules for:

1. The form of application.
2. The time and place of examination.
3. The type of examination.
4. The qualifications for passing the examination.

There is no specific authorization for the Board to contract with third parties to provide examinations. During the 2005 Session of the General Assembly, the Dental Practice Act (the law governing dentists) was amended to authorize the Board to use outside testing agencies for the examination of dentists. However, no such statutory amendment was made to the Dental Hygiene Act.

G.S. 90-232 provides that the Board may set a fee for the examination of dental hygienists not to exceed \$350.00. There is no statutory authorization for a "license processing fee". However, the proposed rule cites G.S. 150B-19(5) as the authority to charge this fee. This section of the APA provides that an agency may adopt a rule establishing a fee for data processing services without specific statutory authority.

Although no constituent has complained, it should also be noted that the Board recently proposed rules to implement the change to the Dental Practice Act. Those proposed rules include a "Board examination processing fee" of \$1400.00 and also cite G.S. 150B-19(5) as the statutory authority for the fee.

Copies of the rules and statutes are attached.

Recommendation:

Inasmuch as the Dental Board has not yet adopted the proposed rules, this Committee can monitor the progress of the proposed rules and the actions taken by the Board.

This Committee may recommend legislation in the short session to clarify the Board's authority in this area.

The Committee may also recommend that G.S. 150B-19(5) be amended to clarify the scope of fees for "data processing".

(5) the mouth of the inlet for Harbor Cove Marina.

(b) Speed Limit. No person shall operate any vessel at greater than no-wake speed on the waters of the regulated areas as described in Paragraph (a) of this Rule.

(c) Placement and Maintenance of Markers. The Cherokee County Board of Commissioners is designated a suitable agency for the placement and maintenance of markers implementing this Rule.

Authority G.S. 75A-3; 75A-15.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 16 – BOARD OF DENTAL EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Dental Examiners intends to adopt the rules cited as 21 NCAC 16C .0401-.0406; amend the rules cited as 21 NCAC 16C .0101, .0202, .0301, .0303, 16M .0102; and repeal the rules cited as 21 NCAC 16C .0203, .0304-.0310.

Proposed Effective Date: April 1, 2006

Public Hearing:

Date: January 5, 2006

Time: 8:00 p.m.

Location: Board Office, 15100 Weston Parkway, Suite 101, Cary, NC 27513

Reason for Proposed Action: *To adopt and amend dental hygiene licensure and examination rules allowing the Board to administer its own dental hygiene licensure examination or to accept the results of other Board-approved regional or third-party clinical examinations. Subchapter 16C, Section .0100 will cover general provisions for licensure. Subchapter 16C, Section .0200 will cover qualifications for dental hygiene licensure. Subchapter 16C, Section .0300 will cover application for dental hygiene licensure and Subchapter 16C, Section .0400 will cover licensure by Board examination. Existing Section .0400 will be renumbered to Section .0500. 21 NCAC 16M .0102 is proposed for amendment to set out a fee for processing the dental hygiene application.*

Procedure by which a person can object to the agency on a proposed rule: *Persons may submit objections regarding the proposed rule changes to Bobby White, North Carolina State Board of Dental Examiners, 15100 Weston Parkway, Suite 101, Cary, NC 27513.*

Comments may be submitted to: Bobby White, NC Board of Dental Examiners, 15100 Weston Parkway, Suite 101, Cary, NC 27513

Comment period ends: February 13, 2006

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission. If the Rules Review Commission

receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact:

- ☐ State
- ☐ Local
- ☐ Substantive (≥\$3,000,000)
- ☒ None

SUBCHAPTER 16C - LICENSURE DENTAL HYGIENISTS

SECTION .0100 - GENERAL PROVISIONS

21 NCAC 16C .0101 LICENSURE

Before beginning the practice of dental hygiene in North Carolina, each applicant is required to procure from the Board a license to practice dental hygiene. In order to obtain such a license, each applicant is required to appear before the Board and satisfactorily pass an examination. pass Board approved written and clinical examinations before receiving a license.

Authority G.S. 90-223; 90-224.

SECTION .0200 - QUALIFICATIONS

21 NCAC 16C .0202 STUDENT MAY APPLY

Dental hygienist applications will be accepted from students currently enrolled in schools of dental hygiene who expect to graduate and successfully pass Board approved licensure examinations prior to the examination. receiving a license. Such applications will automatically be denied if the applicant should fail to complete the required course of study satisfactorily. or fail Board approved licensure examinations.

Authority G.S. 90-223; 90-224.

21 NCAC 16C .0203 TRANSCRIPTS REQUIRED

Applicants shall furnish a high school transcript or high school equivalency certificate or other verification of high school completion, and dental hygiene school or college transcripts. These transcripts are to accompany the application, or may be mailed to the Board's office from the record department of each school attended. Transcripts must be postmarked or delivered to the Board office by the application deadline date.

Authority G.S. 90-223; 90-224.

SECTION .0300 - APPLICATION

21 NCAC 16C .0301 APPLICATION FOR

LICENSURE

- (a) All applications are to be made on the forms furnished by the Board, and no application shall be deemed complete which does not set forth all the information required by the Board relative to the applicant. Any applicant who changes his address should immediately notify the Board office. Applicants are required to furnish transcripts of undergraduate college and dental college credits.
- (b) The application fee shall accompany the application. Such fee is nonrefundable.
- (c) Applicants who are licensed in other states shall furnish verification of licensure from the secretary of the board of each state in which they are licensed. A photograph, taken within six months prior to the date of the application, must be affixed to the application.
- (d) All applicants shall submit to the Board a signed release form, completed Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of the application.
- (e) All applicants shall arrange for and ensure the submission to the Board office the examination scores as required by 16C .0303(a) of this Subchapter. All applicants shall arrange for and ensure the submission to the Board office the examination scores as required by 16C .0303(c), if applicable.

Authority G.S. 90-223; 90-224.

21 NCAC 16C .0303 BOARD APPROVED EXAMINATIONS

A fee of one hundred twenty five dollars (\$125.00) for each examination or re-examination must accompany the application. The fee is nonrefundable.

- (a) The Board, having reviewed and evaluated the written examination as administered by the Joint Commission on National Dental Examinations and having found the same to be a reliable, accurate and valid examination, has adopted as a part of its written examination the National Board Dental Hygiene Examination. Applicants for dental hygiene licensure must achieve a passing score on such examination. Each applicant will be responsible for furnishing to the Board the National Board score.
- (b) All applicants for dental hygiene licensure shall achieve passing scores on the Board's sterilization and jurisprudence examinations. Additional written examinations may be given to each candidate in such subject areas as the Board may designate.
- (c) In order to fulfill the clinical examination component for dental hygiene licensure, the Board shall accept passing scores from Board approved testing agencies which administer reliable, accurate and valid examinations and allow for Board representation and input in the examination development and administration. The clinical examination shall be substantially equivalent to the clinical licensure examination administered by the Board and include procedures performed on human subjects including probing, stain removal, supra and subgingival scaling, and soft tissue management. The Board shall accept scores upon such examinations for a period of five years following the date of such examinations. Each applicant will be responsible for furnishing to the Board the applicant's scores. The applicant shall comply with all requirements of such testing agency in

applying for and taking the examination, including paying all applicable fees as set by the testing agency.

Authority G.S. 90-224.

21 NCAC 16C .0304 OTHER REQUIREMENTS

- (a) ~~Applicants who are licensed in other states shall furnish verification of licensure from the appropriate regulatory agency of each state in which they are licensed, together with two letters of recommendation. A photograph, taken within six months prior to the date of application, must be affixed to the application. A second photograph, not over two inches in height, must be paper-clipped to the application, to be used as part of the identification badge.~~
- (b) ~~All applicants shall submit to the Board a signed release form, completed Fingerprint Record Card, and such other form(s) required to perform a criminal history check at the time of the application.~~

Authority G.S. 90-223; 90-224; 90-229.

21 NCAC 16C .0305 TIME FOR FILING

~~The completed application, fee, photographs, high school transcripts or high school equivalency certificate or other verification of high school completion, and dental hygiene school or college transcripts, must be postmarked or delivered to the Board's office at least 90 days prior to the date of the examination. Dental hygiene school transcripts for those still in dental hygiene school must be sent in before the examination date. All data received by the Board concerning the applicant shall become a part of the required application and shall be retained as part of the record.~~

Authority G.S. 90-223; 90-224.

21 NCAC 16C .0306 EXAMINATIONS

- (a) ~~The Board, having reviewed and evaluated the written examination as administered by the Joint Commission on National Dental Examinations and having found the same to be a reliable, accurate and valid examination, has adopted as a part of its written examination the National Board Dental Hygiene Examination. Applicants for dental hygiene licensure must achieve a passing score on such examination. Each applicant will be responsible for furnishing to the Board the National Board score.~~
- (b) ~~Additional written examinations may be given to each candidate in such subject areas as the Board may designate.~~
- (c) ~~Each candidate will be given a numbered badge. This badge will contain the candidate's photograph and will be presented to the candidate at the opening session. The number on the badge will be the only identification allowed on any paper or manuscript during the examination. This badge must be returned to the Board at the completion of the examination.~~
- (d) ~~The Board reserves the right to dismiss any candidate who may be detected using or attempting to use any unfair assistance. If such violation is discovered by the Board after a license has been issued to the violator, the license will be revoked.~~

Authority G.S. 90-222; 90-223; 90-224.

21 NCAC 16C .0307 CLINICAL EXAMINATION

The clinical examination may include:

- (1) ~~performing a prophylaxis;~~
- (2) ~~charting the mouth and pocket depth determination;~~
- (3) ~~preventive care instruction to the patient;~~
- (4) ~~the taking of a series of radiographs as specified by the Board.~~

Authority G.S. 90-223; 90-224.

21 NCAC 16C .0308 SUPPLIES

The candidate must furnish his own instruments and materials including handpieces. Additional instructions concerning supplies will be mailed to each candidate. A dental chair and unit will be provided.

Authority G.S. 90-223; 90-224.

21 NCAC 16C .0309 PATIENT

The candidate will be responsible for securing patients for clinical prophylaxis. The patient must have sufficient dental calculus to enable the Board to determine the scaling proficiency of the candidate. All patients must be approved by a member or members of the Board before prophylaxis is started.

Authority G.S. 90-223; 90-224.

21 NCAC 16C .0310 REEXAMINATION

- (a) ~~A complete application except for school transcripts and National Board score, is required in case of reexamination.~~
- (b) ~~Any applicant who has passed the written portion of the examination but has failed the clinical portion of the examination need not retake the written portion of the examination for a one year period upon reexamination.~~
- (c) ~~Any applicant who has passed the clinical portion of the examination but has failed the written portion of the examination may retake the written portion of the examination two additional times during a one year period and need not retake the clinical portion of the examination. If the applicant does not pass the written portion of the examination upon the second reexamination, the applicant must retake both the written and clinical portions of the examination upon subsequent reexamination.~~

Authority G.S. 90-223; 90-224.

**SECTION .0400 – LICENSURE BY EXAMINATION
CONDUCTED BY THE BOARD**

**21 NCAC 16C .0401 APPLICATION FOR
EXAMINATION CONDUCTED BY THE BOARD**

- (a) All applications for licensure examination conducted by the Board are to be made on the forms furnished by the Board, and no application shall be deemed complete which does not set forth all the information required by the Board relative to the applicant. Any candidate who changes his address should immediately notify the Board office.
- (b) The fee for such examination or re-examination must accompany the application. Such fee is non-refundable.

(c) A photograph, taken with six months prior to the date of the application, must be affixed to the application. A second photograph, not over two inches in height, must be paper-clipped to the application to be used as part of the identification badge.

Authority G.S. 90-223; 90-224.1.

21 NCAC 16C .0402 TIME FOR FILING

The completed application, fee, photographs, and undergraduate college and dental hygiene school transcripts must be postmarked or delivered to the Board's office at least 90 days prior to the date of the examination conducted by the Board. Dental hygiene school transcripts for those still in dental hygiene school must be sent in upon graduation. All data received by the Board concerning the applicant shall be part of the application and shall be retained as part of the record.

Authority G.S. 90-223; 90-224.

**21 NCAC 16C .0403 EXAMINATION CONDUCTED
BY THE BOARD**

- (a) Written materials designating the subject areas to be covered and instructions will be made available to candidates prior to the date of the examination conducted by the Board.
- (b) Each candidate will be given a numbered badge. This badge will contain the candidate's photograph and will be presented to the candidate at the opening session. The number on the badge will be the only identification allowed on any paper or manuscript during this examination. The badge must be returned to the Board at the completion of the examination.
- (c) The Board reserves the right to dismiss any candidate who may be detected using or attempting to use any unfair assistance. If such violation is discovered by the Board after a license has been issued to the violator, the license will be revoked.

Authority G.S. 90-223; 90-224.

**21 NCAC 16C .0404 PATIENTS AND SUPPLIES FOR
BOARD CONDUCTED CLINICAL EXAMINATION**

- (a) Each candidate must furnish his own patients and instruments for the clinical examination conducted by the Board. Additional instructions concerning supplies will be mailed to each candidate.
- (b) Supplies necessary for all clinical work are to be provided by the candidate.

Authority G.S. 90-223; 90-224.

**21 NCAC 16C .0405 BOARD CONDUCTED
REEXAMINATION**

- (a) A complete application except for school transcripts and National Board score, is required in case of reexamination.
- (b) Any applicant who has passed the written portion of the examination but has failed the clinical portion of the examination conducted by the Board need not retake the written portion of the examination for a one year period upon reexamination.
- (c) Any applicant who has passed the clinical portion of the examination conducted by the Board but has failed the written portion of the examination may retake the written portion of the

examination two additional times during a one year period and need not retake the clinical portion of the examination. If the applicant does not pass the written portion of the examination upon the second reexamination, the applicant must retake both the written and clinical portions of the examination upon subsequent reexamination.

Authority G.S. 90-223; 90-224.

SUBCHAPTER 16M - FEES PAYABLE

SECTION .0100 – FEES PAYABLE

21 NCAC 16M .0102 DENTAL HYGIENISTS

(a) The following fees shall be payable to the Board:

- (1) Application for examination
conducted by the Board
\$ 170.00
- (2) Renewal of dental hygiene license
\$ 81.00

- (3) Reinstatement of license after retirement from
practice in this State
\$ 60.00
- (4) Application for provisional licensure
\$ 60.00
- (5) Certificate to a resident dental hygienist
desiring to change to another state or territory
\$ 25.00
- (6) Application for license by credentials
\$ 750.00
- (7) License application processing fee
\$ 75.00

(b) Each dental hygienist renewing a license to practice dental hygiene in North Carolina shall be assessed a fee of twenty-five dollars (\$25.00), in addition to the annual renewal fee, to be contributed to the operation of the North Carolina Caring Dental Professionals.

Authority G.S. 90-232; 150B-19(5).

§ 90-224. Examination.

(a) The applicant for licensure must be of good moral character, have graduated from an accredited high school or hold a high school equivalency certificate duly issued by a governmental agency or unit authorized to issue the same, and be a graduate of a program of dental hygiene in a school or college approved by the Board.

(b) The Board shall have the authority to establish in its rules and regulations:

- (1) The form of application;
- (2) The time and place of examination;
- (3) The type of examination;
- (4) The qualifications for passing the examination.

(c) The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new or renewal license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1945, c. 639, s. 4; 1971, c. 756, s. 3; 2002-147, s. 10.)

§ 90-232. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules not exceeding the following:

- (1) Each applicant for examination \$350.00
- (2) Each renewal certificate, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dental hygienist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dental hygienist..... 250.00
- (3) Each restoration of license 150.00
- (4) Each provisional license..... 150.00
- (5) Each certificate of license to a resident dental hygienist desiring to change to another state or territory 50.00
- (6) Annual fee to be paid upon license renewal to assist in funding programs for impaired dental hygienists 80.00
- (7) Each license by credentials 1,500.

In no event may the annual fee imposed on dental hygienists to fund the impaired dental hygienists program exceed the annual fee imposed on dentists to fund the impaired dentist program. All fees shall be payable in advance to the Board and shall be disposed of by the Board in the discharge of its duties under this Article. (1945, c. 639, s. 11; 1965, c. 163, s. 7; 1967, c. 489, s. 2; 1971, c. 756, s. 12; 1987, c. 555, s. 2; 1999-382, s. 3; 2002-37, s. 6; 2003-348, s. 2.)

§ 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. (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).)

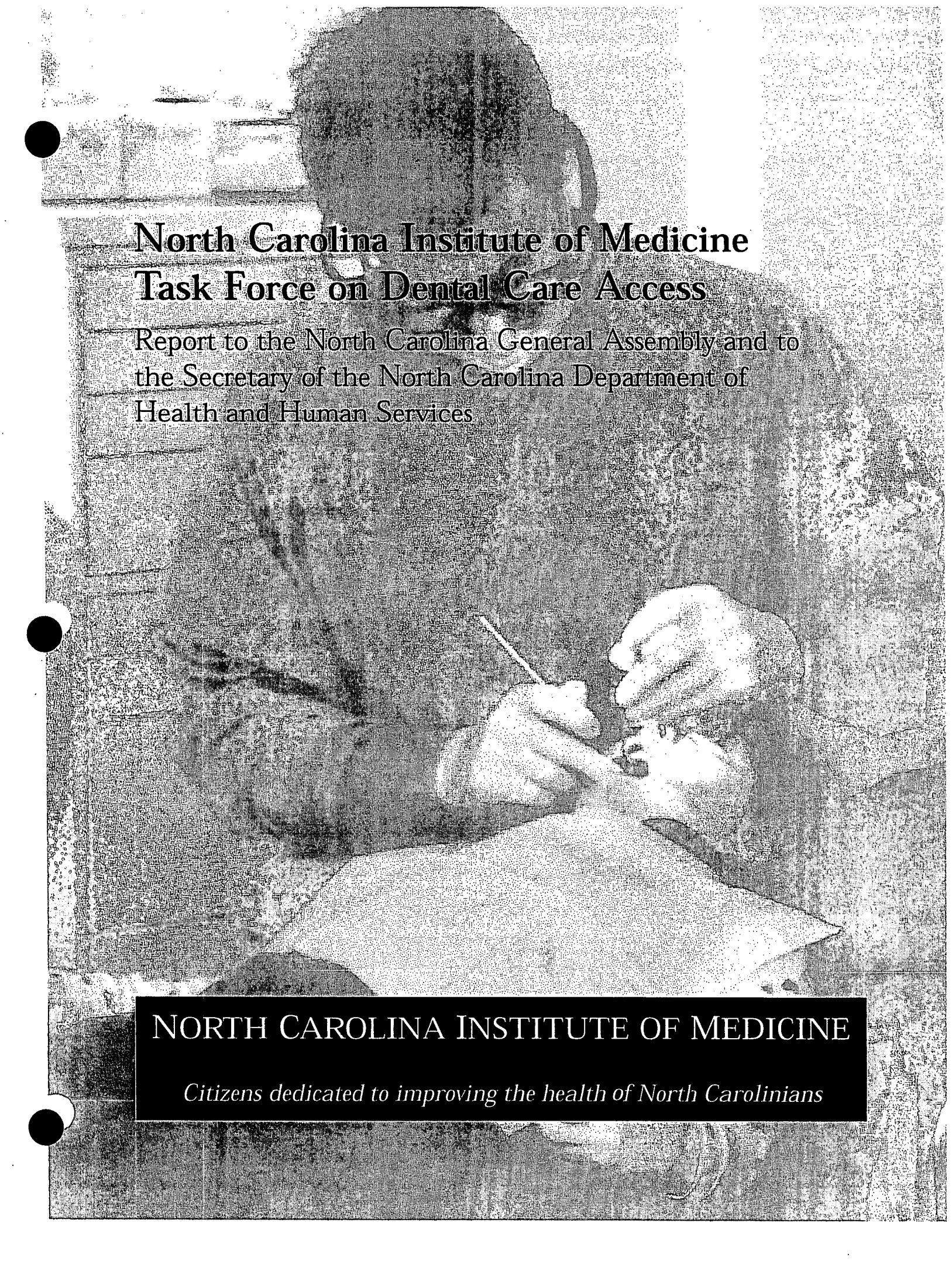
EXHIBITS FOR:

**THE JOINT LEGISLATIVE
ADMINISTRATION PROCEDURE
OVERSIGHT COMMITTEE**

JANUARY 12, 2006

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North Carolina Institute of Medicine Task Force on Dental Care Access

Report to the North Carolina General Assembly and to
the Secretary of the North Carolina Department of
Health and Human Services

NORTH CAROLINA INSTITUTE OF MEDICINE

Citizens dedicated to improving the health of North Carolinians

Although dental problems don't command the instant fears associated with low birth weight, fetal death, or cholera, they do have the consequences of wearing down the stamina of children and defeating their ambitions. Bleeding gums, impacted teeth, and rotting teeth are routine matters for children I have interviewed... Children get used to feeling constant pain. They go to sleep with it. They go to school with it. Sometimes their teachers are alarmed and try to get them to a clinic. But it's all so slow and heavily encumbered with red tape and waiting lists... that dental care is long delayed. Children live for months with pain that grown-ups find unendurable. The gradual attrition of accepted pain erodes their energy and aspirations (Jonathan Kozol, 1991).

Members:

The Honorable Dennis Wicker,
Lieutenant Governor, Chair

Sherwood Smith, Jr., Chairman of the Board,
Carolina Power & Light Company, Vice-Chair

L'Tanya Bailey, D.D.S., President,
Old North State Dental Society

Suzi Bowden, Past-President,
NC Dental Hygiene Association

E. Harvey Estes, Jr., M.D., Chairman of the
Board of Directors, NC Institute of Medicine,
and former Director, Community Practitioner
Program, NC Medical Society Foundation

Stanley L. Fleming, D.D.S., President,
NC State Board of Dental Examiners

James Harrell, Jr., D.D.S., President,
NC Dental Society

Olson Huff, M.D., Former President,
NC Pediatric Society

Johanna Irving, D.D.S., M.P.H., Dental Director,
Wake County Human Services

James Lewis, D.D.S., Dental Director, Lincoln
Community Health Center, Durham

Barbara D. Matula, Director, Health Care
Programs, NC Medical Society Foundation

William E. Milner, D.D.S., M.P.H., Chair,
Special Care Committee, NC Dental Society

Carolyn Newman, C.D.A., President, NC
Dental Assistants Association

Sharon Nicholson-Harrell, D.D.S., M.P.H.,
Dental Director, FirstHealth Dental Care
Centers, Pinehurst

Barbara Hardee Parker, R.D.H., Member, NC
State Board of Dental Examiners

Bruce Parsons, M.B.A., Health Director,
Gaston County Health Department

John Sowter, D.D.S., Clinical Faculty,
UNC-CH School of Dentistry

John W. Stamm, D.D.S., Dean, UNC-CH
School of Dentistry

Terry Stevens, Program Coordinator, Mobile
Health Unit, Chatham County Health
Department

Ronald Venezie, D.D.S., M.S., Regional Dentist
Supervisor, NC DHHS, Fayetteville

J. Steven Cline, D.D.S., M.P.H., Chief, Dental
Health Section, NC DHHS (ex-officio)

Richard Perruzzi, Director, Division of Medical
Assistance, NC DHHS (ex-officio)

Staff to the panel:

Gordon H. DeFriese, Ph.D., President and
C.E.O., NC Institute of Medicine

Pam Silberman, J.D., Dr.P.H., Vice President,
NC Institute of Medicine

R. Gary Rozier, Ph.D., D.D.S., M.P.H., Professor
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Jessica Y. Lee, D.M.D., M.P.H.,
NRSA Research Fellow, UNC-CH

B. William Lohr, P.H.L., Research Associate, NC • IOM

Heather M. Edin, Research Associate, NC • IOM

Kristie W. Schmidt, M.A., Research Associate,
NC • IOM

NC Institute of Medicine Task Force on Dental Care Access

Final Report

Executive Summary

Charge to the Task Force

The North Carolina General Assembly charged the NC Department of Health and Human Services (DHHS) to evaluate and recommend strategies to increase the level of participation of dentists in the Medicaid dental program and to improve the Medicaid program's provision of preventive services to Medicaid patients. Specifically, the Department was directed to develop strategies for:

1. Assisting dentists in increasing the number of their Medicaid patients;
2. Increasing Medicaid patients' access to quality dental services;
3. Informing dental professionals on how to better integrate Medicaid patients into their practices; and
4. Expanding the capacity of local health departments and community health centers to provide properly diagnosed and supervised preventive dental services such as sealant, fluoride, and basic hygiene treatments.

The Department was directed to report its progress and recommendations to the Senate and House Appropriations Committee on Human Resources by April 30, 1999. David H. Bruton, M.D., Secretary of the DHHS, asked the NC Institute of Medicine (NC•IOM) to undertake a study of this problem and to make recommendations. The NC•IOM convened a task force of prominent North Carolina dentists, dental professionals, public health practitioners, physicians, and other interested citizens to study this issue. The NC•IOM Task Force on Dental Care Access was chaired by the Honorable Dennis Wicker, Lt. Governor of North Carolina. Sherwood Smith, Jr., Chairman of the Board of Carolina Power & Light Co., served as Vice-Chair. The Task Force met on four occasions, and took comments from the public during two of the meetings.

Overview of the Problem

Inadequate access to dental care is commonplace among children of families living in poverty. Nationally, among parents who feel that their children have unmet health care needs, 57% report the unmet need is for dental care—nearly twice the number reporting a need for medical care. A lack of dental care for low-income and Medicaid-eligible adults and children often results in severe or persistent pain, inability to eat, swollen faces, and increased susceptibility to other

A lack of dental care for low-income and Medicaid-eligible adults and children often results in severe or persistent pain, inability to eat, swollen faces, and increased susceptibility to other medical conditions.

medical conditions. For children, failure to prevent dental disease can result in missed school days, dysfunctional speech, and compromised nutrition.

Under the federal Medicaid statute, all states are required to provide dental services to Medicaid eligible children. However, dental services for adults are optional. North Carolina, like 26 other states, provides dental coverage for all eligible Medicaid recipients. While dental services are covered under the Medicaid program, use of these services is very low. On average, only 20% of Medicaid recipients visited the dentist in state fiscal year 1998. This is based on the number of Medicaid recipients who used any dental services during the year, thus the number probably overstates the number of Medicaid recipients who receive comprehensive dental services. Use of services varies by both age and geographic location. For example, young children are the least likely to use dental services. Once a child enters the school system, the use of dental services increases.

Table 1. Percentage of Medicaid Recipients who Used Dental Services by Age, 1998.

<u>Age</u>	<u>Percent of Recipients Who Used Services</u>
<1	0.1%
1-5	12.2%
6-14	26.7%
15-20	18.9%
21-64	19.3%
65+	16.4%

Use of dental services also varies by county. The dental participation rate among Medicaid recipients ranged from a low of 10% in Alexander county, to a high of 26% in Henderson and New Hanover counties.

Dentists are reluctant to participate in the Medicaid program because of the low payment rates.

A number of factors influence the low use of dental services among North Carolina Medicaid recipients. One of the primary problems is the low dentist participation rate in the Medicaid program. Recipients often have difficulties finding dentists who are willing to serve them. Only 16% of North Carolina dentists actively participate in Medicaid. In fact, North Carolina has one of the lowest rates of actively participating dentists in the country. There are only six states with lower rates of actively participating dentists. Dentists are reluctant to participate in the Medicaid program because of the low payment rates. On average, North Carolina pays dentists approximately 62% of their usual, customary and reasonable charges (UCR) for 44 of the most common procedures for children,

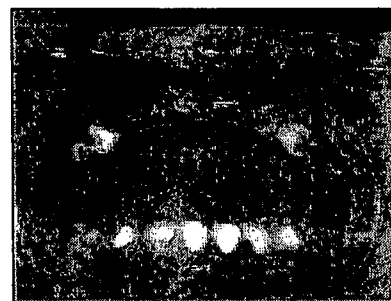
and 42% of UCR for other procedures. Yet, the average overhead cost of operating a dental practice is approximately 60% of total revenues. Thus, many dentists lose money, or at best, can only cover their overhead costs when treating Medicaid patients. In addition, dentists are concerned with the high rate of broken appointments and poor patient adherence among Medicaid recipients.

The problem of low dental participation rates in the Medicaid program is compounded by the overall shortage of dentists and dental professionals in North Carolina. North Carolina ranks 47th in the supply of dentists to serve its population. In North Carolina, there are 38 dentists per 100,000 population compared to the national rate of 60 dentists. Currently, 3,037 dentists practice in North Carolina, with 81% in general dentistry. In addition, there is a maldistribution of dentists in the state. There are four counties with no dentist in practice; another 36 counties have no dentist currently offering services to Medicaid recipients. The NC Office of Research, Demonstrations and Rural Health Development estimates that 79 counties qualify as nationally recognized dental professional shortage areas. Thus, in many communities there are insufficient dentists to serve the insured population, let alone low-income Medicaid or uninsured populations. A similar shortage exists for dental hygienists. With the shortage of dentists and hygienists in private practice, efforts will need to be made to recruit dental professionals to work specifically in underserved areas and in public health and community clinics serving underserved populations.

Another factor is the shortage of pediatric dentists in the state. Care for very young children is difficult and may require hospital care for severe dental caries. Pediatric dentists are specially trained to provide this care in a hospital under general anesthesia. But there are only 47 actively practicing pediatric dentists in the state, and the number of pediatric dentists is declining. General dentists are often unwilling to treat very young children. The lack of accessibility of dental services, and the low utilization of dental services among low-income children contributes to the large number of young children with untreated dental disease. Approximately 25% of all children entering kindergarten each year in North Carolina have untreated dental decay. And unlike older children, the rate of untreated dental disease among very young children has not been declining over time. Much of this disease could be prevented if children had access to preventive services. Providing fluoride varnish to very young children could help to reduce the incidence of dental disease among this population by approximately 40%.

Not only do young children have particular problems accessing dental services, but people in institutional or group home settings, especially

Approximately 25% of all children entering kindergarten each year in North Carolina have untreated dental decay.



Severe baby bottle tooth decay in an 18-month old child (photo courtesy North Carolina Dental Health Section, DHHS)

older adults and others suffering from dementia and other disabilities, also have unique access problems.

Finally, Medicaid recipients do not always understand the need to obtain regular dental services or they experience other non-financial barriers to care that prevent them from effectively using dental services. Medicaid recipients who are interested in obtaining dental care for themselves or their children are sometimes discouraged by the difficulty in obtaining timely appointments. Dental appointments are often booked months in advance and many practices limit the services provided to children. Many low-income and Medicaid working populations find it difficult to take time off of work to see a dentist. In addition, the lack of available child or elder care makes it difficult for some families to access services. The absence of personal and/or public transportation is also a barrier to receiving care.

The Task Force recommendations are grouped in the following areas: a) increasing dentist participation in the Medicaid program; b) increasing the overall supply of dentists and dental hygienists in the state with a particular focus on efforts to recruit dental professionals to serve underserved areas and to treat underserved populations; c) increasing the number of pediatric dentists practicing in North Carolina and expanding the provision of preventive dental services to young children; d) training dental professionals to treat special needs patients and designing programs to expand access to dental services for these populations; and e) educating Medicaid recipients about the importance of ongoing dental care, and developing programs to remove non-financial barriers to the use of dental services.

Increasing dentist participation in the Medicaid program

- *Recommendation #1: Increase the Medicaid reimbursement rates for all dental codes to 80% of UCR. The state's cost of this increase along with an anticipated 10% increase in utilization would be \$8.7 million in SFY 1999-2000, and \$9.57 million in SFY 2000-01.*
- *Recommendation #2: The North Carolina dental societies should develop an outreach campaign to encourage dentists in private practice to treat low-income patients. (Note: This is contingent on increasing Medicaid reimbursement rates). Does not require legislation.*
- *Recommendation #3: The Division of Medical Assistance should work with the NC Dental Society, the Old North State Dental Society, the NC Academy of Pediatric Dentistry, the Dental Health Section of the NC Department of Health and Human Services, the UNC-CH*

Options to increase dentist participation in the Medicaid program

School of Dentistry, and other appropriate groups to establish a Dental Advisory Committee to work with the Division of Medical Assistance on an ongoing basis. The Advisory Committee should also include Medicaid recipients or parents of Medicaid-eligible children. Does not require legislation.

Increasing the overall supply of dentists and dental hygienists in the state with a particular focus on efforts to recruit dental professionals to practice in underserved areas and to treat underserved populations

- *Recommendation #4: Establish an Oral Health Resource Program within the Office of Research, Demonstrations and Rural Health Development to enhance ongoing efforts to expand the public health safety net for dental care to low-income populations in North Carolina. The state cost of this program would be \$1.0 million for each year for three years. The majority of the funds would be used to provide seed grants to communities to leverage private funds to establish or expand community facilities providing dental care.*
- *Recommendation #5: The NC Dental Society should seek private funding from the Kate B. Reynolds Charitable Trust, the Duke Endowment, and other private sources to establish a NC Dental Care Foundation for the purpose of assuring access to needed preventive and primary dental care services in underserved communities and for underserved populations in our state. Does not require legislation.*
- *Recommendation #6: Revise the NC Dental Practice Act to permit specially trained public health dental hygienists to perform oral health screenings as well as preventive and educational services outside the public school setting under the direction of a licensed public health dentist.*

Suggested legislative language: N.C.G.S. 90-233 should be amended to read as follows:

Practice of dental hygiene. (a) A dental hygienist may practice only under the supervision of one or more licensed dentists.

Subsection (a) shall be deemed to be complied with in the case of dental hygienists if

- employed by or under contract with a county or state government dental public health program,*
- specially trained by the NC Dental Health Section as public health dental hygienists,*
- while performing their duties for the persons officially served by the county or state government program by whom he or she is*

Expanding the dental safety-net

*employed or has a contract to practice,
iv. and under the direction of a duly licensed dentist employed by
that program or by the NC Dental Health Section.*

- *Recommendation #7: The NC • IOM, in conjunction with the NC State Board of Dental Examiners, the NC Dental Society, the Old North State Dental Society, NC Dental Hygiene Association, the NC Primary Health Care Association, the Dental Health Section and NC Office of Research, Demonstrations and Rural Health Development of the NC Department of Health and Human Services, should explore different methods to use dental hygienists to expand preventive dental services to underserved populations in federally funded community or migrant health centers, state-funded rural health clinics or not-for-profit clinics that serve predominantly Medicaid, low-income or uninsured populations. A report should be given to the Governor and the Joint Legislative Commission on Governmental Operations no later than March 15, 2000.*
- *Recommendation #8: Existing and any future loan repayment programs established with the purpose of attracting dental professional personnel to work in rural or underserved areas should be accompanied by more stringent requirements to ensure that the dentists serve low-income and Medicaid patients. Does not require legislation.*
- *Recommendation #9: The Board of Governor's Scholarship Program and other state tuition assistance programs should carry a requirement of service in underserved areas upon graduation. Would require legislation.*
- *Recommendation #10: The General Assembly should direct the NC State Board of Dental Examiners to establish a licensure-by-credential procedure that would license out-of-state dentists and dental hygienists who have been practicing in a clinical setting in other states with the intent of increasing the number of qualified dental practitioners in the state. Specifically, the NC State Board of Dental Examiners should consider the following:*
 - *Graduation from an accredited school*
 - *Passage of another state or regional examination*
 - *Proof of current licensure in another state*
 - *Minimum of two years of clinical dental experience*
 - *Personal interview of applicant*
 - *Minimum of three professional references*
 - *Criminal record is checked and certification required to assure that no criminal charges are pending*

Increasing the number
of qualified dental
practitioners in the
state

- *Passage of written examination testing knowledge and skills of infection control*
- *Passage of the NC dental jurisprudence exam*

The Board shall establish a timely process for reviewing applications for licensure-by-credential. Specifically, the process should be completed in a timely fashion to allow the NC Office of Research, Demonstrations and Rural Health Development to recruit dentists to practice in medically underserved areas in those cases where loan repayment arrangements must be made.

- *Recommendation #11. The NC State Board of Dental Examiners should be required to evaluate the competencies required by the different regional examinations to determine if these examinations ensure the same level of professional competence required to pass the North Carolina clinical examination. The NC State Board of Dental Examiners shall report its findings to the Governor and the presiding officers of the North Carolina General Assembly no later than March 15, 2001. If the Board concludes that participation in one or more regional examinations would not ensure minimum competencies, the Board shall describe why these other examinations do not meet North Carolina's standards and how the quality of care provided in North Carolina could negatively be affected by participating in such examinations. If the Board finds these exams to be comparable, procedures should be developed for accepting these examinations as a basis for North Carolina licensure in the year following this determination.*
- *Recommendation #12: The NC State Board of Dental Examiners should consider a change in the wording in the regulations governing dental assistants in order to increase access to dental services for underserved populations. May require change in regulations.*

Increasing the number of pediatric dentists practicing in North Carolina and expanding the provision of preventive dental services to young children.

- *Recommendation #13: Increase the number of positions in the pediatric residency program at the UNC-CH School of Dentistry from two per year to a total of four per year. The cost of this proposal would be \$93,440 in the SFY 1999-2000 (to cover the costs of two pediatric residents and one dental assistant); \$186,880 in SFY 2000-01 (to cover the costs of four pediatric residents and two dental assistants); and \$252,880 in SFY 2001-02 and thereafter (to cover the costs of six pediatric residents and two dental assistants). Does require legislation.*



Photo courtesy UNC-CH School of Dentistry

Increasing the availability of preventative and restorative dental services for children

- *Recommendation #14: The NC • IOM, in conjunction with the NC Academy of Pediatric Dentistry, the UNC-CH School of Dentistry, the NC Area Health Education Centers (AHEC) program, and the Dental Public Health Program within the UNC-CH School of Public Health, should explore the feasibility of creating additional pediatric dental residency program(s) at East Carolina University, Carolinas Healthcare System, and/or Wake Forest University. A report should be given to the Governor and the Joint Legislative Commission on Governmental Operations no later than March 15, 2000. The report should include the costs of establishing additional pediatric dental residency program(s) and possible sources of funding for pediatric dental residency programs, such as state appropriations or the Health Resources and Services Administration (HRSA), within the US Department of Health and Human Services.*
- *Recommendation #15: The Division of Medical Assistance should add American Dental Association procedure code 1203 to allow dentists to be reimbursed for the application of dental fluoride varnishes without the administration of a full prophylaxis. This recommendation would require a new appropriation. The cost to the state would be approximately \$500,000 in SFY 1999-2000, and \$550,000 in SFY 2000-01.*
- *Recommendation #16: Fund the Ten-Year Plan for the Prevention of Oral Disease in Preschool-Aged Children as proposed by the NC Dental Health Section. The goals of this effort would be to reduce tooth decay by 10% in all preschool children statewide in ten years; and reduce tooth decay by 20% in high-risk children statewide in ten years. The Ten-Year Plan would expand the use of public health dental hygienists from school-based settings to community-based settings such as day care centers, Smart Start programs, Head Start Centers and other community settings where high-risk children are located. The program would provide health education to mothers and caregivers, apply fluoride varnishes to young children, use dental sealants when appropriate, and provide continuing education courses for any professional who has contact with young children. The Ten-Year Plan would cost \$966,028 in SFY 1999-2000 (to hire 10 public health dental hygienists, one field dentist supervisor, and four health educators), \$1,827,673 in SFY 2000-2001 (to hire an additional 10 public health hygienists, one field dentist supervisor and maintain staff hired in SFY 99-00 plus \$165,000 for program evaluation), and \$2,288,418 in SFY 2001-2002 (to hire an additional 10 public health hygienists, maintain staff hired in SFY 99-00 and SFY 00-01, plus \$35,000 to complete the program evaluation).*



- *Recommendation #17: The NC Dental Society, the NC Academy of Pediatric Dentistry, the Old North State Dental Society, the NC Pediatric Society and the NC Academy of Family Physicians should jointly review and promote practice guidelines for routine dental care and prevention of oral disease as well as guidelines for referring children for specific dental care, to provide all children with early identification and treatment of oral health problems and to ensure that care givers are provided the information necessary to keep children's teeth healthy. Does not require legislation.*
- *Recommendation #18: The Division of Medical Assistance should develop a new service package and payment method to cover early caries screenings, education, and the administration of varnishes provided by physicians and physician extenders to children between the ages of nine and 36 months. This recommendation will require a new appropriation. The cost to the state will be approximately \$1.0 million in SFY 1999-2000, and \$1.1 million in SFY 2000-01.*
- *Recommendation #19: Support the enactment of HB 905 or SB 615 which would expand NC Health Choice to cover sealants, fluoride treatment, simple extractions, stainless steel crowns and pulpotomies. Requires legislation.*

Training dental professionals to treat special needs patients and designing programs to expand access to dental services.

- *Recommendation #20: The UNC-CH School of Dentistry, the NC AHEC system, and the NC Community Colleges that offer educational programs for dentists, dental hygienists and dental assistants should intensify and strengthen special-care education programs to train professionals on child management skills and how to provide quality oral health services to residents and patients in group homes, long term care facilities, home health, and hospice settings. Does not require legislation.*
- *Recommendation #21: Support the development of statewide comprehensive care programs designed to serve North Carolina's special care and difficult-to-serve populations. Does not require legislation.*

Educating Medicaid recipients about the importance of ongoing dental care, and developing programs to remove non-financial barriers to the use of dental services.

- *Recommendation #22: The Division of Medical Assistance, in conjunction with the NC Dental Health Section of the NC Department of Health and Human Services, should develop or modify community*

Addressing the dental health needs of our most vulnerable citizens

Educating Medicaid recipients about the importance of dental care

education materials to educate Medicaid recipients about the importance of ongoing dental care. Does not require legislation.

- *Recommendation #23: The NC Division of Medical Assistance should pilot test dental care coordination services to improve patient compliance and enhance the ability of low-income families and people with special health care needs to overcome non-financial barriers to dental care. The Division of Medical Assistance should evaluate the program to determine if care coordination increases utilization of dental care services. The evaluation should be reported to the Governor and the Presiding Officers of the NC General Assembly no later than January 15, 2001. Note: The Division may be able to utilize existing care coordinators in the pilot (for example, Health Check for children or Carolina Access coordinators). If the program is successful, funding may be needed to expand the program statewide. Because of the reporting requirements, this provision should be added as a special provision in the SFY 1999-2000 appropriations bill. Does not require legislation.*

Legislation Needed in 1999 General Assembly

The legislative recommendations fall into three areas: appropriations, substantive, and issues that must be further studied and reported back to the NC General Assembly.

Appropriations Needed

If all of the Task Force's recommendations are adopted, the total cost to the state in FY 1999-2000 will be: \$12,289,468 and \$ 14,234,553 in 2000-01. The costs are distributed as described in Table 2.

Substantive Legislation

In addition to the appropriations items, some of the other Task Force recommendations will require legislative action:

- Revise the NC Dental Practice Act to permit specially trained public health dental hygienists to perform oral health screenings as well as preventive and educational services outside the public school setting under the direction of a licensed public health dentist (Recommendation #6).
- The Governor's Scholarship Program and other state tuition assistance programs should carry a requirement of service in underserved areas upon graduation (Recommendation #9).

NORTH CAROLINA INSTITUTE OF MEDICINE

Citizens dedicated to improving the health of North Carolinians

2001 Update

Task Force on Dental Care Access Report to the North Carolina General Assembly and to the Secretary of the North Carolina Department of Health and Human Services

The Task Force's original recommendations were grouped into the following five areas:

- (a) increasing dentist participation in the Medicaid program;
- (b) increasing the supply of dentists and dental hygienists in the state with a particular focus on recruiting dental professionals to practice in underserved areas and to treat underserved populations;
- (c) increasing the number of pediatric dentists practicing in North Carolina and expanding the provision of preventive dental services to young children;
- (d) training dental professionals to treat special needs patients and designing programs to expand access to dental services for these populations; and
- (e) educating Medicaid recipients about the importance of ongoing dental care, and developing programs to remove non-financial barriers to the use of dental services.

Some progress has been made on many of these recommendations. To date, no action has been taken on 39% (9) of the recommendations, information gathering is underway or agreement has been reached without effect yet for 22% (5) of the recommendations, and 39% (9) of the recommendations have been implemented with solid indicators of accomplishment. In sum, some action has been taken on 61% (14) of the recommendations. Thus, progress has been made, but further steps are necessary.

The following is a list of recommendations from the 1999 report, along with a status report on the actions that have been taken, if any, to implement the recommendations.

Increasing dentist participation in the Medicaid program

- ***Recommendation #1: Increase the Medicaid reimbursement rates for all dental procedure codes to 80% of UCR.***

No action taken. This recommendation would require a new state appropriations of \$6.0 in fiscal year 2001 (with a January 1, 2001 implementation date), and \$11.9 annually thereafter to increase dental reimbursement rates to 80% of UCR.

The 2001 General Assembly appropriated \$1.0 million in SFY 2002 and \$2.0 million in SFY 2003 to expand access to dental services for Medicaid eligible

adults and children (Sec. 21.98 of SB 1005). The funds can be used to increase dental reimbursement rates, develop incentives to encourage dentists to serve Medicaid clients or encourage the use of dental vans. However, insufficient funding was provided to increase dental reimbursement to 80% of UCR.

- *Recommendation #2: The NC Dental Societies should develop an outreach campaign to encourage dentists in private practice to treat low-income patients.*

The NC Dental Society and Old North State Dental Society agreed to conduct an active outreach campaign to encourage more dentists to participate in the Medicaid program if the state increased its dental reimbursement rates. Even without the increase in reimbursement rates, the NC Dental Society has worked with the NC Division of Medical Assistance to begin an active outreach campaign to recruit dentists into the Medicaid program.

- *Recommendation #3: The Division of Medical Assistance should work with the NC Dental Society, the Old North State Dental Society, the NC Academy of Pediatric Dentistry, the Dental Health Section of the NC Department of Health and Human Services, the UNC-CH School of Dentistry, and other appropriate groups to establish a dental advisory committee to work with the Division of Medical Assistance on an ongoing basis. The Advisory Committee should also include Medicaid recipients or parents of Medicaid-eligible children.*

The Division of Medical Assistance is in the process of working with the NC Dental Society to develop an advisory committee, which will include Medicaid patients and providers, as well as representatives of all elements of organized dentistry in the state.

Increasing the overall supply of dentists and dental hygienists in the state with a particular focus on efforts to recruit dental professionals to serve underserved areas and to treat underserved populations

- *Recommendation #4: Establish an Oral Health Resource Program within the Office of Research, Demonstrations and Rural Health Development to enhance ongoing efforts to expand the public health safety net for dental care to low-income populations in NC. The state cost of this program would be \$1.0 million for each year for three years.*

No action taken. This program would be charged with recruiting dental professionals to serve in dental underserved areas, and providing seed grants to communities to leverage private funds to establish or expand community-based facilities that provide dental care.

- *Recommendation #5: The NC Dental Society should seek private funding from the Kate B. Reynolds Charitable Trust, the Duke Endowment, and other sources to establish a NC Dental Care Foundation for the purpose of assuring access to needed preventive and primary dental care services in underserved communities and for underserved populations in our state.*

The NC Dental Society established the NC Dental Health Endowment through the North Carolina Community Foundation. The NC Dental Society will perform fund-raising activities to fund the Endowment. The three goals of the Endowment are: 1) Address the oral health needs of the state's underserved; 2) Conduct ongoing campaigns to fund the Endowment; 3) Apply endowment funds to support oral health programs for those with limited access to regular dental care. As of June, 2001, more than \$50,000 of the \$100,000 goal has been raised.

- *Recommendation #6: Revise the NC Dental Practice Act to permit specially trained public health dental hygienists to perform oral health screenings as well as preventive and educational services outside the public school setting under the direction of a licensed public health dentist.*

The North Carolina General Assembly, in their 1999 session, passed legislation to revise the NC Dental Practice Act to permit specially trained public health dental hygienists to perform oral health screenings as well as preventive and educational services outside the public school setting under the general direction of a licensed public health dentist (Sec. 11.65 of HB 168)

Two training events have taken place for hygienists to prepare them to exercise these practice privileges. The NC Oral Health Section has sought clearer language (clarification) in the Practice Act regarding these hygienist functions.

The Dental Practice Act (and rules of the NC State Board of Dental Examiners) currently will allow public health dental hygienists to offer both preventive and clinical hygiene services to children served in public health settings. There are, however, limitations in funding and priorities in preventive dental education which inhibit the extension of these rules to the practice of public health dental hygienists in NC

- *Recommendation #7: The NC IOM, in conjunction with the NC State Board of Dental Examiners, the NC Dental Society, the Old North State Dental Society, NC Dental Hygiene Association, the NC Primary Health Care Association, the Dental Health Section and NC Office of Research, Demonstrations and Rural Health Development of the NC Department of Health and Human Services, should explore different methods to expand access to the services of dental hygienists practicing in federally funded community or migrant health centers,*

state-funded rural health clinics or not-for-profit clinics that serve predominantly Medicaid, low-income or uninsured populations. The study should include consideration of general supervision, limited access permits, additional training requirements, and other methods to expand preventive dental services to underserved populations.

The NC Oral Health Section is working to establish contracts to provide clinical hygiene services (under the temporary rules of the NC State Board of Dental Examiners) with appropriate agencies that need dental hygienists.

- *Recommendation #8: Existing and any future loan repayment programs established with the purpose of attracting dental professional personnel to work in rural or underserved areas should be accompanied by more stringent requirements to ensure that the dentists serve low-income and Medicaid patients. Does not require legislation.*

The Office of Research, Demonstrations and Rural Health Development (ORHRD) was not given additional funding to recruit dentists to serve in rural areas of North Carolina, but the office was granted flexibility in their use of funds for educational loan-repayment. As the need for physicians has lessened, the priority can be shifted to dentists and hygienists who are willing to work in public health, rural and migrant health centers.

The Duke Endowment and Kate B. Reynolds Charitable Trust contribute funds to build facilities while the ORHRD recruits dentists. Using loan-repayment funds, the Office is recruiting about 30 dentists per year. This "incremental" approach will yield 150 dentists working in approximately 75 sites over five years. The Office is also trying to recruit hygienists.

ORDRH has established more stringent requirements to ensure that the dental professionals who were recruited using loan repayment programs will actively serve low-income and Medicaid patients.

- *Recommendation #9: The Board of Governors' Scholarship Program and other state tuition assistance programs should carry a requirement of service in underserved areas upon graduation.*

No action taken.

- *Recommendation #10: The General Assembly should direct the NC State Board of Dental Examiners to establish a licensure-by-credential procedure that would license out-of-state dentists and dental hygienists who have been practicing in a clinical setting in other states with the intent of increasing the number of qualified dental practitioners in the state.*

No action taken. The NC State Board of Dental Examiners developed proposed statutory language and proposed rules for licensure-by-credential and submitted the proposed statutory language to the General Assembly. The NC Dental Society developed consensus support for draft legislation with broad access-to-care implications. This legislation included a proposal for: a five-year intern permit allowing dental school graduates to serve low-income populations; a faculty licensing provision (applicable to all educational institutions training dental professionals); a limited volunteer dental license for foreign-trained dental professionals working in dental educational programs; and licensure by credential for dentists and hygienists. In spite of the effort shown by the NC Dental Society and the NC State Board of Dental Examiners, the bill did not pass.

- *Recommendation #11: The NC State Board of Dental Examiners should be required to evaluate the competencies required by the different regional examinations to determine if these examinations ensure the same level of professional competence required to pass the North Carolina clinical examination. The NC State Board of Dental Examiners shall report its findings to the Governor and the Presiding Officers of the North Carolina General Assembly no later than March 15, 2001. If the Board concludes that participation in one or more regional examinations would not ensure minimum competencies, the Board shall describe why these other examinations do not meet North Carolina's standards and how the quality of care provided in North Carolina could be affected negatively by participating in such examinations. If the Board finds these exams to be comparable, procedures should be developed for accepting these examinations as a basis for North Carolina licensure in the year following this determination.*

The NC State Board of Dental Examiners is gathering information about regional examinations and is planning to attend several exams during this year to observe their procedures and testing methods. Reports will be available following the visits.

- *Recommendation #12: The NC State Board of Dental Examiners should consider a change in the wording in the regulations governing Dental Assistants in order to increase access to dental services for underserved populations.*

The NC State Board of Dental Examiners spent much of last year reviewing and revising its rules governing delegable functions for dental assistants and dental hygienists. New rules are to become effective August 1, 2000, with provisions for in-office training for dental assistants.

Increasing the number of pediatric dentists practicing in North Carolina and expanding the provision of preventive dental services to young children.

- *Recommendation #13: Increase the number of positions in the pediatric residency program at the UNC School of Dentistry from two-per-year to a total of four-per-year.*

No action taken. This recommendation would require a new appropriations of \$93,440 in the first year (to cover the costs of two pediatric residents and one dental assistant); \$186,880 in the second year (to cover the costs of four pediatric residents and two dental assistants); and \$252,880 in the third year and thereafter (to cover the costs of six pediatric residents and two dental assistants).

- *Recommendation #14: The NC IOM, in conjunction with the NC Academy of Pediatric Dentistry, the UNC-CH School of Dentistry, the NC AHEC program, and the Dental Public Health Program within the UNC-CH School of Public Health, should explore the feasibility of creating additional pediatric dental residency program(s) at ECU, Carolinas Healthcare System, and/or Wake Forest University. A report should be given to the Governor and the Joint Legislative Commission on Governmental Operations no later than March 15, 2000. The report should include the costs of establishing additional pediatric dental residency program(s) and possible sources of funding for pediatric dental residency programs, such as state appropriations or the Health Resources and Services Administration (HRSA), within the U.S. Department of Health and Human Services.*

No action taken. Meetings following the 1999 Task Force Report involving East Carolina University, the University of North Carolina at Chapel Hill, Wake Forest University, and Carolinas Medical Center led to a proposal that Wake Forest University begin such a program in Winston-Salem (with plan for two residents per year and total of four when program was fully enrolled). However, Wake Forest University was not able to recruit a pediatric dentist to lead this program. The American Dental Association ADA requires that all program directors be board-certified. There are only 1200 Board certified pediatric dentists in the nation and not all of them are practicing.

- *Recommendation #15: The Division of Medical Assistance is directed to add ADA procedure code 1203 to allow dentists to be reimbursed for the application of dental fluoride varnishes and other professionally applied topical fluorides without the administration of full oral prophylaxis.*

The Division of Medical Assistance added this procedure code as of April 1, 1999.

- *Recommendation #16: Fund the Ten-Year Plan for the Prevention of Oral Disease in Preschool-Aged Children as proposed by the NC Dental Health Section. The goals of this effort would be to reduce tooth decay by 10% in all preschool children statewide in ten years; and reduce tooth decay by 20% in high-risk children statewide in ten years. The Ten-Year Plan would expand the use of public health dental hygienists from school-based settings to community-based settings such as day care centers, Smart Start programs, Head Start Centers and other community settings where high-risk children are located. The program would provide health education to mothers and caregivers, apply fluoride varnishes to young children, use dental sealants when appropriate, and provide continuing education courses for any professional who has contact with young children.*

No action taken. This recommendation would require a new appropriations of \$966,028 in the first year (to hire 10 public health dental hygienists, one field dentist supervisor, and four health educators), \$1,827,673 in the second year (to hire and additional 10 public health hygienists, one field dentist supervisor and maintain staff hired in the first year, plus \$165,000 for program evaluation), and \$2,288,418 in the third year (to hire an additional 10 public health hygienists, maintain staff previously hired, plus \$35,000 to complete the program evaluation).

- *Recommendation #17: The NC Dental Society, the NC Academy of Pediatric Dentistry, the Old North State Dental Society, the NC Pediatric Society and the NC Academy of Family Physicians should jointly review and promote practice guidelines for routine dental care and prevention of oral disease as well as guidelines for referring children for specific dental care, so as to provide all children with early identification and treatment of oral health problems and to ensure that their care givers are provided the information necessary to keep their children's teeth healthy.*

No action taken.

- *Recommendation #18: The Division of Medical Assistance should develop a new service package and payment method to cover early caries screenings, education and the administration of fluoride varnishes provided by physicians and physician extenders to children between the ages of 9 and 36 months.*

Provisions were put in place to allow pediatricians, nurse practitioners or physician's assistants to apply dental varnishes to the teeth of young children in order to more rapidly disseminate this proven preventive procedure among the state's low-income children. The Division of Medical Assistance began implementing this in the Carolina Access II and III project sites in the fall, 1999. They hope to implement this statewide by the spring 2000.

- *Recommendation #19: Support the enactment of HB 905 or SB 615 which would expand NC Health Choice to cover sealants, fluoride treatment, simple extractions, stainless steel crowns and pulpotomies.*

NC Health Choice has been expanded to cover dental sealants, fluoride treatment, simple extractions, stainless steel crowns and pulpotomies. This provision was enacted as part of the 1999 Appropriations Act. (Sec. 11.9 of HB 168).

Training dental professionals to treat special needs patients and designing programs to expand access to dental services

- *Recommendation #20: The UNC-CH School of Dentistry, the NC AHEC system, and the NC Community Colleges that offer educational programs for dentists, dental hygienists and dental assistants should intensify and strengthen special-care education programs to train professionals on child management skills and how to provide quality oral health services to residents and patients in group homes, long term care facilities, home health, and hospice settings.*

The UNC-CH School of Dentistry continues to offer predoctoral dental (DDS) students and dental hygiene students a variety of opportunities to develop knowledge and skills regarding child behavior management for dental care and dental care of people with disabilities. These opportunities include:

Child behavior management for dental care:

1. All dental students receive eight hours of classroom instruction on child behavior management. The DDS students obtain clinical experience by providing dental care for children in several settings in addition to the School of Dentistry including health departments and an Indian Health Service clinic. These sites offer students experience caring for children from a wide range of socioeconomic, ethnic and cultural backgrounds.
2. All dental hygiene students receive two hours of classroom instruction on child behavior management. Students gain clinical experience by rotating through the Pediatric Dentistry Clinic. A special clinic elective is available for hygiene students who wish to gain additional pediatric dentistry training.

Dental care for people with disabilities:

1. All dental students receive eight hours of classroom instruction on providing dental care for people with disabilities. Approximately 75% of the dental students elect also to participate in a 21-hour clinical experience providing

dental care for people with disabilities that live at a caregiver's home, group homes or supported apartments.

2. All dental hygiene students receive 2 hours of classroom instruction on providing oral health care for people with disabilities. Hygiene students also have the option of taking a special elective where they provide preventive dental care for people with disabilities. This rotation includes visits to group homes where the students meet the residents and the staff works with them on improving their oral hygiene and health.

The Department of Pediatric Dentistry offers several AHEC courses focused on child behavior management and providing dental care for people with disabilities. These courses are provided several times per year throughout North Carolina. The Department of Dental Ecology also provides learning experiences in providing oral health care for children and people with disabilities.

- *Recommendation #21: Support the development of statewide comprehensive care programs designed to serve North Carolina's special care and difficult-to-serve populations.*

Since the release of the NC Institute of Medicine's report on Dental Care Access in April, 1999, there have been a number of agencies that have established programs to provide dental services to institutional and other difficult-to-serve populations. However, additional work is needed to ensure that these programs are available statewide.

Educating Medicaid recipients about the importance of ongoing dental care, and develop programs to remove non-financial barriers to the use of dental services.

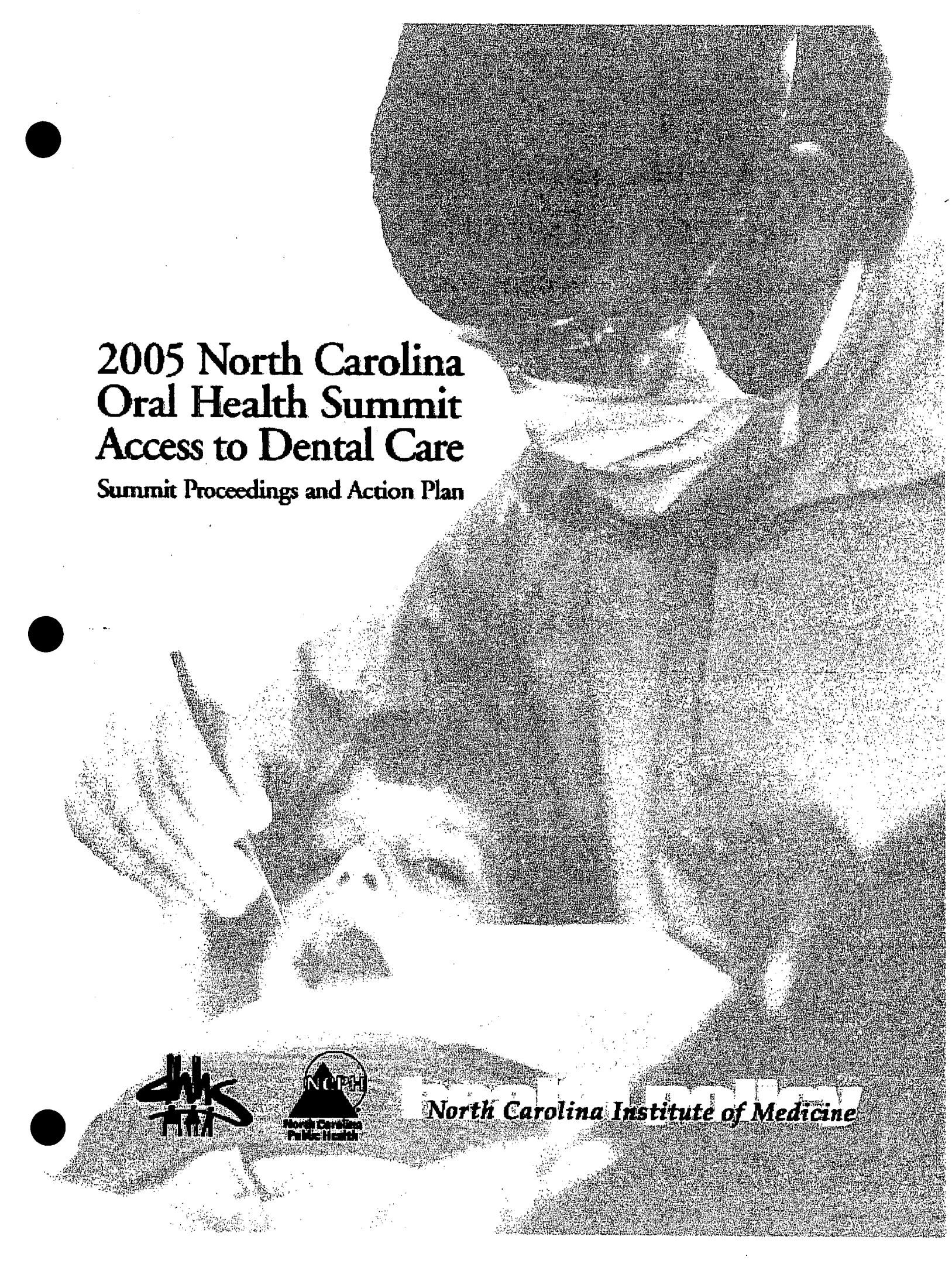
- *Recommendation #22: The Division of Medical Assistance, in conjunction with the NC Dental Health Section of the NC Department of Health and Human Services, should develop or modify community education materials to educate Medicaid recipients about the importance of ongoing dental care.*

No action taken.

- *Recommendation #23: The NC Division of Medical Assistance should pilot test dental care coordination services to improve patient compliance and enhance the ability of low-income families and people with special health care needs to overcome non-financial barriers to dental care. The Division of Medical Assistance should evaluate the program to determine if care coordination increases utilization of dental care services. The evaluation*

should be reported to the Governor and the NC General Assembly no later than January 15, 2001.

The Division of Medical Assistance has health check coordinators in various counties that have tested dental care coordination to some degree. The Division is in the process of studying the results from these counties and plans to pilot test and extend dental care coordination to additional counties in the near future.



2005 North Carolina Oral Health Summit Access to Dental Care

Summit Proceedings and Action Plan



Research Institute
North Carolina Institute of Medicine

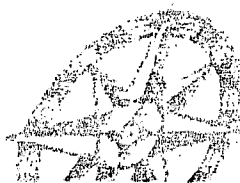
2005 NC Oral Health Summit

Access to Dental Care

Summit Proceedings and Action Plan

Submitted by the North Carolina Institute of Medicine to the NC Oral Health Section of the NC Division of Public Health within the NC Department of Health and Human Services.

October 2005



North Carolina
Oral Health Summit

Building a Collaborative for Action

Funded by the Association of State and Territorial Dental
Directors and the National Governors Association

The full text of this report is available online at:

www.nciom.org

and

<http://www.communityhealth.dhhs.state.nc.us/dental/index.htm>

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The work of this Summit would not have been possible without the generous financial support of the Association of State and Territorial Dental Directors and the National Governors Association. The Summit expresses thanks to its keynote speaker, Don Schneider, DDS, MPH, a consultant in health policy and dental health, and former Chief Dental Officer for the US Centers for Medicare and Medicaid Services.

The Summit extends special recognition to the six authors who wrote background pieces for the Summit. Those articles served as the basis for discussion at the Summit, as well as the foundation for this report. The authors and their background papers included: "Increasing dentist participation in the Medicaid program," by Mahyar Mofidi, DMD, MPH; "Increasing the overall supply of dentist and hygienists in North Carolina: Focus on dental professionals to practice in underserved areas and to treat underserved populations," by John Stamm, DDS, DDPH, MScD; "Increasing the number of pediatric dentist practicing in North Carolina; expanding the provision of preventive dental services to young children," by Michael Roberts, DDS, MScD; "Training dental professionals to treat special needs patients; designing programs to expand access to dental services," by Allen Samuelson, DDS; "Training dental professionals to treat special needs patients; designing programs to expand access to dental services," by F. Thomas McIver, DDS, MS; and "Educating Medicaid recipients about the importance of ongoing dental care; developing programs to remove non-financial barriers to the use of dental services," by Don Schneider, DDS, MPH. These background papers can be accessed online at http://www.communityhealth.dhhs.state.nc.us/dental/oral_health_summit.htm#workgroups.

Special thanks are also due to the members of the planning committee for helping to plan the Summit, and arrange for the background papers and resource individuals, facilitators, and recorders: Keshia Bailey, Missy Brayboy, Rebecca King, DDS, MPH, Faye Marley, Rick Mumford, DMD, MPH, Mike Roberts DDS, MScD, Paul Sebo, Marla Smith, Jean Spratt, DDS, MPH, Martha Sexton Taylor, RDH, MBA, MHA, Kristie Weisner Thompson, MA, and Ronald Venezie, DDS, MS. The Summit also appreciates the participation of the facilitators and recorders: Gordon H. DeFriesse, PhD, Gary Rozier, DDS, MPH, Monica Teutsch, MPH, William F. Vann, Jr., DMD, PhD, MS, Kristen L. Dubay, MPP, Robert Leddy, DDS, MPH, Adrienne R. Parker, Pam Silberman, JD, DrPH, Jeffrey Simms, MSPH, MDiv, and Martha Sexton Taylor, RDH, MBA, MHA.

Thanks are also due to the North Carolina Department of Health and Human Services for all of its support to the Oral Health Section.

The primary staff direction for the work of the Summit was the responsibility of Rebecca King, DDS, MPH, Jean Spratt, DDS, MPH, and Keshia Bailey of the Oral Health Section of the Division of Public Health, a division of the NC Department of Health and Human Services (DHHS). They were principally responsible for leading the overall work of the Summit. Primary responsibility for compiling research, writing, and editing this report were Kristen L. Dubay, MPP, Gordon H. DeFries, PhD, Pam Silberman, JD, DrPH, Kristie Weisner Thompson, MA, and Michaela Jones, PhD of the North Carolina Institute of Medicine. Data provided by the Division of Medical Assistance were integral to the development of this report.

Finally, but most importantly, the Oral Health Section extends its appreciation to the 61 participants (listed below) who shared their time and expertise in an effort to continue evaluating the status of access to dental care in North Carolina. Many of the Summit participants are professionals who have dedicated their careers to improving access to dental services for underserved populations, and for this, we applaud them.

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2005 NC ORAL HEALTH SUMMIT PROCEEDINGS AND PROPOSED ACTION PLAN

In 1998, the NC General Assembly asked the NC Department of Health and Human Services (DHHS) to study and recommend strategies to increase access to dental services for Medicaid recipients. The Honorable David H. Bruton, Secretary of the NC DHHS, asked the NC Institute of Medicine (NC IOM) to convene a task force to study this issue. The NC IOM Task Force on Dental Care Access was comprised of 22 members, and was led by the Honorable Dennis Wicker, Lt. Governor (Chair), and Sherwood Smith, Jr., Chairman and CEO of Carolina Power & Light (now Progress Energy) (Co-Chair). The NC IOM Task Force on Dental Care Access released its report to the NC General Assembly and the NC DHHS in April 1999. It consisted of 23 recommendations, which focused on:

- 1) Increasing dental participation in the Medicaid program;
- 2) Increasing the overall supply of dentists and dental hygienists in the state with a particular focus on efforts to recruit dental professionals to practice in underserved areas and to treat underserved populations;
- 3) Increasing the number of pediatric dentists practicing in North Carolina and expanding the provision of preventive dental services to young children;
- 4) Training dental professionals to treat special needs patients and designing programs to expand access to dental services; and
- 5) Educating Medicaid recipients about the importance of ongoing dental care, and developing programs to remove non-financial barriers to the use of dental services.

The NC IOM convened a one-day meeting in 2003 to review progress on these recommendations.¹ In July 2003, the Oral Health Section of the NC Division of Public Health, a division of the NC Department of Health and Human Services, obtained funding from the Association of State and Territorial Dental Directors and the National Governors Association to convene an NC Oral Health Summit. The purpose of the Summit was to review the 1999 NC IOM Task Force report for progress made

¹ The 2003 Update of the NC IOM Task Force on Dental Care Access is available at: <http://www.nciom.org/pubs/dental.html>.

since 2003.¹ The NC Oral Health Summit was held on April 8, 2005, and included 63 participants. Participants included representatives of the Oral Health Section within the NC Division of Public Health, the NC Dental Society, the NC State Board of Dental Examiners, the NC Academy of Pediatric Dentistry, the NC Dental Hygiene Association, the University of North Carolina at Chapel Hill (UNC-CH) School of Dentistry, East Carolina University, the NC Community Health Care Association, the Division of Medical Assistance, the NC Office of Research, Demonstrations and Rural Health Development, the NC Division of Aging, the NC Partnership for Children, non-profit dental clinics, community health centers, and other interested individuals. Six of the original 22 members of the NC IOM Task Force were among the participants.



The Summit participants reviewed the Task Force's original findings and recommendations to determine if the issues were still relevant, what actions had occurred to implement the Task Force's recommendations, and the barriers to implementation. Summit participants then suggested changes to the original recommendations. The goal of the NC Oral Health Summit was to identify potential strategies to improve dental care access – whether by further implementation of the original 1999 NC IOM Task Force recommendations – or through new strategies to improve access.

The report begins with an overview of the problem as it exists today (2005), followed by sections corresponding to recommendations in the original 1999 report. These sections present updated data (if available) related to the problem, highlight what has been done to implement the recommendations, propose changes to the recommendations (if any), and propose strategies for fulfilling them.

Unlike the original Task Force, which met multiple times over several months, the Summit was a single-day event. Thus, participants did not have the ability to thoroughly analyze or discuss new recommendations. Nonetheless, the Summit provided an opportunity to gather dental care leaders to reflect upon the actions taken and identify further steps needed to improve access to dental services for underserved populations. This document is the genesis for a new *action plan*, which if

implemented, will help ensure access to dental care for more of the underserved North Carolinians across the state.

OVERVIEW OF THE PROBLEM IN 2005

Since the 1999 NC IOM Task Force on Dental Care Access, North Carolina has made significant progress toward improving access to dental care for underserved populations. One of the most positive steps was the increase in Medicaid reimbursement rates for dental services. Following the rate changes in 2002 and 2003, data indicate that between 2002 and 2005, the price Medicaid paid per unit of dental service increased 31% (from \$133 in 2002 to \$174 in 2005), after dropping 8% between state fiscal years (SFY) 2001 and 2002.² Total expenditures also increased during this time. Medicaid dental expenditures accounted for \$197 million in 2004, an increase of 89% since 2002. In fact, the dental program constitutes one of the highest growth areas in the North Carolina Medicaid program.³

Data indicate that this increase in reimbursement has coincided with an increase in dentist participation in the Medicaid program between state fiscal years (SFY) 2001-2005. Table 1 illustrates the number of private dentists who submitted a Medicaid claim to the Medicaid program during that period. Between SFY 2001 and 2005, 156 additional dentists participated in the Medicaid program, an increase of almost 10%. Of that group, more than 50% began serving Medicaid patients since SFY 2004, and 80% of the growth occurred in the last two years. While the absolute number of dentists who participate in Medicaid has increased, the *percentage* of private practicing dentists who participate in Medicaid remained relatively steady (about 48-49%) between fiscal years 2001 and 2004.³

private practice, to have 10-20% of their patients covered by public insurance.

1999 Task Force Recommendation #10

The General Assembly should direct the NC State Board of Dental Examiners to establish a licensure-by-credential procedure that would license out-of-state dentists and dental hygienists who have been practicing in a clinical setting in other states with the intent of increasing the number of qualified dental practitioners in the state.

In August 2002, Senate Bill 861 was signed into law (SL2002-37) to allow licensure by credentials for dentists and dental hygienists who have practiced in another state for at least five years without any disciplinary actions. The NC State Board of Dental Examiners enacted rules to implement this procedure, effective January 2003. Since that time, 139 dentists and 145 dental hygienists have received a license by credentials. Dental professionals have one year from the time their application is approved to establish a practice in North Carolina.

1999 Task Force Recommendation #11

The NC State Board of Dental Examiners should be required to evaluate the competencies required by the different regional examinations to determine if these examinations ensure the same level of professional competence required to pass the North Carolina clinical examination. The NC State Board of Dental Examiners shall report its findings to the Governor and the Presiding Officers of the North Carolina General Assembly no later than March 15, 2001. If the Board concludes that participation in one or more regional examinations would not ensure minimum competencies, the Board shall describe why these other examinations do not meet North Carolina's standards and how the quality of care provided in North Carolina could be affected negatively by participating in such examinations. If the Board finds these exams to be comparable, procedures should be developed for accepting these examinations as a basis for North Carolina licensure in the year following this determination.

As highlighted in the 2003 Dental Care Access Update report, the NC State Board of Dental Examiners examined the other regional examinations and recommended against pursuing this option any further. Since then, the NC State Board of Dental Examiners has entered into discussions with its counterpart boards in other states (and members of the American

Association of Dental Boards) about the feasibility of a national licensing exam for dentists. This matter is still unresolved, but it is thought that North Carolina would likely participate were such an exam to be promulgated.

1999 Task Force Recommendation #12

The NC State Board of Dental Examiners should consider a change in the wording in the regulations governing Dental Assistants in order to increase access to dental services for underserved populations.

As highlighted in the 2003 Update of the Dental Care Access Report, this recommendation has been fully implemented. New rules became effective August 1, 2000, with provisions for in-office training for dental assistants.

INCREASING THE NUMBER OF PEDIATRIC DENTISTS PRACTICING IN NORTH CAROLINA AND EXPANDING THE PROVISION OF PREVENTIVE DENTAL SERVICES TO YOUNG CHILDREN

A 2000 Task Force report from the American Academy of Pediatric Dentistry found that between 1990 and 1998, the number of trained pediatric dentists in the United States declined from 3,900 to 3,600. This decline was attributed to a lack of pediatric training programs rather than a lack of interest in pediatric dentistry training.²⁰ Fortunately, between 1998 and 2004, North Carolina succeeded in reversing the declining workforce trends of pediatric dentists in the state. As of 1998, there were only 47 pediatric dentists practicing in North Carolina, but by 2004, 92 pediatric dentists were active in the state. Most notably, five of these dentists are engaged in community dental health services within health departments or Medicaid clinics. In addition, there are ongoing efforts to establish a new pediatric dental residency program at the Carolinas Medical Center in Charlotte. These successes are extremely important because, according to the American Academy of Pediatric Dentistry, pediatric dentists provide a disproportionately higher amount of oral healthcare for underserved children and children receiving Medicaid.

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

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BOBBY D. WHITE, Chief Operations Officer

Date

Name

Address

City, State, Zip

Dear:

Thank you for expressing your concerns to the North Carolina Board of Dental Examiners regarding the 2006 hygiene examination. The Board's decision to join a regional testing agency is a departure from previous years, but comes as a result of recommendations developed for the Board through the North Carolina General Assembly and the Department of Health and Human Services. Please allow us to explain.

In 1999 the General Assembly charged the NC Department of Health and Human Services (DHHS) to evaluate and recommend strategies to increase the level of participation of dentists in the Medicaid Dental Program. One of the specific goals of this charge was to increase "Medicaid patient's access to quality dental services." DHHS in turn asked the NC Institute of Medicine (the Institute) to study this problem and to make recommendations. After bringing together the appropriate groups and analyzing the available data, the Institute proposed, among other things, that the overall supply of dentists and dental hygienists in the state should be increased. To this end, Recommendation #11 of the Institute required the NC Board of Dental Examiners to "evaluate the competencies required by the different regional examinations to determine if these examinations ensure the same level of professional competence required to pass the North Carolina clinical examination...If the Board finds these exams to be comparable, *procedures should be developed for accepting these examinations as basis for North Carolina licensure in the year following this determination.*" [Emphasis added]

Since submitting its initial report in 2001, the Board has dutifully continued to review other regional and independent examinations to determine if they ensure the same level of professional competence as the "in-house" North Carolina exam. During this time a strong movement developed within the examining community to develop a national exam

for dental hygiene. This movement resulted in the creation of the American Board of Dental Examiners (ADEX). The exam content, criteria and scoring developed by ADEX created an exam that met the Board's standards in terms of psychometric defensibility, validity, and candidate anonymity. What ADEX failed to provide, however, was an organizational structure that could develop actual test materials, manuals, scoring sheets, and all other forms necessary to conduct and administer the exam.

Given these facts, the Board believed that these crucial services could be best developed and maintained by a regional testing agency whose sole function it is to administer an examination and to keep its administration uniform and current. Only by establishing such consistency and uniformity can progress be made in having other states and jurisdictions accept the examination as a component of their licensure process - and thus increase the mobility mandated in Recommendation #11 of the Institute's final report. The Board investigated the possibility of joining an existing region, but did not find one that addressed all of the Board's concerns regarding examination content and administration. Therefore, it was the Board's decision to join with the other independent states of Mississippi, Louisiana, Alabama, Florida and Puerto Rico to form a new regional testing agency. The Board has confidence that this new agency, the Council of Interstate Testing Agencies (CITA), will remain progressive and in the forefront of exam development at a level that an individual state board simply cannot do.

In essence, CITA is providing for North Carolina what ADEX failed to provide. The Board has confidence in the CITA exam since the Board's dental, dental hygiene, and consumer members had a great deal of input into its development at both the national and regional level. Furthermore, the Board has confidence that: (1) the number of states accepting results of the CITA exam will continue to grow and thereby increase mobility for North Carolina licensees, (2) CITA will continue the process of exam development in a way that individual boards can no longer afford to do, and (3) Board members will remain active in the exam process to assure the highest quality examination will be provided for dental hygiene students.

CITA itself is a nonprofit 501(c)(3) organization. Its Board of Directors is composed of officers and directors from its various member states. All serve as volunteers though a small per diem and expenses are paid for those days devoted to CITA business. It should be noted as well that the \$700 CITA hygiene exam fee is comparable to the fee charged by other regional testing agencies and is \$200 less than the fee originally set for the ADEX hygiene exam. The financial records of CITA are open for inspection and you may arrange a time to review how CITA is structured financially and how its financial resources are being spent.

Attached you will find a list of frequently asked questions. The Board hopes this document will provide a factual basis from which to continue discussions of the proposed rule changes necessary to implement a regional examination format. It is also hoped this will correct any misinformation that may be circulating. For example, there seems to be a great deal of misunderstanding as to the time frame for reporting scores. CITA will report final scores within ten days - not ten weeks as some seem to believe.

Please note that a public hearing will be held on January 5, 2006 at 8:00 p.m. at the Board's office to discuss the rule revisions necessary for the Board to separate the Board's previous clinical dental hygiene examination fee from the Board's fee for the issuance of the license to practice dental hygiene in the state of North Carolina. If you are unable to attend this meeting, any written comments you have sent or will send will be presented to the Board at the hearing.

Thank you for your interest in this important matter.

Sincerely,

Stanley L. Allen, DDS
President, NC State Board of Dental Examiners

Neplus Hall, RDH
Hygiene Member, NC State Board of Dental Examiners

Questions Regarding the CITA Hygiene Examination

- 1) *What were the factors that precipitated an increase of over \$500.00 in the examination fee?*

In general, it should be recognized that all of the states in CITA are moving from an examination process previously administered by independent state boards of dentistry to one administered by a regional testing agency. Historically, regional testing agency fees have been considerably higher than independent state board fee structures. Being a part of an independent state administered exam, candidates have previously enjoyed exam costs which were offset by general board operating revenues. However, this has been framed against a backdrop of limited recognition of the independently administered examination and subsequent limited mobility. The new paradigm of regional and national mobility through regionally administered examinations breaks down previous barriers of recognition and limited mobility, but carries with it a new ledger of higher associated expenses and examination costs.

The dental hygiene examination administered by CITA was developed under the auspices of the American Board of Dental Examiners (ADEX), with representation and input from CITA, a number of other regional testing agencies and independent states. Central to this unprecedented level of cooperation was the development and evolution of a national clinical examination that would be recognized by each state board of dentistry as fulfilling the clinical examination requirement for licensure in their respective state. The ADEX Board of Directors appointed a Hygiene Examination Committee whose charge was to develop content, criteria and scoring for the new national hygiene examination. The Dental Hygiene Committee of ADEX consisted of hygienists and hygiene educators from across the nation who reviewed existing hygiene clinical and computer examinations and used existing as well as new testing constructs to develop the national examination.

The fee for the national examination was set by the ADEX Board of Directors, with input and consultation with the Dental Hygiene Committee members and the representatives from existing state and regional testing agencies.

One of the conditions for membership in ADEX, and concomitant recognition and acceptance of the national hygiene examination, is that all who are members of ADEX, and have signed membership agreements, are to uniformly administer the examination and charge a uniform fee for the examination. The fee for the examination was set by ADEX after discussion of the existing regional testing agencies as to what fee they were currently charging, and what additional

expenses would be required in the delivery, administration and reporting of the new dental hygiene examination. Aside from the additional expenses in the administration of the examination, each test administering agency, who is a member of ADEX is contractually obligated to send a portion of each examination fee to ADEX for examination development expenses, and to help support ADEX organizationally on the national level.

Therefore, the central factor in the fee increase was that it was a requirement for membership in ADEX; that all test administering bodies charge a uniform fee as set by the ADEX Board of Directors. For most regional testing agencies the fee increase was nominal over what those agencies had been charging in the past. For states which had been independently administering the dental hygiene examination, and who had general board revenues to offset exam administration expenses, the fee represented a departure from traditional, historic fee structures.

- 2) *We understand that CITA has withdrawn from the ADEX process. Does CITA plan to rejoin the ADEX process and what will this mean for candidates who take the CITA examination?*

Although CITA states have currently withdrawn from the ADEX process, CITA is hopeful that ADEX will address CITA concerns regarding representation on committees, release of examination materials and governance issues so that the present impediments preventing CITA membership and participation can be resolved. If recognition of the CITA administration of the examination is to occur, with the associated mobility realized, it is important that CITA continue to comport with existing ADEX guidelines in examination administration, including the required ADEX fee structure.

Should CITA determine that the ADEX process is untenable, then CITA will have some latitude in determining what an appropriate fee structure may be for the CITA dental hygiene exam and the subsequent administration of the same. However, with the present budget of CITA, and the expense of delivering the dental hygiene examination, it is doubtful that for the immediate future significant reductions in the fee structure will be forthcoming.

- 3) *Some concern has been expressed that the new fee is a mechanism for the dental boards, or its members to realize an economic gain? What is the organizational structure of CITA and is its Board of Directors or Officers receiving economic income from the administration of the examination?*

CITA was organized and incorporated as a nonprofit 501C-3 corporation. CITA consists of representatives from member states who vote on matters brought before the membership. There is a Board of Directors and Officers who serve to govern and carry on the day-to-day activities of the organization. CITA Board Members and Officers are not required to be current state board members.

CITA Board Members and Officers expend considerable amounts of time in their service to the citizens of our states, and to the profession but do not receive compensation for their positions as Board Members or Officers. Their time is donated and provided without compensation. CITA Board members may participate in the examination process along with other dentists and hygienists as Clinic Floor Monitors or Examiners. Participants in the administration of the CITA examination receive an honorarium and an allowance for travel, meals and lodging. CITA does employ staff personnel to provide administrative and clerical duties within the CITA office.

4) *What is the relationship between CITA and the state boards of dentistry?*

It is important to distinguish that state dental examining boards are typically considered a part of state government. The boards as state agencies have delivered the clinical licensure examinations as a service to the citizens of the state and the profession. In the new national/regional format state boards of dentistry will no longer be administering the dental hygiene examination. Although state board members will assist in the delivery of the examination, the examination will be administered by CITA, an outside independent regional testing agency similar to the Northeast Regional Board (NERB), the Western Regional Examination Board (WREB), or the Southern Regional Testing Agency (SRTA).

Member states and their State Boards of Dentistry have agreed by contract to accept the results of the CITA administered examination, however the state boards of dentistry do not have the specific authority to set what CITA, or any other regional testing agency for that matter, charges for the development and administration of a licensure examination. The fee is determined by the regional testing entity and is a function of exam development expenses, administration expenses, psychometric expenses, staff expenses and examiner travel, honorarium and lodging expenses incurred in the administration of the examination.

5) *If this large increase is needed to meet expenses, does this mean that the (Boards) have been losing thousands of dollars the last few years they gave the exam?*

While each state board of dentistry's circumstances may differ, it is likely accurate to state that typically the expenses in delivering an examination are not covered by the fees generated by examination applicants. The income generated by the licensure renewals fees of existing practitioners is used to offset the shortfall of administering the examination. In addition, aside for the direct cost of administering the examination such as hotel, travel, honorarium and meals, the indirect expenses such as exam development, psychometric or measurement specialist consultation expenses, technical manual development, and post examination analysis are usually absorbed by boards as general operating costs, which again are paid from general board revenues generated by practitioner licensure renewal. This is one of the many reasons regional testing agencies have

for numerous years required a greater examination fee than those states who have independently administered their examinations.

- 6) *In their Spring Semester, our senior students are facing National Boards, final exams, completion of clinical requirements, and finding patients for licensure examination. They are now in the process of preparing for the licensure examination but have insufficient information as to requirements, patient type, use of Cavitrons, etc. When will such information be made available?*

The CITA Hygiene Examination Committee has met to finalize the content, criteria and scoring of the CITA hygiene examination. Final information and the candidate manual will be available the first part of January, and may be obtained by a written request to the CITA office or by visiting the CITA website at www.citaexam.com.

- 7) *Are there any hygienists on the CITA board? If not, why not since CITA administers a dental hygiene licensure examination?*

The CITA Board of Directors was organized subsequent to its Bylaws and Articles of Incorporation. The Board of Directors is comprised of dentists from the member states of CITA.

The development of the hygiene examination, determinations of content, scoring and criteria are functions of the CITA Hygiene Examination Committee, which is composed of dental and dental hygiene representatives from the member states.

- 8) *How was the CITA exam designed? Who participated in the design? Was the Dental Hygiene National Board Examination referenced when the CITA examination was constructed? Were other regional board examinations referenced during exam construction?*

The hygiene examination utilized by CITA embodies the examination as developed by the participating hygienists who helped develop the ADEX examination. This examination was the result of input and guidance from hygienists and hygiene educators from across the nation. Regional test agency representation of hygienists came from CRDTS, NERB, CITA and SRTA.

- 9) *How is the CITA examination like and different from the NCSBDE dental hygiene licensure examinations of recent years?*

The CITA examination will be similar in some respects and in others differ from the examinations conducted in the individual states comprising CITA. The CITA exam will have a written component, as well as a clinical component. The clinical component will test additional areas of expertise and knowledge, and the exam will test calculus identification as well as removal. Please consult the CITA

website after January 1, 2006 for more specific information regarding the CITA examination.

10) What are other regional testing agencies charging for their hygiene examinations?

Currently NERB, CRDTS and WREB are charging \$700 plus a variable school facility fee. SRTA is currently charging \$650 plus a variable school facility fee.

Many schools charge a fee for the use of the school and the school's personnel during the course of the examination. This fee is paid directly to the school.

11) If CITA withdraws from ADEX, what states will recognize the results of the CITA examination?

Currently the member states of CITA are North Carolina, South Carolina and Mississippi. CITA examinations results are recognized as fulfilling the clinical examination requirements for licensure in those states. At this time, CITA is also finalizing paperwork with Louisiana and Puerto Rico who should have recognition by next year, along with Alabama. As CITA moves forward soliciting new states as members, we are asking all members to accept the results of the CITA exam from this date forward. That means that those member states who join later will accept the results of a CITA exam taken now. Mobility will grow as new states accept the results of the CITA administered exam.

Additionally, acceptance of CITA results is a state board right, and CITA will continue to petition individual state boards of dentistry who are not, and may not become CITA members, to accept the results of the CITA exam for licensure in their states.

12) It has been stated that North Carolina was asked by the legislature to join a regional exam agency. Is this true? If so can the legislature mandate to the regional testing agency what fees they can charge for the examination?

No. Subsequent to the Institute of Medicine's Task Force on Access to Care, the Task Force developed 23 recommendations to be submitted to the Legislature regarding mechanisms which might address access to care issues. Recommendation number eleven of the final task force document stated:

• Recommendation #11: The NC State Board of Dental Examiners should be required to evaluate the competencies required by the different regional examinations to determine if these examinations ensure the same level of professional competence required to pass the North Carolina clinical examination. The NC State Board of Dental Examiners shall report its findings to the Governor and the Presiding Officers of the North Carolina General Assembly no later than March 15, 2001. If the Board concludes that participation in one or more

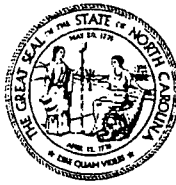
regional examinations would not ensure mini-mum competencies, the Board shall describe why these other examinations do not meet North Carolina's standards and how the quality of care provided in North Carolina could be affected negatively by participating in such examinations. If the Board finds these exams to be comparable, procedures should be developed for accepting these examinations as a basis for North Carolina licensure in the year following this determination.

The North Carolina State Board of Dental Examiners reported its findings to the Governor as directed and recommended. At that time, the Board did not recommend that North Carolina join a regional examination agency. However, subsequent to further study by the Board, and subsequent to the Board's participation in the development of a national exam, the Board elected to join a regional test administration agency to administer an examination, and to accept the results of that examination for fulfilling the clinical examination component for licensure in dental hygiene. This decision has effectively addressed Recommendation # 11 of the Institute of Medicine's Task Force on Dental Care Access.

The regional testing agencies, including CITA, are private, independent nonprofit corporations separate from individual state legislature authority. Additionally, testing agencies do not receive subsidy from state legislatures and must therefore charge for the administration of the licensure examinations as may be required to meet the expense of delivery of those examinations as any private nonprofit corporation might be empowered.

13) Are funds or scholarships available to help dental hygiene students meet the increased expense of the CITA examination?

It has been suggested that there are monies available in student aid offices for the expense of the licensure examinations. Students should inquire at the Student Aid Office at the institution where they are enrolled to see if funds are available for this purpose.



STATE OF NORTH CAROLINA
OFFICE OF THE LIEUTENANT GOVERNOR

DENNIS A. WICKER
LIEUTENANT GOVERNOR

July 8, 1999

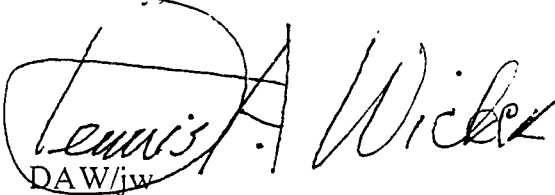
Dear Task Force Member:

I am pleased to report that the legislature included many of our recommendations from the Task Force on Dental Care Access in the 1999-2000 budget. Even though our report was issued late in the budget process, legislators were very receptive to our suggestions and requests. I am proud that so many different groups were able to work together towards a common goal and support all of the recommendations. I have attached a brief outline of the recommendations included in the budget. The legislature was unable to find enough money in the very tight budget for the 80% Medicaid reimbursement rate, but we will continue to work for its inclusion in the next budget.

I want to thank each of you for your support of the recommendations. I encourage you to continue your letter writing campaigns and invite you to share your support of the report with your local delegation. I will continue to keep you updated on the recommendations in the short legislative session next summer.

With warmest regards, I am

Sincerely,


DAW/jw



Task Force on Dental Care Access
Recommendations included in 1999 Budget

Recommendation	Section in Budget
Recommendation 19: Support the enactment of HB 905 or SB 615 which would expand NC Health Choice to cover sealants, fluoride treatment, simple extractions, stainless steel crowns and pulpotomies.	Section 11.9 G.S. 108A-70.21(b)(1) was rewritten to include the recommendation.
Recommendation 7, 11 and 14 – further studies	Section 11.14
Recommendation 6: Revise the NC Dental Practice Act to permit specially trained public health dental hygienists to perform oral health screenings as well as preventive and educational services outside the public school setting under the direction of a licensed public health dentist.	Section 11.65 G.S. 90-233(a) was rewritten to include the recommendation.

*Recommendation 10: Licensure by credential was included in Senate bill 665 which received a favorable report from the health care committee and is now in the rules committee.

Dear members and Component Presidents,

On Friday, December 30, a meeting was held by the North Carolina Board of Dental Examiners and the CITA Board members to explain the CITA exam which will replace the North Carolina Dental and Dental Hygiene Board exams held in June

Martha Taylor, our Governmental Affairs chairperson, and I attended the meeting along with representatives from at least six of our dental hygiene programs. CITA is short for Council of Interstate Testing Agencies. "CITA is dedicated to the creation and evolution of a strong, unified regional examination whose results are recognized for licensure in CITA member states." At this time, Mississippi is the only other participant with Nevada, Puerto Rico, Alabama and South Carolina to join after receiving approval by their 2006 House of Delegates. We were assured that the North Carolina Board of Dental Examiners would not accept preceptor dental hygienists from Alabama even if they passed the CITA exam.

Advantages of this exam are:

- 1) standardized exam practices
- 2) the beginning of the process of regional mobility
- 3) technological advancement
- 4) psychometric defensibility
- 5) educational feedback
- 6) student entry into the profession

Much hard work and research has gone into this exam which was written by a team of dental and dental hygiene educators and the American Board of Dental Examiners along with regional testing agency members. The fee of \$700 was set by the National Examining Board. North Carolina Dental Hygiene applicants must also pay a \$75 licensure fee. Application for the board as well as licensure application and the on-line sterilization and jurisprudence can be completed prior to the clinical exam in June.

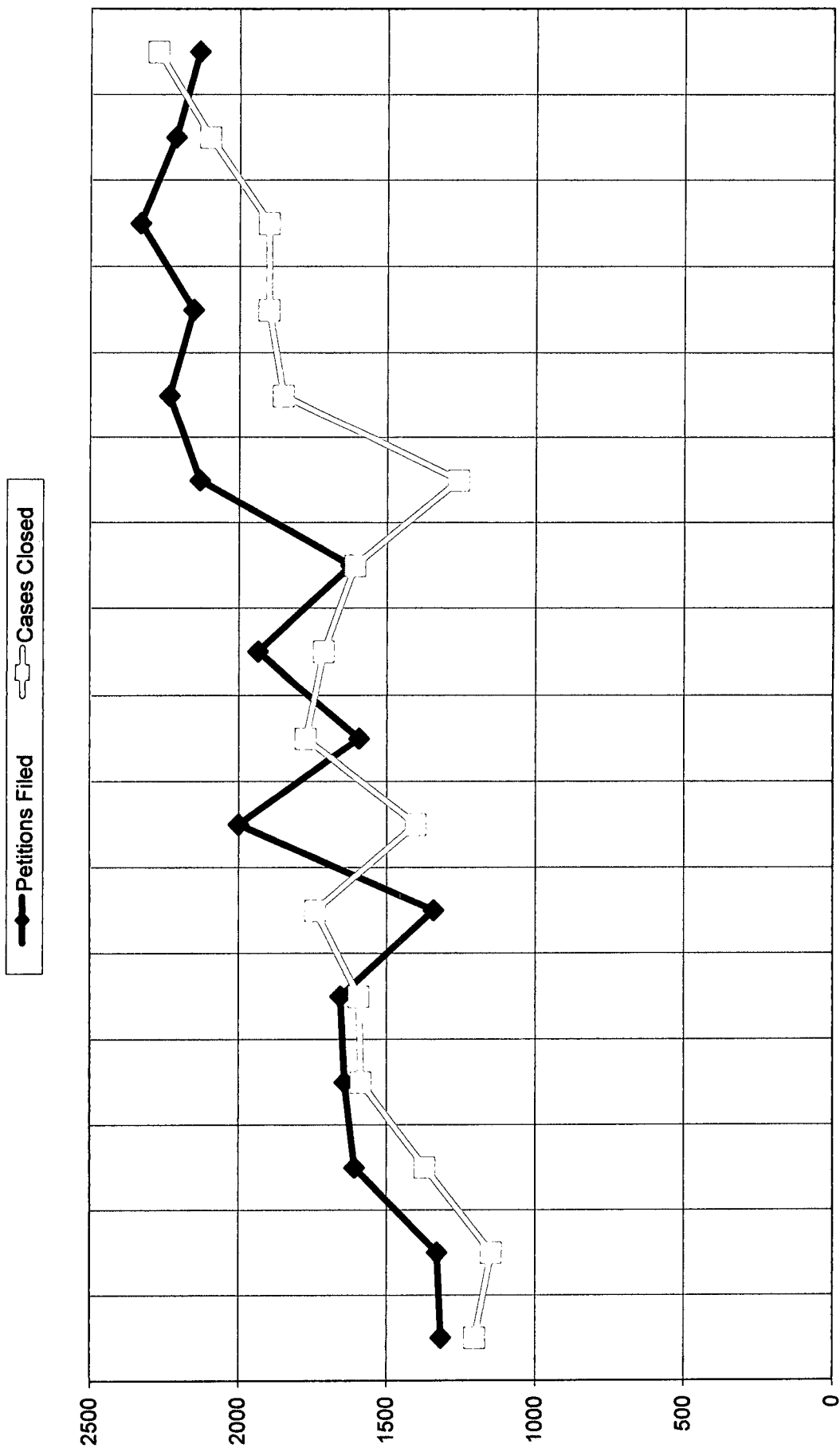
This covers some of the highlights of this exam. For more detailed information, go to www.citaexam.com.

I would like to suggest that all local components, as well as study clubs, to contact the dental hygiene school closest to you for a list of hygiene students who may need assistance with the new licensure fee. Dental hygiene programs are required to inform students when they enter the program to expect to pay \$170 for their board exam and license. With the new exam just being created, there will be many students who will have a hard time coming up with the additional \$530 to make up the difference. Please be willing to do what you can to show these students that we do care about them and welcome them into the wonderful, challenging world of dental hygiene.

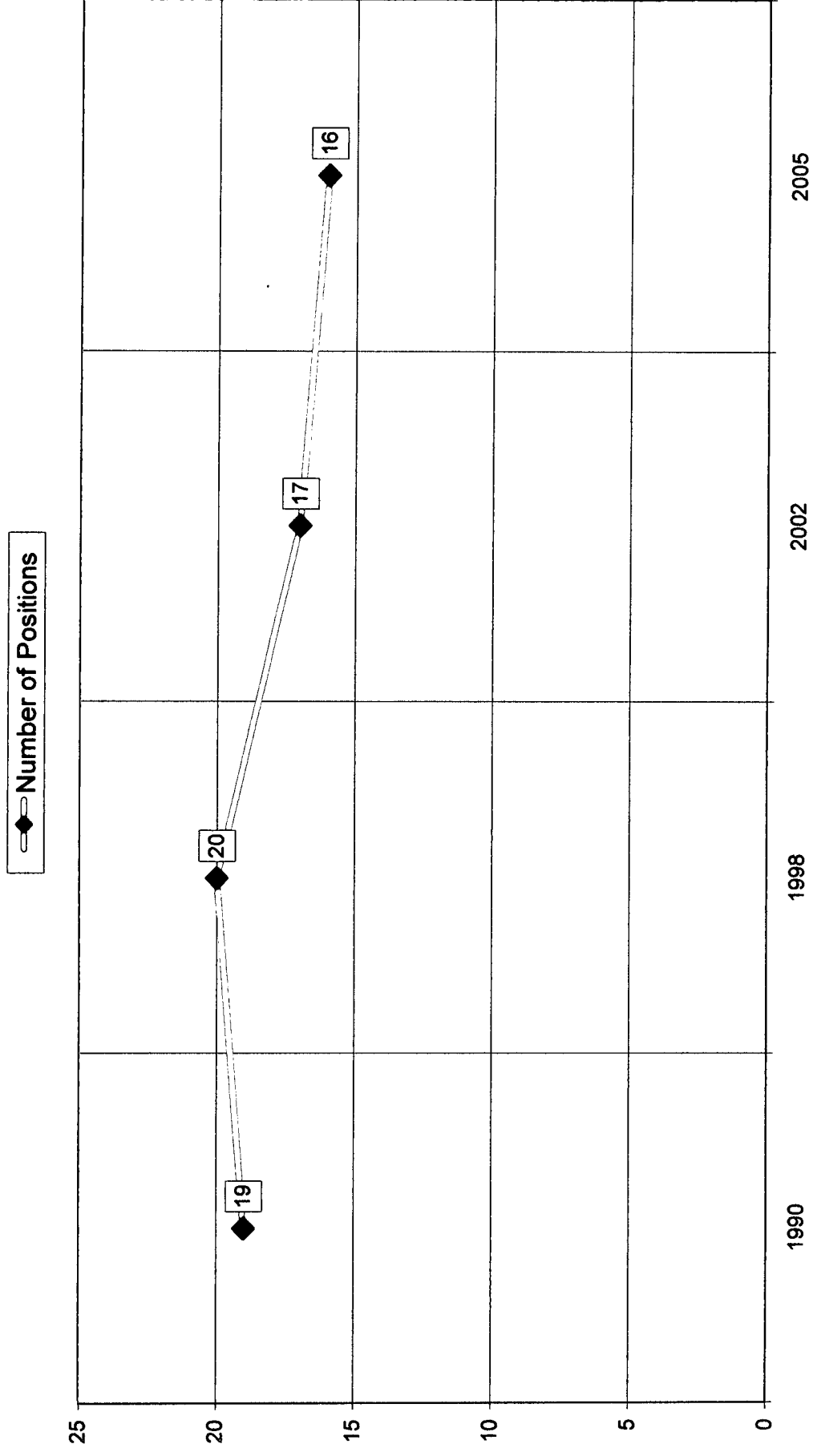
Thank you and Happy New Year!

Betsy Hardin

Petitions Filed -- Cases Closed 1990 thru 2005

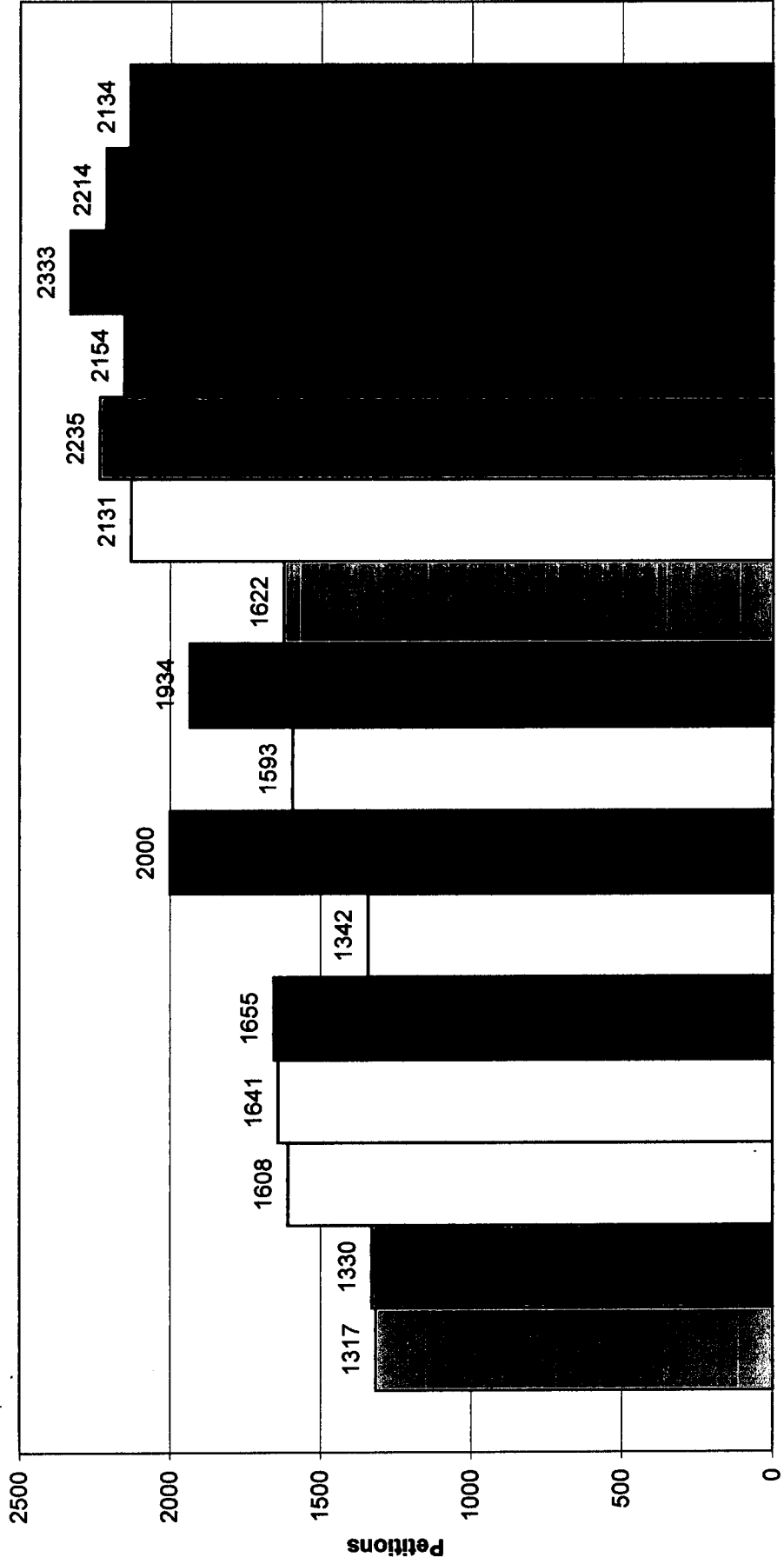


Hearings Division Positions 1990 Thru 2005

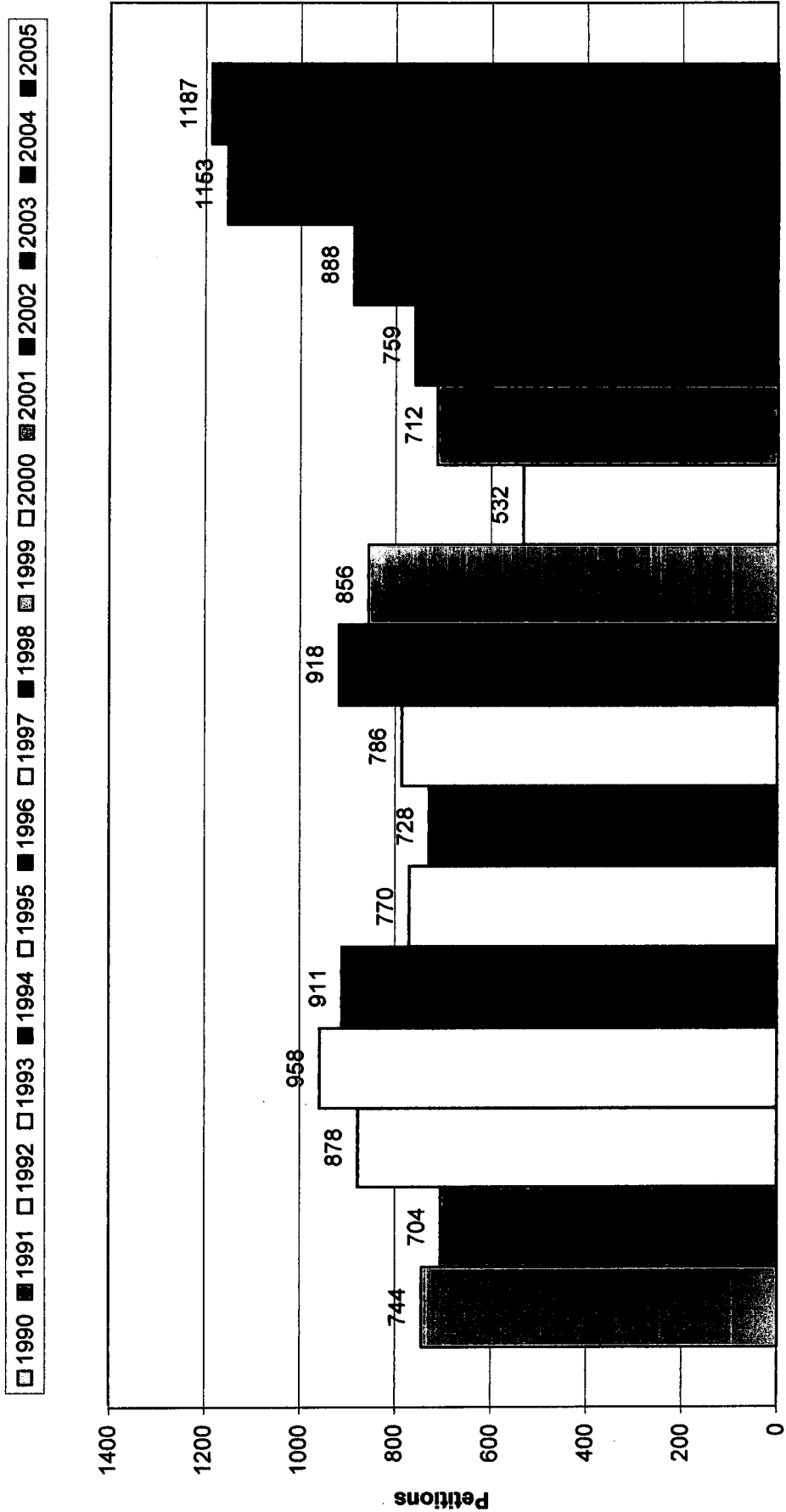


CONTESTED CASE PETITIONS FILED

1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005

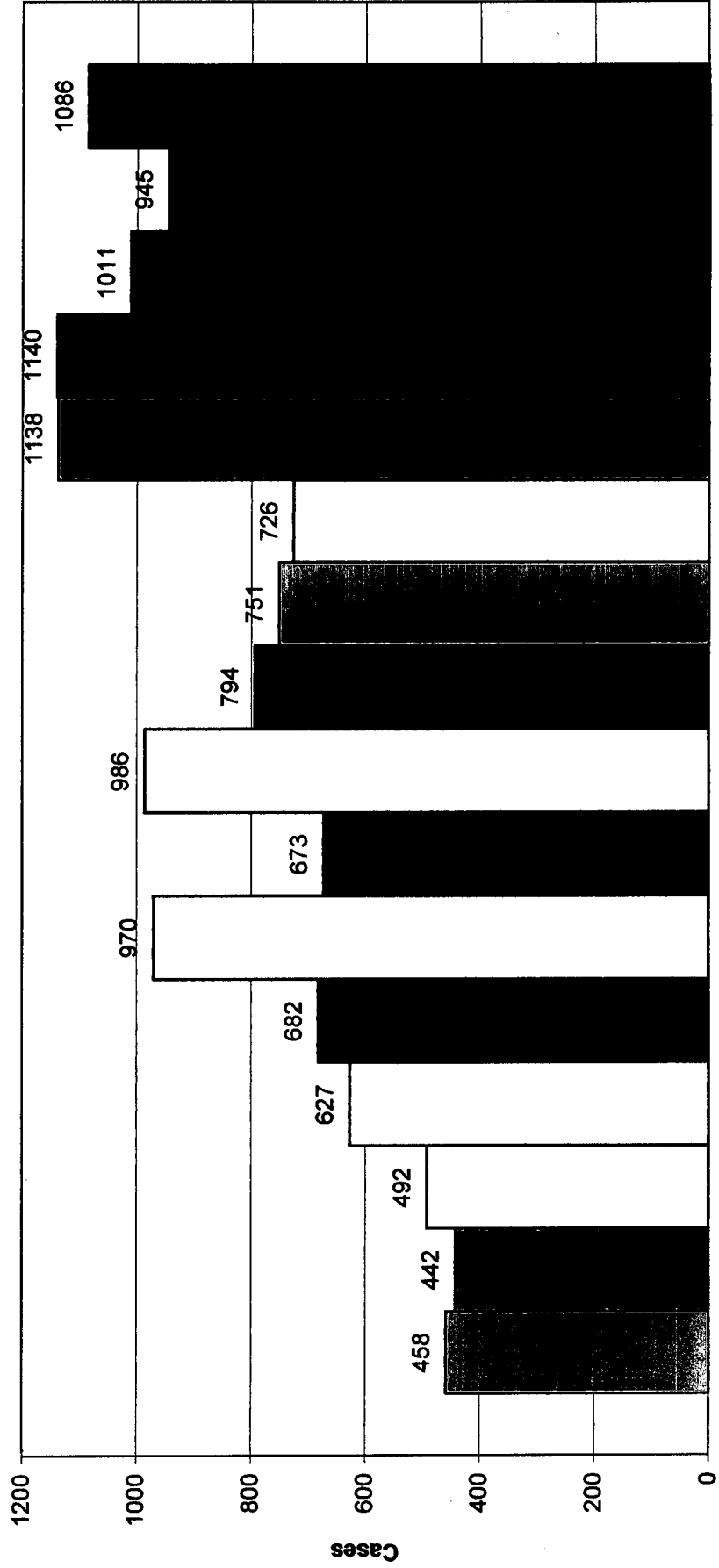


CONTESTED CASE PETITIONS WITHDRAWN OR SETTLED

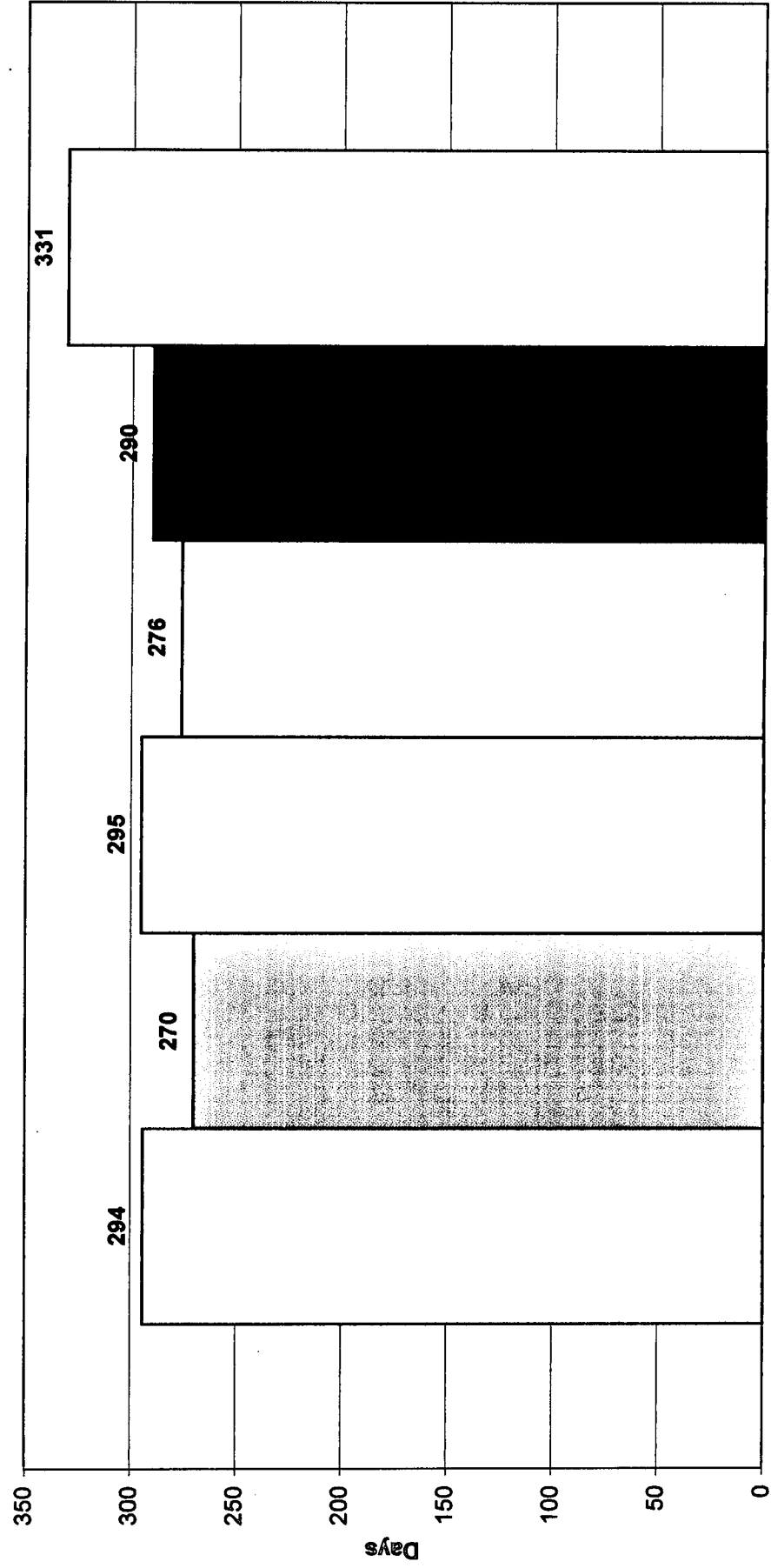


CONTESTED CASE PETITIONS CLOSED BY DECISION

1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005

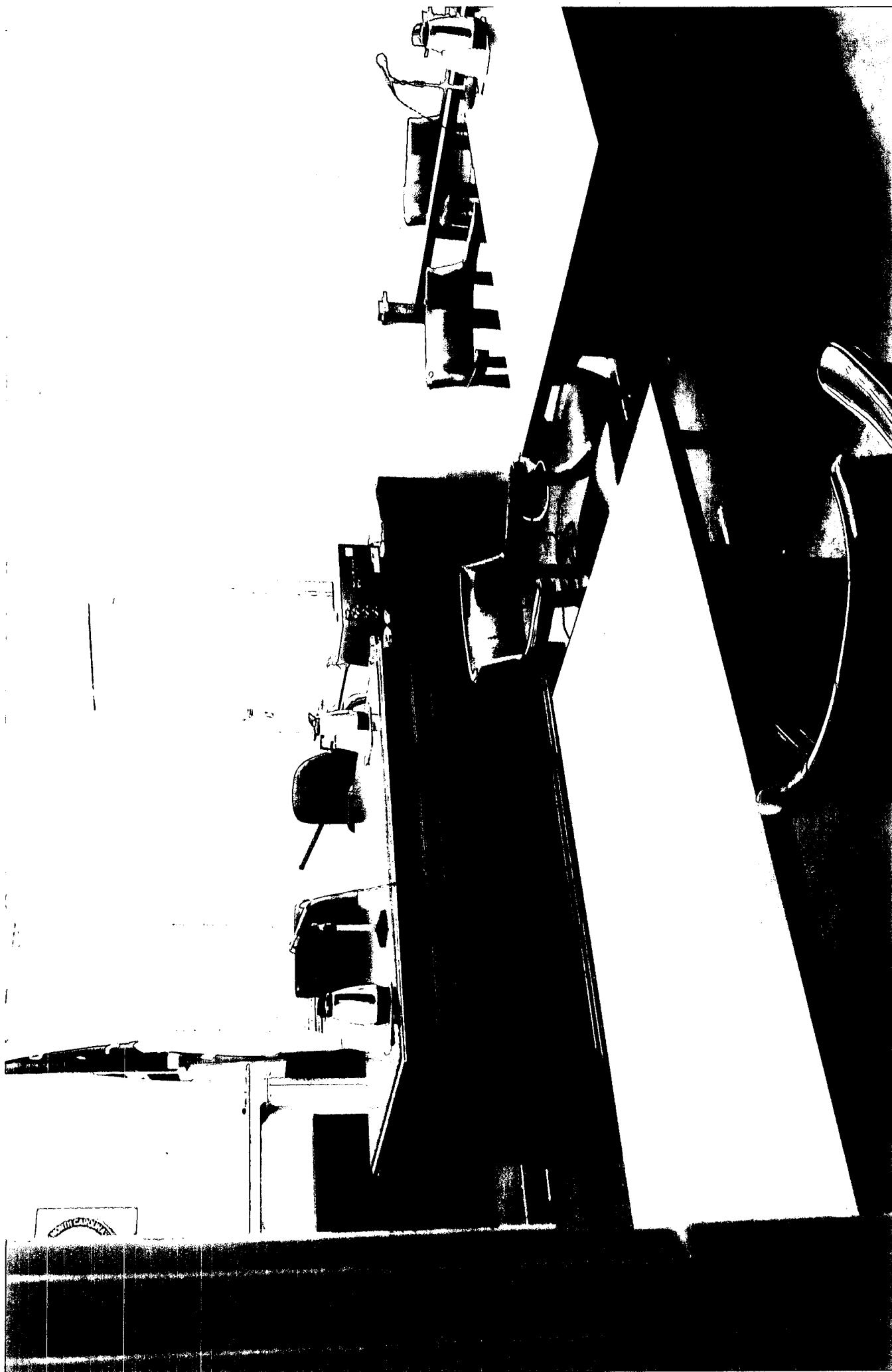


MEDIAN AGE BY YEAR OF OSP CASES CLOSED BY DECISION









SELECTED HIGHLIGHTS

Page 1 "[An] efficient hearings' system, one designed to move cases swiftly to trial, can deliver both justice and due process by avoiding unnecessary delay."

Page 4 "To do nothing to resolve the problem of court delay is to acquiesce in a system which fails to consistently produce due process."

Page 5 "North Carolina's Office of Administrative Hearings (OAH) is an example of an administrative hearings system which does have control over the means to manage its cases effectively; thus, it should be held accountable to the ABA Time Standards."

Page 6 "North Carolina was the 13th jurisdiction in the nation to provide for a central panel system for administrative litigation. But what exactly is a "central panel" and how is it distinguished from other administrative law systems? Without delving into a detailed analysis, a central panel is an autonomous, quasi-judicial, executive branch agency composed of an independent cadre of administrative law judges who hear and decide a wide range of administrative cases."

Page 10 "Article 3 of North Carolina's Administrative Procedure Act (APA) sets out the procedures governing administrative hearings and confers upon the Office of Administrative Hearings the jurisdiction to hear contested cases for most State agencies."

Pages 13-14 "[T]he exhaustion of the mandatory settlement requirements found in G.S. 150B-22 remains as a condition precedent to the filing of a contested case petition. When first enacted, this statutory provision enunciated a new public policy in North Carolina requiring the citizen and agency to exhaust informal settlement negotiations prior to filing a contested case in OAH. The General Assembly stated affirmatively in its new public policy that administrative disputes should not lead to litigation without first requiring the parties to seriously explore alternatives."

Page 17 "With the filing and service of the petition, administrative litigation is initiated in a manner similar to the civil system. Litigants and their attorneys regularly file pleadings in the Clerk's Office of the Hearings Division."

Page 18 "Certain contested cases are more complex causes of action than others. Among these are: Challenges to environmental permits and civil penalties, including claims to funds for leaking underground storage tanks (EHR); review of hospital certificates of need (CON); child day care license revocation and penalties (DHR); awards of competitive bids for state contracts (DOA); discharge of public employees (OSP); and denial of services or entitlement to special education services in public education (EDC). Other contested cases are less complex causes of action. Among these are: contests over the state's right to intercept taxpayer refunds to enforce past due child support (CSE); Alcoholic Beverage Control permit denial and penalties (ABC); and revocation of Women, Infant and Children (WIC) program certification for retail establishments (DHR)."

Page 19 "The similarities between OAH and a civil court system ends when venue is considered because Administrative Law Judges conduct administrative hearings in all of North Carolina's one hundred counties."

Page 20 "Although potentially OAH is responsible for conducting hearings in all one hundred counties, litigants are routinely directed to regionally convenient cities such as: Asheville (Buncombe County), Newton (Catawba County), Charlotte (Mecklenburg County), High Point (Guilford County), Raleigh (Wake County), Fayetteville (Cumberland County), Wilmington (New Hanover County), New Bern (Craven County), Halifax (Halifax County), and Elizabeth City (Pasquotank County). All the courtrooms in these regional cities (except Raleigh and Charlotte) fall under the jurisdiction of the counties and the Administrative Office of the Courts."

Page 21 "Since the inception of OAH in 1986, there have been two different contested case scheduling systems. The first system...operated under a decentralized scheduling system. The second system (was) based upon a calendar..."

Page 25 "Until the OAH caseload became unmanageable, the old system worked well enough and provided the Administrative Law Judge with greater autonomy in scheduling hearings."

Page 26 "With the assistance of several of the Administrative Law Judges and staff members, OAH created a calendaring system patterned after a docketing system which was already in place."

Page 27 "Unlike the old system, however, the presiding ALJ immediately sends a Scheduling Order to the parties, setting a tentative week for hearing between 120 and 150 days from the date of the filing of the petition."

Page 28 "The greatest advantage attributable to the new system is the multiple setting of cases during a trial week in a regional city. As a consequence, calendars are created in these central locations, and often ten to twenty cases are set for trial during a particular week."

Page 31 "Mediation in administrative litigation was first established in North Carolina with the enactment of G.S. 150B-23.1 in 1993. It furthered the existing public policy favoring settlements between citizens and State agencies found in G.S. 150B-22."

Pages 34-35 "Although the new system is less than perfect, it is much more efficient than the previous decentralized system. Due to North Carolina's one hundred county venue, problems still remain with continuances and motions practice before OAH."

Page 36 "The administrative law judges who strictly follow the grounds for continuances ultimately enhance settlement possibilities by resisting the motion for continuance. Once an ALJ earns a reputation for denying such motions, attorneys know what to expect, and they must make arrangements to either try or settle their contested cases."

Page 40 "The ABA Time Standards are generally recognized as the benchmark for case disposition in civil courts. Section 2.52 of the ABA Time Standards relating to trials in civil courts is in part quoted below:

- (A) General civil - 90% of all civil cases should be settled, tried or otherwise concluded within twelve months of the date of case filing;
- (B) 98% within 18 months of such filing; and
- (C) the remainder within 24 months of such filing, except for individual cases, in which the court determines exceptional circumstances exist and for which a continuing review should occur."

Page 44 "Setting a firm trial date at the time that the Petition is filed requires lawyers to settle the case prior to hearing or be prepared to try the case as scheduled. The judicial administration literature stresses and reiterates the necessity of early and firm setting of trial dates."

Page 47 "The Office of Administrative Hearings has designated one of its employees as its Trial Court Administrator. Previously, the Clerk's Office, in coordination with the Hearings Division, was responsible for maintaining docket control. Now, with the addition of this new position, the Trial Court Administrator will be responsible for monitoring the progress of every case filed in the Office of Administrative Hearings until conclusion. If an Administrative Law Judge continues a case or if a case is not reached by the Administrative Law Judge, no longer will this Judge retain this case. It will be referred to the Trial Court Administrator and reset upon another calendar or docket. Many of the Judges in the Office of Administrative Hearings take pride in disposing of all cases assigned and are serious about resisting continuances."

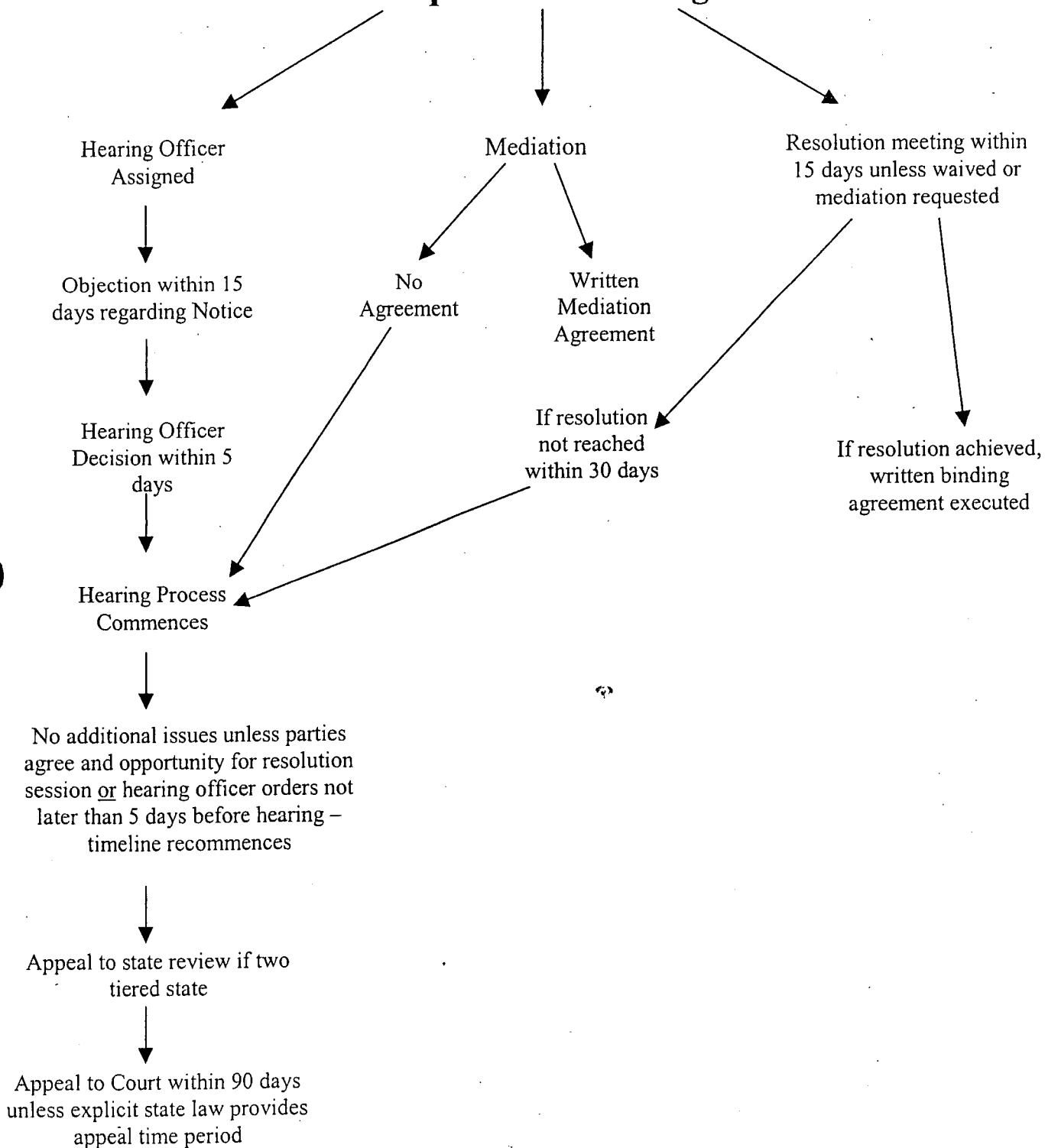
Page 51 "If there is one conclusion that may be drawn from this study of administrative litigation in North Carolina, it is that the earlier the hearing date is established, the earlier the disposition."

Page 55 "The quality of the service rendered must be compatible with the delivery of efficiency in that service..... The Office of Administrative Hearings attempts to measure the effectiveness of the delivery of this service by developing a "client" (user) survey form. This form is presented to each attorney and party at the close of each administrative hearing but before the administrative law judge renders a decision. The litigants are asked to assess the quality of the service that they received in OAH."

Page 56 "The supreme purpose for which all central panel systems exists is to promote fair hearings. This guiding principle cannot be overlooked. No amount of speed in producing hearings can outweigh the commitment to fairness. Delay in reaching due process can, in fact, produce unfairness. However, negating delay does not ensure a fair hearing. North Carolina's Office of Administrative Hearings strives to achieve both goals in its system of administrative justice."

Due Process Hearing System

Request For Hearing



**STRIVING FOR EFFICIENCY IN ADMINISTRATIVE LITIGATION:
NORTH CAROLINA'S OFFICE OF ADMINISTRATIVE HEARINGS**

JULIAN MANN, III*

Due process of law¹ is the driving force behind the need for efficiency in administrative litigation. The old adage, "Justice delayed is justice denied," describes in modern terms an inefficient hearings' system that cannot deliver justice.² By contrast, an efficient hearings' system, one designed to move cases swiftly to trial, can deliver both justice and due process by avoiding unnecessary delay.³

*Chief Administrative Law Judge and Director of the State of North Carolina's Office of Administrative Hearings (OAH), now serving in his second term under appointment of Chief Justice (Retired) James G. Exum, Jr.. The author gratefully acknowledges the assistance of OAH Law Clerk Anna K. Baird, and the research staff of the National Center for State Courts, Williamsburg, Virginia.

¹ "Law in its regular course of administration through courts of justice." BLACK'S LAW DICTIONARY 449 (5th ed. 1979).

² See Anthony F. Vollack, *Keeping Abreast of the Flood: How Judges Can Control Caseflow*, 5 State Court Journal 8, 9 (1981); see Chief Justice Thomas O. Marshall, Workshop on Reducing Trial Court Delay (Dec. 10, 1986), reprinted in 2 PLANNING AND CONDUCTING A WORKSHOP ON REDUCING DELAY IN FELONY CASES (INSTITUTE FOR COURT MANAGEMENT OF THE NATIONAL CENTER FOR STATE COURTS) Tab 16 (1991); see also KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT § 8.06 (3rd ed. 1972) ("Delay may be the equivalent of denial of relief so that immediate judicial review becomes appropriate.").

³ "The time has come for the courts to reduce delay and to make efficiency a high priority of the judicial system." The North Carolina Courts Commission, Case Management (A Report by the Subcommittee on Structure of the Courts to the North Carolina Courts Commission) 5 (Jan. 1995) (on file with the North Carolina Courts Commission); see also William E. Hewitt, *Courts that Succeed: A Tour of Six Successful Courts*, THE CT. MANAGER, Spring 1993, at 4 (asserting that delay has a negative effect on the quality of justice).

How is efficiency measured in a modern hearings' system? Although distinctions have been drawn between measuring "delay" and "pace" of litigation⁴, most authorities agree that an accurate gauge of efficiency is determined by monitoring the median time between the filing and resolution of court cases in a judicial system.⁵

Some of the variables which affect this efficiency measure are: (a) degree of intervention by the court in asserting control over dockets;⁶ (b) existence of Differentiated Case Management (DCM)⁷; (c) use of a computerized system to track cases⁸; (d) time

⁴ Pace of litigation refers to the "time it takes a case to proceed from the filing of a complaint to the issuance of a verdict or judgment." Delay pertains to a particular case and refers to the "time beyond that which is reasonable for obtaining a just resolution of the case." JOHN A. GOERDT ET AL., REEXAMINING THE PACE OF LITIGATION IN 39 URBAN TRIAL COURTS 36 (1991).

⁵ AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO TRIAL COURTS § 2.52 (1985) (hereinafter "ABA Time Standards"). The ABA Time Standards call for disposition of 90% of general civil cases within twelve months of filing, 98% within eighteen months, and 100% within twenty-four months. See *infra* text p. 40.

⁶ See Kathryn Fahnestock & Maurice D. Geiger, *We All Get Along Here: Case Flow in Rural Courts*, 76 JUDICATURE 258, 262 (1993); see Thomas W. Church, *The "Old" and "New" Conventional Wisdom of Court Delay*, 7 JUST. SYS. J. 395, 405 (1982).

⁷ See Thomas A. Henderson, et al., Differentiated Case Management File Report 2 (July 1990) (on file with the National Center For State Courts) ("DCM [Differentiated Case Management] is a sophisticated means of early case categorization to facilitate individual case management and to move the cases in each category to conclusion with the procedures, information support, speed and resource appropriate for the particular category."); see Caroline S. Cooper et al., *Differentiated Case Management: What is It? How Effective has it Been?*, JUDGES J., Winter 1994, at 2.

⁸ See Marcia L. Goodman, *Effective Case Monitoring and Timely Dispositions: The Experience of One California Court*, 76 JUDICATURE 254, 256 (1993).

limits for discovery and motions⁹; (e) case load per judge¹⁰; (e) availability of Alternative Dispute Resolution (ADR)¹¹; and (g) adoption by the court of a firm continuance policy.¹² A system which is too focused on efficiency measures may unnecessarily rush due process.¹³ However, more often than not, unnecessary delay occurs when courts ignore these variables.¹⁴

**PERICULUM IN MORA
(DELAY BREEDS DANGER)**

Trial delay and its relationship to injustice compels judges, lawyers, and administrators to address the need for efficiency. In short, delay reduction is as much a matter of judicial and professional ethics as it is a question of judicial administra-

⁹ See THE BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION: REPORT OF A TASK FORCE 19 (1989).

¹⁰ See GOERDT, *supra* note 4, at 54; *see also* Chief Justice Burley B. Mitchell, Jr., Address to a Joint Session of the North Carolina General Assembly 5 (Mar. 21, 1995) (on file with the Clerk of the North Carolina Supreme Court).

¹¹ See THE BROOKINGS INSTITUTION, *supra* note 9, at 23; *see* Valerie P. Simmons, *Differentiated Case Management and ADR -- A Plan to Reduce Costs and Delay in Civil Litigation*, 72 MICH. BAR REV. 1010 (1993).

¹² See THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS 69 (1978).

¹³ See George E. (Ted) Allen, *Another View of the Rocket Docket*, TRIAL, Apr. 1993, at 48 ("Disposition rates and speed, although important, should be balanced with other considerations. Concern for timeliness should not be allowed to elevate procedure over substance.").

¹⁴ See BARRY MAHONEY et al., CHANGING TIMES IN TRIAL COURTS 194 (1988).

tion.¹⁵ To do nothing to resolve the problem of court delay is to acquiesce in a system which fails to consistently produce due process.¹⁶ The scales of justice cannot weigh accurately unless they are calibrated.

The need for efficiency exists in all courts from trials in the magistrate court to complex appeals in the supreme court. Administrative tribunals are no different. Trials in administrative forums assume many of the characteristics of trials in judicial branch courts,¹⁷ and moreover, the United States Supreme

¹⁵ "A Judge Should Perform the Duties of His Office Impartially and Diligently. . . . (5) A judge should dispose promptly of the business of the court." N.C. Code of Judicial Conduct, Canon 3, § A(5) (1994). "A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials." *Id.* at § B(1); see GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS, *Philosophy of General Rules of Practice* ("These rules are applicable in the Superior and District Court Divisions of the General Court of Justice. They shall at all times be construed and enforced in such manner as to avoid technical delay and to permit just and prompt consideration and determination of all the business before them."); see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1994) ("*Diligence, A lawyer shall act with reasonable diligence and promptness in representing a client.* COMMENT: (2) Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.").

¹⁶ "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. CONST., art. I § 18.

¹⁷ See CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 6.1 (1985); see also Frederick Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389 (1977).

Court has addressed the issue of delay and its relationship to due process in two significant administrative law decisions.¹⁸

The ABA Time Standards were not originally intended to be applied to every administrative tribunal. Writing in the official introduction, Judge Robert C. Broomfield, Chairman of the National Conference of State Trial Judges (1983-84), excludes administrative litigation from the ABA Time Standards, not for the reason that administrative litigants are undeserving of timely due process, but that administrative tribunals may lack the necessary authority or resources to meet the standards. Judge Broomfield writes:

As contrasted with judicial branch judges, administrative law judges in the executive branch may have insufficient authority or resources to manage their caseloads in an effective manner. To insure the independence of their adjudicative decisions, the requisite authority should be conferred on these courts and sufficient resources allocated to exercise that authority. In the absence of such control over the means of managing cases effectively, it is not intended that these standards apply to administrative law judges, and they should be deemed exempted from application of them.¹⁹

North Carolina's Office of Administrative Hearings (OAH) is an example of an administrative hearings system which does have control over the means to manage its cases effectively; thus, it should be held accountable to the ABA Time Standards.

¹⁸ "It [due process] is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62, 66 (1965); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547, 105 S. Ct. 1487, 1496, 84 L. Ed. 2d 494, 507 (1985).

¹⁹ AMERICAN BAR ASSOCIATION, *supra* note 5, at 2.

NORTH CAROLINA AS A CENTRAL PANEL

The General Assembly created OAH in 1985.²⁰ North Carolina was the 13th jurisdiction in the nation to provide for a central panel system for administrative litigation. But what exactly is a "central panel" and how is it distinguished from other administrative law systems? Without delving into a detailed analysis,²¹ a central panel is an autonomous, quasi-judicial, executive branch agency composed of an independent cadre of administrative law judges who hear and decide a wide range of administrative cases.²² This system is designed to separate the hearings function from the investigative and prosecutorial functions in state administrative

²⁰ 1985 N.C. Sess. Laws, Ch. 746. This Sessions Law created the Office of Administrative Hearings and a newly revised Administrative Procedure Act (APA), N.C. GEN. STAT. §150B, which was preceded by N.C. GEN. STAT. § 150A. Much of the new APA's language and concepts, originally found in Chapter 150A, was incorporated into Chapter 150B. For an excellent overview of these concepts as found in the predecessor APA, 150A, see Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833 (1975).

²¹ See MALCOLM C. RICH & WAYNE E. BRUCAR, *THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES* (1983) [hereinafter RICH & BRUCAR]; see KOCH, *supra* note 17, § 6.4[5] (Supp. 1995); see John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. OF THE NAT'L ASSOC. OF A.L.J.s 5, 12, (1994); see Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 76 (1994), reprinted in 14 J. OF THE NAT'L ASSOC. OF A.L.J.s 107 (1994) (*infra* citations will be to the reprinted article); see Edwin L. Felter, Jr., *Administrative Adjudication Total Quality Management: The Only Way to Reduce Costs and Delays Without Sacrificing Due Process*, 15 J. OF THE NAT'L ASSOC. OF A.L.J.s 5 (1995); .

²² "The central panel system also emphasizes adjudicative skill and competence without requiring ALJs to be experts in the complexities of the particular agency's policies." C. Stuart Greer, Note, *Expanding the Judicial Power of the Administrative Law Judge to Establish Efficiency and Fairness in Administrative Adjudication*, 27 U. RICH. L. REV. 103, 123 (1992).

law.²³ In the other decentralized state systems of administrative law, the ALJ is often employed by the same agency which investigates and prosecutes the action. However, the North Carolina General Assembly did not create a central panel solely in response to a need for autonomy.²⁴ It was created equally in response to economic reasons²⁵ based upon a study questioning the excessive cost of maintaining a decentralized system.²⁶

²³ "An unbiased, impartial decision-maker is essential to due process." *Crump v. Board of Educ.*, 93 N.C. App. 168, 378 S.E.2d 32 (1989), *aff'd as modified*, 326 N.C. 603, 392 S.E.2d 579 (1990); *see Lyness v. Pennsylvania*, 529 Pa. 535, 605 A.2d 1204 (1992); *see* Bernard G. Segal, *The Administrative Law Judge*, 62 A.B.A. J. 1424, 1426 (1976); *see* Edward A. Slavin, Jr., *ALJ Independence Undermined*, JUDGES J., Spring 1992, at 26.

²⁴ The Office of Administrative Hearings is an independent, quasi-judicial agency under Article III, Sec. 11 of the Constitution and, in accordance with Article IV, Sec. 3 of the Constitution, has such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which it is created. The Office of Administrative Hearings is established to provide a source of independent hearing officers to preside in administrative cases and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process.

N.C. GEN. STAT. § 7A-750 (1989).

²⁵ *See Hardwicke, supra* note 21, at 81 ("The separation of adjudication from investigation and prosecution renders each process more efficient, more direct and more accountable.").

²⁶ Tom L. Covington, Legislative Report to Representative William T. Watkins, Regarding the Costs of Rulemaking, Contested Cases, Appeals, etc. (Apr. 23, 1985) (on file with the North Carolina General Assembly, Legislative Services Office); *see* Michael Crowell (presently serving as Executive Director of the Committee for the Future of Justice and the Courts in North Carolina), Overview of the North Carolina Administrative Procedure Act (APA), History of Administrative Procedure Statutes in North Carolina 1-4 (Jan. 12, 1990) (on file with the North Carolina Bar Foundation).

After its creation, OAH did reduce overall costs with the centralization of these administrative hearings²⁷ but at that same time the central panel also produced unexpected advances in: competency of the adjudicator,²⁸ perception of the impartiality of the decision-maker,²⁹ quality of the official record,³⁰ convenience of hearings' locations, and broader access to administrative justice.

California originated the central panel system of administrative hearings in 1945. Twenty other jurisdictions, including the City of New York, have followed: Missouri (1965), Massachusetts (1974), Minnesota (1974), Tennessee (1974), Florida (1975), Colorado (1976), Wisconsin (1978), New Jersey (1979), New York City (1979), Washington (1982), Iowa (1986), North Carolina (1986), Wyoming (1987), Maryland (1990), North Dakota (1991), Texas (1992), South Dakota (1993), South Carolina (1994), Hawaii (1994) and Georgia (1994).

Not all states that have proposed legislation have adopted a central panel system. The State of Oregon has recently failed to

²⁷ Julian Mann, III, In Support of the APA: A Report to the General Assembly app. E (Feb. 11, 1991) (on file with the North Carolina Office of Administrative Hearings). OAH operates under a biennial budget directly funded by appropriations from the General Assembly.

²⁸ See Segal, *supra* note 23 (suggesting that a central panel will attract more qualified ALJs).

²⁹ *Id.* at 1426 (separating the ALJ from the agency avoids the appearance of bias); see North Carolina Bar Association, Administrative Law and Procedure Task Force: Report to the Board of Governors (Jan. 1989) (on file with the North Carolina Bar Association).

³⁰ See Julian Mann, III, OAH Official Record (June 15, 1995) (on file with the North Carolina Bar Foundation) (explaining the importance of and the methods utilized by OAH in preserving the hearings' record).

enact a central panel after extensive study.³¹ Also, preceded by a lengthy study,³² the State of New York's Legislature twice enacted legislation creating a central panel system only to have this legislation vetoed by the Governor.³³ Presently, the State of New York has introduced legislation to reconsider, for the third time, the wisdom of creating a central panel.³⁴ This year, the Illinois legislature considered such a move; however, the implementing legislation was withdrawn late in the session but will be reintroduced in the fall of 1995.³⁵ Maine at one time established an administrative court which was fully judicial (vs. quasi-judicial) to hear administrative cases,³⁶ but now this court is no longer in existence. Since 1981, the Model State Administrative Procedure Act has provided an alternative prototype for legislation creating a central panel,³⁷ and for more than a decade, Senator

³¹ KOCH, *supra*, note 17 § 6.4[5] (Supp. 1994), citing Hoberg, *supra*, note 19.

³² Hardwicke, *supra* note 21, at 16-20. This article contains a thorough review of the New York State's Bar Association Task Force Study which preceded (but did not recommend) the New York State's legislation.

³³ *Id.* at 20-21.

³⁴ S. 2029--A, N.Y. Reg. Sess. (1995-96).

³⁵ S.B. 1188, Ill. Reg. Sess. (1995-96) (per telephone interview with Judge Edward J. Schoenbaum, President of the National Association of Administrative Law Judges, August 14, 1995).

³⁶ See RICH & BRUCAR, *supra* note 21, at 10.

³⁷ The Uniform Commissioner's Model State Administrative Procedure Act (1981); see Hoberg, *supra* note 21, at 89; see also N.A.A.L.J. NEWS, July 1995, at 4 (A committee of the National Association of Administrative Law Judges, chaired by President-Elect John W. Hardwicke, in conjunction with a committee of the National Conference of Administrative Law

Howell Heflin (D-Alabama) has sponsored congressional legislation which has in recent years won passage in the United States Senate, attempting to implement a central panel system on the federal level.³⁸

COMPARING ADMINISTRATIVE LITIGATION WITH CIVIL LITIGATION

Article 3 of North Carolina's Administrative Procedure Act (APA) sets out the procedures governing administrative hearings and confers upon the Office of Administrative Hearings the jurisdiction to hear contested cases for most State agencies.³⁹ In fact, North

Judges, chaired by Edwin L. Felter, Jr., Chief Administrative Law Judge (Colorado), is circulating for comment a model state act to create an Office of Administrative Hearings).

³⁸ S. 486, 104th Cong., 1st Sess. (1995); S. 486, 103rd Cong., 1st Sess. (1993); S. 826, § 102nd Cong., 1st Sess. (1991); S. 1275, 98th Cong., 1st Sess. (1983); *see also* Edwin L. Felter, Jr., *The Hidden Executive Branch Judiciary: Colorado's Central Panel Experience -- Lessons for the Feds*, 19 COLO. LAW. 1307 (1990), *reprinted in* 14 J. OF NAT'L ASSOC. OF A.L.J.s 95 (1994).

³⁹ Besides hearings, there are two other major divisions found in the Office of Administrative Hearings. Article 2A of the APA provides for and authorizes the publication of the *North Carolina Register* and the *North Carolina Administrative Code* by the Office of Administrative Hearings. The public is notified of agency rulemaking through a subject matter notice published in the *North Carolina Register*, followed 60 days later by publication of the proposed text. This notice provides a means for interested parties to be present and debate the merits of a proposed rule before adoption by the agency. After the formal adoption and review by the Rules Review Commission and the Joint Legislative Administrative Procedure Oversight Committee (unless a bill is enacted by the General Assembly specifically disapproving a proposed rule), the Rule is filed for codification in the *North Carolina Administrative Code*. All the rules adopted by state agencies are published in the *North Carolina Administrative Code*. Both the *Register* and the *Code* are published by the Office of Administrative Hearings. (In 1994, Barclays Law Publisher won the competitive bid for the printing, marketing, and distribution of the Code.)

The other major function of the Office of Administrative Hearings is found under the provisions of Chapter 7A of the North Carolina General Statutes. The Office of Administrative Hearings is designated as a 706 deferral agency of the U. S. Equal Employment Opportunity Commission. Chapter 7A authorized the creation of the OAH Civil Rights Division. This

Carolina's citizens are granted broad rights under the APA to challenge a wide range of bureaucratic actions.⁴⁰ North Carolina

Division investigates complaints of discrimination for alleged violations of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans With Disabilities Act. The complaining party must be a state or local government employee covered under North Carolina's State Personnel Act (N.C. GEN. STAT. §126).

⁴⁰ The contested case provisions of the APA apply to every state agency except:

1. The Department of Human Resources and the Department of Environment, Health 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. The North Carolina Low-Level Radioactive Waste Management Authority in administering the provisions of G.S. 104G-9 through -11;
3. The North Carolina Hazardous Waste Management Commission in administering the provisions of G.S. 130B-11, -13, and -14;
4. 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;
5. The Department of Revenue;
6. The Department of Correction;
7. The Department of Transportation, except as provided in G.S. 136-29;
8. The Occupational Safety and Health Review Board in all actions that do not involve agricultural employers; and
9. 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.

N.C. GEN. STAT. §150B-1(e)(1-10) (Supp. 1994).

In addition, the following agencies are exempt entirely from G.S. 150B:

1. The North Carolina National Guard in exercising its court-martial jurisdiction;
2. The Department of Human Resources 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. The Industrial Commission; and
5. The Employment Security Commission.

N.C. GEN. STAT. §150B-1(a) (Supp. 1994).

is the only central panel system that is exclusively petition-generated.⁴¹ Any person aggrieved may file a petition for a contested case hearing.⁴²

Prior to September 1994, North Carolina's appellate decisions restrictively interpreted OAH's jurisdiction. The North Carolina Court of Appeals construed the APA to mean that a citizen's right to file a contested case petition originated by reference to an organic statute outside of the APA.⁴³ This organic statute must

⁴¹ A contested case shall be commenced by filing a petition with the Office of Administrative Hearings. . . N.C. GEN. STAT. § 150B-23(a) (Supp. 1994). However, Article 3A of Chapter 150B provides for concurrent jurisdiction in OAH for certain agencies, primarily professional licensing boards. When exercising this concurrent jurisdiction, the agency requests that the ALJ preside at the agency hearing and no petition is filed. See RICH & BRUCAR, *supra* note 21, at 41. With the exception of social services cases in Colorado and public employee discharge and discipline cases in Minnesota, citizens are not granted direct rights to file petitions in other central panel states. (The trend nationally seems to permit more direct filings by petitioners in the central panels, particularly those systems that hear workers' compensation cases).

⁴² "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." N.C. GEN. STAT. § 150B-2(6) (1991).

⁴³ *Harding v. N.C. Dep't of Correction*, 334 N.C. 414, 432 S.E.2d 298 (1993); *Citizens for Clean Industry v. Lofton*, 109 N.C. App. 229, 427 S.E.2d 120 (1993); *House of Raeford Farms, Inc. v. N.C. Dep't of Env't, Health and Natural Resources*, 112 N.C. App. 228, 435 S.E.2d 106 (1993), *rev'd*, 338 N.C. 262, 449 S.E.2d 453 (1994). The North Carolina Court of Appeals relied on restrictive language in *Batten v. N.C. Dep't. of Correction* to support a narrow construction of OAH's jurisdiction:

The jurisdiction of the OAH over the appeals of state employee grievances derives not from Chapter 150B, but from Chapter 126. The administrative hearing provisions of Article 3, Chapter 150B, do not establish the right of a person "aggrieved" by agency action to OAH review of that action, but only describe the procedures for such review.

have specifically referenced the right to file a contested case hearing before there was subject matter jurisdiction in OAH to file a petition. However, in September of 1994 a unanimous North Carolina Supreme Court ruled in Empire Power Co. that any person defined in the APA as a "person aggrieved" and who was not otherwise specifically excluded by the organic statute, met the jurisdictional requirements to file a contested case petition in the Office of Administrative Hearings. Justice Whichard, writing for the court:

Respondents misconstrue the relation of the organic statute to the NCAPA. The NCAPA confers procedural rights and imposes procedural duties, including the right to commence an administrative hearing to resolve disputes between an agency and a person involving the person's rights, duties or privileges. The organic statute may confer procedural rights and impose procedural duties in addition to those conferred and imposed by the NCAPA, but more importantly, it defines those rights, duties, or privileges, abrogation of which provides the grounds for an administrative hearing pursuant to the NCAPA.⁴⁴

In addition to the prerequisites of subject matter jurisdiction, the exhaustion of the mandatory settlement

Batten v. N.C. Dep't. of Correction, 326 N.C. 338, 342-43, 389 S.E.2d 35, 38 (1990).

⁴⁴ Empire Power Co. v. N.C. Dep't of Env't, Health and Natural Resources, 337 N.C. 569, 583, 447 S.E.2d 768, 776-77 (1994), *reh'g denied*, 338 N.C. 314, 451 S.E.2d 634 (1994). For a general discussion of the implications of the Empire decision, see *N.C. Supreme Court Clarifies OAH Appeal Rights in Empire Power Co.*, ADMIN. LAW. (N.C. Bar Association's Admin. L. Section), Feb. 1995, at 1.

requirements found in G.S. 150B-22⁴⁵ remains as a condition precedent to the filing of a contested case petition. When first enacted, this statutory provision enunciated a new public policy in North Carolina requiring the citizen and agency to exhaust informal settlement negotiations prior to filing a contested case in OAH. The General Assembly stated affirmatively in its new public policy that administrative disputes should not lead to litigation without first requiring the parties to seriously explore alternatives. G.S. 150B-22 did not speak to a particular settlement procedure or provide for a neutral mediator. Without the assistance of an ADR facilitator, too often, the agency and citizen were not able to achieve a pre-contested case disposition.

Once the parties exhausted the settlement negotiations requirements, another precondition to OAH jurisdiction arises under G.S. 150B-23(f). The Petitioner must expeditiously file the contested case petition in OAH within 60 days from the date the agency notifies the Petitioner of the right to an administrative

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It is the policy of this State that any 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, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

N.C. GEN. STAT. § 150B-22 (1991).

hearing.⁴⁶ Petitioners who file outside this time limitation are barred.⁴⁷

The petitioner, in some fashion, must allege sufficient facts in the petition to establish one or more of the grounds specified in G.S. 150B-23 in order to state a claim for relief.⁴⁸ To assist members of the public who are without legal representation, the Office of Administrative Hearings provides several pre-printed standardized forms (H-06, H-06A, H-06B, and H-06C) where the Petitioner, normally the citizen⁴⁹, need only fill in a few blanks, check a few boxes, and name a state agency as the Respondent. The use of a form petition is not mandatory, and most attorneys create their own pleading, alleging facts in enumerated paragraph much the

⁴⁶ N.C. GEN. STAT. § 150B-23(f) (Supp. 1994); however, the following are statutes which prescribe a shorter time period than 60 days:

1. G.S. 105A-7(b) - 30 days to file child support enforcement contested cases;
2. G.S. 126-38 - 30 days to file state personnel contested cases;
3. G.S. 110-94 - 30 days to file child day care facility contested cases; and
4. G.S. 113A-121.1(a) - 20 days to file Coastal Area Management Act contested cases.

⁴⁷ *Lewis v. N.C. Dep't of Human Resources*, 92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989); *Gummels v. N.C. Dep't of Human Resources*, 98 N.C. App. 675, 392 S.E.2d 113 (1990).

⁴⁸ The Petitioner must allege that the agency: "[S]ubstantially prejudiced the petitioner's rights and that the agency: 1) Exceeded its authority or jurisdiction; 2) Acted erroneously; 3) Failed to use proper procedure; 4) Acted arbitrarily or capriciously; or 5) Failed to act as required by law or rule." N.C. GEN. STAT. § 150B-23(a) (Supp. 1994).

⁴⁹ However, a "party" is defined as either the citizen or agency: "[A]ny 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." N.C. GEN. STAT. § 150B-2(5) (1991) (emphasis added).

same as with a civil complaint filed in a court systems under the Rules of Civil Procedure.⁵⁰

After completing the petition, the Petitioner must next file the petition with the Hearings' Clerk in the Office of Administrative Hearings.⁵¹ The Hearings' Clerk clocks in the petition with the date and time of receipt printed on the face of the petition. The Clerk also assigns a contested case number and agency designation⁵² for each petition. The petition is the initial pleading contained in the contested case file. As the litigation progresses, the parties file other pleadings, all marked with the appropriate number and designation in the contested case file. After the hearing, the recommended decision is usually the final

⁵⁰ "The Administrative Procedure Act does not require the particularity of the pleadings of an indictment or a statement of the elements of a cause of action, as required at law or in equity, unless the proceedings are mandatory or penal in nature." N.C. Dep't. of Correction v. Hill, 313 N.C. 481, 484-85, 329 S.E.2d 377, 379 (1985); *see also* DAVIS, *supra* note 2, § 8.02 at 196 ("The most important characteristic of pleadings in the administrative process is their unimportance.").

⁵¹ Due to the shortness of the time limitation, OAH permits the filing of petitions and other pleadings by facsimile (fax) transmission during regular business hours. N.C. ADMIN. CODE tit. 26, r. 03 .0101(4) (Feb. 1994).

⁵² The following are agencies and division against whom a large majority of petitions have been filed since 1986: Alcohol Beverage Control Commission (ABC), Crime Control and Public Safety (CPS), Child Support Enforcement Section of the Department of Human Resources (CSE), Department of Human Resources (DHR), Department of Justice (DOJ), Department of State Treasurer (DST), Department of Public Instruction (EDC), Department of Environment, Health, and Natural Resources (EHR), and personnel cases reviewed by the State Personnel Commission (OSP).

pleading filed.⁵³ Thereafter, the Clerk certifies the decision and transfers the file to the agency making the final decision.

The petitioner must serve the respondent with a copy of the petition in much the same manner as a plaintiff serves the defendant in a civil action. Rule 4 of the North Carolina Rules of Civil Procedure is the preferred method for service in an administrative action. However, N.C. General Statute § 150B-23(a), which proscribes the service requirements under the APA, does not adopt Rule 4 as the standard for service but seems to permit a less cumbersome method. "The party who files the Petition shall serve a copy of the Petition on all other parties and, if the dispute concerns a license, the person who holds a license." Though the service requirements vary slightly, both the civil and administrative systems initiate litigation by service of process.

The foregoing description demonstrates that North Carolina's Office of Administrative Hearings assumes many of the characteristics of a county court system. With the filing and service of the petition, administrative litigation is initiated in a manner similar to the civil system. Litigants and their attorneys regularly file pleadings in the Clerk's Office of the Hearings Division. Likewise, the hearing follows at the conclusion of the pleadings phase in the administrative process. Because of this

⁵³ The OAH Clerk's Office provides a central repository within State government for information concerning each contested case. A completed file includes all pleadings, exhibits, transcripts (or cassette recordings), as well as the recommended and final agency decisions. As a result of the file created by OAH, the public and courts are able to track and review each step in the OAH hearings' process.

similarity, OAH generates statistical data which is comparable to the data generated in a civil system. By having all of these characteristics in common with a civil system, North Carolina is capable of performing a statistical comparison of the relative efficiency between administrative and civil litigation. But before drawing these comparisons, certain other characteristics of administrative litigation must be addressed.

Certain contested cases are more complex causes of action than others.⁵⁴ Among these are: Challenges to environmental permits and civil penalties, including claims to funds for leaking underground storage tanks (EHR); review of hospital certificates of need (CON); child day care license revocation and penalties (DHR); awards of competitive bids for state contracts (DOA); discharge of public employees (OSP); and denial of services or entitlement to special education services in public education (EDC).⁵⁵ Other contested cases are less complex causes of action. Among these are: contests over the state's right to intercept taxpayer refunds to enforce past due child support (CSE); Alcoholic Beverage Control permit denial and penalties (ABC); and revocation of Women, Infant

⁵⁴ Mann, *supra* note 26, app. B. Appendix B contains an enumeration of the causes of action which may be tried before the Office of Administrative Hearings.

⁵⁵ The 1995 General Assembly transferred to OAH a cause of action previously heard by the Federal District Court, i.e. determination of eligibility for special services in "Willie M." cases (troubled youths). 1995 N.C. Sess. Laws Ch. 249. In addition, the General Assembly created a new administrative law cause of action pertaining to revocation of underwater easement leases in public trust waters of the State. 1995 N.C. Sess. Laws Ch. 529. The City of Raleigh has requested that OAH hear special use zoning cases to begin in the fall of 1995 after the adoption of a city ordinance to specify the procedure.

and Children (WIC) program certification for retail establishments (DHR). Although OAH treats most filings similarly, the more complex contested cases are placed on a slightly slower DCM track to hearing than are the less complex cases.⁵⁶

The similarities between OAH and a civil court system ends when venue is considered because Administrative Law Judges conduct administrative hearings in all of North Carolina's one hundred counties. N.C. General Statute § 150B-24 determines the venue for contested cases. The priorities are: (1) the county of residence of the Petitioner; (2) the principal office of the State agency; or (3) any other venue which the ALJ determines will promote the ends of justice. As a consequence of the one hundred county venue, OAH is responsible for securing a hearing room, a hearing assistant, a security officer, and a presiding judge for each hearing outside of Raleigh (as well as the other requirements necessary to conduct a hearing in each and every county in North Carolina). But any inconvenience caused to OAH under this system is a source of great benefit to the litigants who are not required to travel great distances to the State's capitol in order to try their

⁵⁶ "D.C.M. is a system which provides for management based on individual case characteristics." Simmons, *supra* note 11, at 1010. However, with the notable exceptions of hospital certificate of need contested cases (complex) which must lead to a fairly rapid decision (within 120 days of the filing of the petition), and the child support tax intercept contested cases (less complex) which often are delayed to secure district court domestic records, generally, OAH can establish tracks by case profile for purposes of D.C.M. without having to individually examine each petition.

administrative grievances.⁵⁷ Although potentially OAH is responsible for conducting hearings in all one hundred counties, litigants are routinely directed to regionally convenient cities such as: Asheville (Buncombe County), Newton (Catawba County), Charlotte (Mecklenburg County), High Point (Guilford County), Raleigh (Wake County), Fayetteville (Cumberland County), Wilmington (New Hanover County), New Bern (Craven County), Halifax (Halifax County), and Elizabeth City (Pasquotank County). All the courtrooms in these regional cities (except Raleigh and Charlotte) fall under the jurisdiction of the counties and the Administrative Office of the Courts. The clerks of court and other administrative officials have demonstrated unusual cooperation with OAH in providing hearing space for administrative cases. Since OAH does not lease or otherwise compensate the local governments for the use of these facilities, often the county will "bump" the administrative hearing at the last minute for a higher priority local case. Nevertheless, the use of these facilities for administrative hearings at no cost to OAH produces substantial savings to the taxpayers. To foster these savings, OAH seeks the

⁵⁷ The North Carolina General Assembly does not provide budgetary funding for rental of hearings' space for administrative hearings outside of Raleigh and Charlotte but, nevertheless, establishes the preferred venue as the petitioner's county of residence. The 100 county venue is a distinguishing feature of North Carolina's central panel system. Coordination of so many venues greatly increases the case disposition time for administrative litigation in North Carolina.

goodwill and cooperation of local officials in order to continue receiving this windfall to the State.⁵⁸

THE OLD AND NEW SYSTEMS

Since the inception of OAH in 1986, there have been two different contested case scheduling systems. The first system was created in 1986 and operated under a decentralized scheduling system. The second system, based upon a calendar, was introduced in 1991. The early method had the advantage of providing each Administrative Law Judge with ultimate autonomy over the scheduling of each contested case. The ALJs individually set cases for hearing without reference to any calendar. This system worked well until the jurisdictional caseload increased to the point that such a random system could no longer efficiently accommodate the growing number of cases.⁵⁹ The solution was to either add additional Administrative Law Judges⁶⁰ to hear the cases or create a more

⁵⁸ By maintaining the hearing location in courthouses, the need for security is greatly reduced. Also, courtrooms are by design a more efficient setting to conduct a hearing than are other sites. Attorneys and witnesses are more comfortable in this setting, and most courtrooms provide adequate space for court reporters and hearing assistants which lends itself to the creation of a better record of the proceedings. Lastly, courtrooms provide a neutral setting to hear contested cases. *See also* Hardwicke, *supra* note 21, at 43 (noting the importance of securing neutral locations for hearings).

⁵⁹ *Infra* Table 2.1, at 42.

⁶⁰ "While study is indispensable for disclosing the exact additional judge power needed to cure delay, it takes no ghost come from the grave to tell us that delay can be cured by adding more judges." HANS ZEISEL ET AL., *DELAY IN THE COURT* 8 (2nd ed. 1959); *but see* Mahoney, *supra* note 14, at 53 (suggesting that there may not be a valid correlation between number of judges and case disposition); *see also* CHURCH, *supra* note 12, at 80 (altering the relationship of judges to caseload without the court's control over pace of litigation may cause a fall in

efficient system. Thus, the second system was created to accommodate the need for efficiency.

Under the decentralized system, within five days of the filing of a petition, the Chief Administrative Law Judge⁶¹ randomly assigned each case to an Administrative Law Judge. The controlling assignment criteria was to insure that each judge maintained approximately the same number of pending cases.⁶² After assignment of the contested case, the Administrative Law Judge routinely issued an Order for Prehearing Statements.⁶³ The parties had 30 days to complete and file this pleading. The Prehearing Statement is analogous to a responsive pleading in a civil action that when filed provides certain basic information about the case.⁶⁴ After

productivity); *see also* Thomas W. Church, Jr., *Who Sets the Pace of Litigation in Urban Trial Courts?*, 65 JUDICATURE 76, 78 (1981) (Court delay may not respond to the addition of more judges).

⁶¹ Under the authority of N.C. GEN. STAT. § 7A-751 and N.C. GEN. STAT. § 150B-32, the Chief Administrative Law Judge serves as the Director of OAH and makes all contested case assignments in both the old and new systems. *See* Russell L. Weaver, *Management of ALJ Offices in Executive Departments and Agencies*, 47 ADMIN. LAW REV. 303, 334 (1995) (concluding that it is preferable to have a Chief ALJ in charge of ALJ offices).

⁶² The old system may have unwittingly provided the ALJ with a disincentive to dispose of the assigned caseload. As long as the ALJ maintained an inventory of cases, no new assignments were made.

⁶³ N.C. ADMIN. CODE tit. 26, r. 03.0104 (Oct. 1991).

⁶⁴ An Order for Prehearing Statements requests the parties provide the following information: 1) The nature of the proceeding and the issues to be resolved; 2) A brief statement of the facts and reasons supporting the party's position on each matter in dispute; 3) A list of proposed witnesses with a brief description of his or her proposed testimony; 4) A description of what discovery, if any, the party will seek to conduct prior to the contested case hearing and an estimate of the time needed to complete discovery; 5) Venue considerations; 6) Estimation of length of the hearing; 7) The name, address, and telephone number of the party's attorney, if

the return of the Prehearing Statement within 30 days (or later if the time is extended), the Administrative Law Judge typically requested a telephone conference with the parties in order to establish a date and location for the hearing. Each case was individually scheduled in this manner, with little consideration directed towards collecting cases or creating a calendar.

Normally, about thirty to forty-five days elapsed between the filing of the petition and the scheduling of this telephone conference. The (one) calendaring clerk responsible for scheduling the telephone conference often had difficulty making contact with the parties or arranging a convenient time for all parties to be available for the conference. If successful, it was not unusual for the Clerk to have to deal with last minute cancellations because of conflicts which took precedence over the telephone conference. In this instance, the process was started again from the beginning. This OAH clerk spent most of each day scheduling conference calls for nine Administrative Law Judges.

During the telephone scheduling conference, the ALJ instructed the parties to select a hearing date and location. If agreement was reached, the presiding ALJ confirmed the setting in a scheduling order subsequently mailed to the parties. The scheduling clerk's next responsibility was to locate a hearing site in accordance with the scheduling order. The first priority was to secure a courtroom in a county courthouse, followed by a county

any; and, 8) Other special matters. *Id.*

commissioners' room or as a last resort a conference room in a lawyer's office.⁶⁵ Sometimes, no hearing site could be found that conformed with the scheduling order, prompting a second telephone scheduling conference. Nine Administrative Law Judges participated in this system on a case-by-case basis, funnelling all requests for scheduling through one scheduling clerk.

North Carolina is a state spanning over 500 miles in length and 200 miles in width. It encompasses 100 counties with 100 courthouses.⁶⁶ The Administrative Law Judge endeavored to set the case for hearing in the venue of the Petitioner's home county. Since there was no OAH calendar, the Administrative Law Judge, in theory, could schedule a hearing in Murphy one day, followed the next day by a hearing in Manteo over 500 miles away. Of course, this seldom occurred, but a typical week of hearings for an Administrative Law Judge required a diverse traveling schedule. There was seldom more than one case scheduled in a single location. Although the trial rate was fairly high in comparison to the number of cases scheduled overall, the total disposition rate was low merely because too few cases were set simultaneously for hearing.

Since only one case was scheduled at a time, continuances presented a dilemma for the Administrative Law Judge. A premium

⁶⁵ Actually, hearings have been tried in many different locations. One Administrative Law Judge tried a contested case to conclusion in a restaurant; however, this is a rare exception, as good hearing sites are normally available in all of North Carolina's 100 counties.

⁶⁶ See 2 ROBERT P. BURNS, 100 COURTHOUSES, A REPORT ON NORTH CAROLINA JUDICIAL FACILITIES (1978). This work provides a rich history of North Carolina's 100 courthouses, as well as an excellent architectural analysis of each building.

was placed upon the hearing of that one case as scheduled. If the judge granted the continuance, there was nothing remaining on a calendar to try, and if the Administrative Law Judge denied the continuance, one side might gain an unfair advantage. As a consequence of the dilemma, most of the Administrative Law Judges rigidly resisted granting any continuances. However, under hearing's rule .0118 in title 26, chapter 3 of the N.C. Administrative Code, continuances were allowed for good cause, and when they were granted, the ALJ returned the case to the calendaring clerk for rescheduling, i.e. establishing a telephone conference with the parties; procuring agreement on a new trial date and location; and issuing an amended scheduling order confirming the new dates.

"NECESSITY IS THE MOTHER OF INVENTION" ⁶⁷

Until the OAH caseload became unmanageable, the old system worked well enough and provided the Administrative Law Judge with greater autonomy in scheduling hearings. However, the public and their elected representatives began to take notice of the lengthening administrative hearings' process that prolonged resolution of administrative law cases. If OAH "drug its feet" in filing a recommended decision and then the agency took an additional year to make the final decision, it could be two years before an administrative case was reviewed by a judge of the Superior Court

⁶⁷ Wycherley, *Love in a Wood*, Act III Sc. iii (1671)

sitting in an appellate capacity.⁶⁸ Critics of the central panel began to voice concerns about the overall delay in resolving administrative law cases, particularly in light of the economic value of some of the issues litigated.⁶⁹ The General Assembly all but directed OAH to create greater efficiency measures in the hearings process in order to reduce delay. The General Assembly also amended the APA to require that the final agency decisionmaker issue its (final) decision no later than 180 days from the receipt of the OAH record.⁷⁰

With the assistance of several of the Administrative Law Judges and staff members, OAH created a calendaring system⁷¹

⁶⁸ "Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, . . ." N.C. GEN. STAT. § 150B-43 (1991). See also N.C. GEN. STAT. § 150B-45 (1991) (designating where to file the petition for Superior Court review) and N.C. GEN. STAT. § 150B-51 (1991) (setting out the standards for review in Superior Court).

⁶⁹ Some of these concerns were raised by the Legislative Study Commission at the time of the General Assembly's consideration of the continuation of Office of Administrative Hearings in repealing the OAH sunset provision. See 1991 N.C. Sess. Laws Ch. 103; see *infra* text, at 41 and GPAC, *infra* note 111.

⁷⁰ If the final decision is not issued within this time limitation, the recommended decision of the Administrative Law Judge is considered as adopted by the agency as its final decision. N.C. GEN. STAT. § 150B-44 (1991). This time period varies depending on whether the final decision maker is a board or commission.

⁷¹ This new master calendaring system captured many of the advantages of the civil calendaring system utilized by the Federal Eastern District Court of North Carolina. Under the Eastern District's system, the Judge travels to the regional courthouse in the locality where the civil case was filed to conduct the trial. (This is not the same practice for the Eastern District's criminal calendaring system.) SUSAN M. OLSON, CALENDARING PRACTICES OF THE EASTERN DISTRICT OF NORTH CAROLINA 9 (1987). OAH utilizes a rotational assignment system as is the case with the North Carolina Superior Court Judges who rotate every six months to a new district.

patterned after a docketing system which was already in place. The Alcoholic Beverage Control (ABC) cases were traditionally set on a calendar in regional cities every month. The regional cities were within a short driving distance, although not always in the same county, of the Petitioner's residence. Since the ALJ cadre rotated to these regional cities for a specific week each month, why not set all contested cases in these regional cities? The new system would be fairly simple to incorporate into the existing ABC system.

Under the new system, the Chief ALJ still assigns the case to an Administrative Law Judge within five days of the date the petition was filed.⁷² Unlike the old system, however, the presiding ALJ immediately sends a Scheduling Order to the parties, setting a tentative week for hearing between 120 and 150 days from the date of the filing of the petition.⁷³ The location is determined by the week of the ABC master calendar. It is no longer necessary to wait for the return of a prehearing statement or the scheduling of a telephone conference before calendaring a contested case. The assumption is that most litigants will be available for the hearing if informed of the hearing date four to five months in advance.⁷⁴

⁷² See Weaver, *supra* note 61.

⁷³ "One of the most effective remedies to the cost of the litigation system is the establishment of rigid trial dates. Trial dates have a galvanizing effect on attorneys and parties alike; establishing the date promptly and firmly reduces the occasions for delay and gamesmanship." A Report from the President's Council on Competitiveness, Agenda for Civil Justice Reform in America 19-20 (Aug. 1991).

⁷⁴ "Note that this schedule [order setting pretrial conference, discovery deadline and hearing date] was set by the court from the pleadings and other papers available quite soon after filing, without benefit of any discussion with the attorneys." Steven Flanders, *Case Management in*

The Chief Administrative Law Judge no longer randomly assigns cases. Following the ABC docketing system, venue is automatically established in the district in which the Petitioner lives although not always the same as the county of Petitioner's residence. Nevertheless, this venue is, more often than not, within a short distance of the Petitioners' residence. Consequently, many of the advantages of the local county venue are preserved. There are eight ABC districts encompassing five or more counties with a regional city in the middle of the district. All parties, including the agency officials, travel to the regional city for trial.

The Scheduling Order provides for flexibility as it only tentatively sets the week of hearing and location. The initial setting may be modified for good cause at the request of a party. Early conflicts are resolved. Rarely do the Petitioners or Respondents request their local county venue, unless it is necessary to accommodate a great number of witnesses or to accommodate some other legitimate venue consideration. The greatest advantage attributable to the new system is the multiple setting of cases during a trial week in a regional city. As a consequence, calendars are created in these central locations, and often ten to twenty cases are set for trial during a particular week.

Federal Courts: Some Controversies and Some Results, 4 JUST. SYS. J. 147, 151 (1978).

The Scheduling Order also establishes discovery deadlines. All discovery is to be completed within two weeks before the hearing.⁷⁵ The hearing procedures governing administrative hearings vary widely from state to state.⁷⁶ In North Carolina, both the Rules of Evidence⁷⁷ and the Rules of Civil Procedure⁷⁸ apply to the contested case process. Not all states require as much procedural formality as North Carolina but one advantage of this formality is to promote greater similarity between civil and administrative litigation. Also, the rules governing evidence and procedure are designed to make the process fair.⁷⁹ However, these same procedures also cause litigation to become more complex, particularly in applying the rules of discovery.⁸⁰ For this reason, some

⁷⁵ "The task force recommends that each track within the district's system should provide time guidelines not only for trials but also for the completion of discovery." THE BROOKINGS INSTITUTION, *supra* note 9, at 19.

⁷⁶ Hoberg, *supra* note 21, at 78 (Jurisdiction and Structure of Central Panels).

⁷⁷ See N.C. GEN. STAT. § 150B-29(a) (1991) ("Except as otherwise provided, the rules of evidence as applied in the trial division of the General Court of Justice shall be followed, . . ."); see N.C. ADMIN. CODE tit. 26, r. 03 .0121 (Nov. 1987).

⁷⁸ See N.C. ADMIN. CODE tit. 26, r. 03.0101(1) (Feb. 1994) (This OAH rule applies the Rules of Civil Procedure to contested cases).

⁷⁹ Recent pronouncements by North Carolina's Supreme Court in construing the Rules of Civil Procedure bolster this assertion. "Our recent decisions interpreting the Rules of Civil Procedure have focused on substance rather than form." *Hazelwood v. Bailey*, 339 N.C. 578, 583, 453 S.E.2d 522, 524 (1995), *citing* *Lemons v. Old Hickory Council*, 322 N.C. 271, 275, 367 S.E.2d 655, 657 (1988).

⁸⁰ "Parties in contested cases may engage in discovery pursuant to the provisions of the Rules of Civil Procedure, G.S. 1A-1." N.C. GEN. STAT. § 150B-28(a) (1991); see also N.C. GEN. STAT. § 150B-33(b)(3)(4) (1991) (delineating ALJ authority to rule on objections to discovery and to regulate the course of discovery); N.C. GEN. STAT. § 150B-33(b)(10) (1991) (imposing

administrative tribunals do not provide for or greatly limit discovery. Some commentators believe that the abuses in discovery may outweigh the advantages.⁸¹ Naturally, in the tribunals where discovery is not permitted, hearings proceed (or should proceed) along a faster track. However, in North Carolina most hearings are delayed at least 90 days⁸² to give the parties an opportunity to engage in discovery.⁸³ The Office of Administrative Hearings does not have subject matter jurisdiction over many high volume administrative cases (e.g., motor vehicle drivers license revocation). Most OAH administrative litigation is either complex or highly complex. For complex administrative litigation, time for discovery must be built into the scheduling order. Not all lawyers engaging in administrative litigation will avail themselves of this much time for discovery. At the time of the filing of the contested case petition, it is difficult to predict which cases will require extensive discovery. By setting a discovery deadline for all cases (except CSE, EDC, and ABC cases), parties will know

sanctions for non-compliance).

⁸¹ Chief Justice Joseph R. Quinn, *The Bottom Line, Final Responsibility For Reducing Trial Delay Rests Squarely With The Courts*, ST. CT. J., 1985 (No. 4), at 8.

⁸² See Steven Flanders, *Case Management in Federal Courts*, 4 JUSTICE SYS. J. 147, 155 (1978) ("Stringent discovery controls do not generally limit completion of needed discovery.").

⁸³ In spite of the application of formal discovery methods to administrative hearings, several informal methods are required by statute and rule. See N.C. GEN. STAT. § 150B-28(b) (1991) ("On a request for identifiable agency records, with respect to material facts involved in a contested case . . . an agency shall promptly make the records available to a party."); see also N.C. ADMIN. CODE tit. 26, r. 03.0112(a) (Feb. 1994) (reciting the parties' obligation to exhaust informal discovery).

within five days of the filing of the petition not only what the discovery deadlines are, but that the discovery process must begin immediately. This technique avoids, too, the need for telephone conferencing to determine discovery deadlines. It is true that significant reductions in delay can be realized by eliminating or greatly reducing discovery; however, the elimination of discovery flies in the face of the modern day approach to complex litigation, whether that complex litigation is in a civil courtroom or an administrative tribunal. Furthermore, discovery will not be utilized in all contested cases because of the expense involved. If the economic value of the litigation is small, likely the parties will forego the additional discovery costs of the litigation and proceed to a determination of the case at hearing. Most of North Carolina's minor civil litigation is governed by the Rules of Civil Procedure.⁸⁴ Little delay is caused by applying the civil rules governing discovery to even simple litigation because the economic value will not justify costly discovery measures. The same is true in administrative litigation.

Mediation in administrative litigation was first established in North Carolina with the enactment of G.S. 150B-23.1 in 1993.⁸⁵

⁸⁴ See N.C. GEN. STAT. § 1A-1, Rule 1 (1990) (making Rules of Civil Procedure applicable to all proceedings of a civil nature); see also N.C. GEN. STAT. § 7A-220 (1989) (including *de novo* appeals of small claims to District Court).

⁸⁵ 1993 N.C. Sess. Laws, Ch. 363. 1995 N.C. Sess. Laws, Ch. 145 removed the sunset contained in the original act. The implementing rules were adopted by OAH on February 1, 1994, and are contained in § 200 of Chapter 3 of Title 26 of the N.C. Administrative Code. N.C. ADMIN. CODE tit. 26, r. 03.0201- .0208 (Feb. 1994).

It furthered the existing public policy favoring settlements between citizens and State agencies found in G.S. 150B-22. Not all contested cases are automatically referenced to mediation, but if the Chief Administrative Law Judge deems the case appropriate,⁸⁶ an Order for Mediated Settlement Conference is issued within five days of the filing of the Petition. The parties are notified that they are required to select a mediator by agreement and if they fail to agree, the presiding ALJ will make the selection for them. The time for completion of mediation is also scheduled in the initial order. The entire mediation process is modeled after North Carolina's program for civil mediation.⁸⁷ Mediation is not the only alternative dispute settlement technique available to the parties. In certain cases, a settlement conference may be held in lieu of mediation.⁸⁸ One major difference between the two methods is that a settlement judge presides at the settlement conference instead of a certified mediator. All of North Carolina's ALJs have training in mediation. They utilize these skills at the settlement conference and, in addition, bring to the table their years of experience in presiding over similar cases. The settlement judge

⁸⁶ Generally, the more complex contested cases heard in OAH are selected for mediation. See *supra* text, at 18.

⁸⁷ Due to the penal nature of many of the administrative actions which result in contested cases, administrative litigation may actually be a hybrid of criminal and civil law, e.g., a substantial environmental penalty is analogous to a criminal fine or forfeiture. Criminal sanctions are probably more difficult to mediate than are tort cases where the relief is purely monetary.

⁸⁸ N.C. ADMIN. CODE tit. 26, r. 03.0107(b) (Feb. 1994) ("A settlement conference shall be held at the request of any party, the [presiding] administrative law judge, or the Chief Administrative Law Judge.").

is never the presiding judge.⁸⁹ As a consequence, no incompetent or prejudicial statements are heard by the judge who will try the case. ADR techniques are not employed in every instance. Only contested cases involving substantial rights or having significant economic value are referred for ADR.⁹⁰ Cases initially selected for mediation will normally extend the scheduling of a hearing date and, as a consequence, will lead to a slightly varied differentiated case management track for these cases.⁹¹

In summary, within five days of filing the petition, the presiding Administrative Law Judge issues a scheduling order setting forth the following information: (1) the week of hearing; (2) the hearing site; (3) the identification of the presiding ALJ; (4) a discovery deadline; and (5) (if selected), an order referring the case to mediation or settlement conference with deadlines for completing ADR.⁹² Once this scheduling order is served, the parties

⁸⁹ "Judges ordinarily should not adjudicate disputes which they have attempted to settle or about which they have received information on the merits through a non-adversarial route." Barry R. Schaller, *Managerial Judging: A Principled Approach to Complex Cases in State Court*, 68 CONN. BAR J. 77, 83 (1994).

⁹⁰ The early statistical data collected by OAH regarding the mediation settlement conferences indicates that 37% of these complex contested cases referred to mediation between February, 1994 and July, 1995 settled prior to, during, or after the mediated settlement conference (Statistics are not available to measure the effectiveness of ALJ settlement conferences).

⁹¹ "The design of management tracks includes specific processes, procedures, time frames, management tools, and alternative dispute resolution techniques situated to the needs of the category of cases in general and tailored to the needs of individual cases." Simmons, *supra* note 11, at 1011.

⁹² GOERDT, *supra* note 4, at 67 ("One of the constant themes in this case management literature is the call for early and continuous control by the court over the scheduling of case events."). "Early and continuous court intervention in scheduling case events . . . has been

and their attorneys know the time constraints of litigation, and they must begin to make arrangements to comply with deadlines. Only rarely will there be scheduling conflicts because everyone involved in the administrative litigation has at least four to five months advanced notice of deadlines. The parties know they must either settle their litigation or be prepared to go forward with the trial at the appointed time, notwithstanding protests by some attorneys.⁹³ Actually, only fifteen to twenty percent of the cases calendared for hearing will be tried.⁹⁴ The overbooking of a trial week is a common experience in trial courts and is similar to overbooking of airline flights. Seldom will there be too many cases for the Administrative Law Judge to try during the week calendared for hearings. Setting more cases on a calendar than can apparently be tried recognizes that a certain number of cases will settle at the "courthouse steps."⁹⁵

Although the new system is less than perfect, it is much more efficient than the previous decentralized system. Due to North

espoused as effective devices for reducing delay in civil litigation." *Id.* at 47.

⁹³ See Church, *supra* note 60, at 85 ("[M]ore court control over the pretrial period may force counsel to trial or disposition faster than they believe to be appropriate, but such actions by the court will generate a predictable and (if experience is any guide) intense outcry from practitioners who believe the accelerated pace is improper.").

⁹⁴ Lisa Driscoll, *Innovations Speed Civil Case Flow in First District*, BAR BULLETIN, STATE BAR OF N.M., Feb. 11, 1993, at 1,4.

⁹⁵ "Our system acknowledges that cases will be settled on the courthouse steps." *Id.* at 4. See also *infra* Table 3.1, at 43.

Carolina's one hundred county venue, problems still remain with continuances and motions practice before OAH.

Prehearing motions in the nature of Rule 41(b) (Involuntary Dismissals) and Rule 56 (Summary Judgment) may be heard upon written motion without oral argument.⁹⁶ If oral argument is deemed necessary, most Administrative Law Judges set a prehearing telephone conference to hear the motion.⁹⁷ In other more complex cases, the Administrative Law Judge may actually set a special hearing for oral argument on the motion, particularly if the case is scheduled in a regional city. This normally means that the ALJ must make special calendaring arrangements with the parties in order to hear dispositive motions on the record.

Under the new system, Title 26, rule 3.0118 of the N.C. Administrative Code still governs continuances. Continuances are granted only upon proof of specific grounds: (1) death or illness of a party or attorney; (2) a court order; (3) lack of statutory notice of hearing; (4) substitution of legal counsel; (5) any other good causes defined in the Rule.⁹⁸

⁹⁶ N.C. ADMIN. CODE tit. 26, r. 03.0115(b) (Nov. 1987).

⁹⁷ *Id.*

⁹⁸ "The objectives of setting early, firm trial dates can be easily defeated if attorneys are freely permitted to obtain continuances. Thus the task force recommends that each plan include a stringent 'good cause' justification for delaying trials and discovery deadlines." THE BROOKINGS INSTITUTION, *supra* note 9, at 21.

Firm trial dates settle cases.⁹⁹ Attorneys who know that a continuance is an option concentrate less on the business of settlement. Title 26, rule 03.0118 in the N.C. Administrative Code is rather specific in its terms about the standards for continuances. The administrative law judges who strictly follow the grounds for continuances ultimately enhance settlement possibilities by resisting the motion for continuance. Once an ALJ earns a reputation for denying such motions, attorneys know what to expect, and they must make arrangements to either try or settle their contested cases. After all, the lawyers have been informed at least four to five months in advance of the date of trial as well as the deadlines of other significant case events. If these deadlines cannot be met, attorneys must move for a continuance.¹⁰⁰

Under a new OAH policy,¹⁰¹ when continuances are granted¹⁰² for

⁹⁹ The trial should commence on the first date scheduled. Unpredictable trial dates breed last minute continuances and settlements. When the court creates pervasive doubt about the firmness of trial dates, counsel tend to defer trial preparation and then seek a continuance when pressed for trial. With sufficient notice of a trial date and the beginning of the trial on the first day set, counsel learn that the court means business, resulting in earlier settlements or pleas without an increase in the trial rate.

AMERICAN BAR ASSOCIATION, *supra* note 5, at 10-11.

¹⁰⁰ Unavailability of witnesses is a common reason for requesting a continuance. Some ALJs will now start the hearing without the witness and require the taking of the testimony of the absent witness by deposition or continue the hearing after the completion of all the other evidence and take the absent witness's testimony at a later date.

¹⁰¹ "Essential elements which the trial court should use to manage its cases are: (G) A firm, consistent policy for minimizing continuances." AMERICAN BAR ASSOCIATION, *supra* note 5, at 7.

meritorious reasons, the parties, whenever possible, must consent to the following: specify the exact reason for the continuance; indicate how a postponement will cure the need for the continuance; and otherwise announce the cases ready for hearing at the time of the future trial date. This new policy will eliminate objections to the next trial date by anticipating potential grounds for delay. Resisting unwarranted continuances is one of the court's best tools to resolve contested cases.¹⁰³

Statistical data is necessary in order to evaluate the effectiveness of any delay reduction program.¹⁰⁴ Computer-generated statistical data for contested cases has always been available in the Office of Administrative Hearings. The computer software was specifically designed for this purpose in 1986. This software enables the Clerk's office personnel to track and retrieve statistical information based on certain queries.¹⁰⁵

¹⁰² "We do not propose an excessively rigid continuance policy or mindless enforcement of arbitrary rules. Rather, a court should create the *expectation* that a case will be tried on the first scheduled trial date unless there are compelling reasons for a postponement. . . ." CHURCH, *supra* note 12, at 69.

¹⁰³ "Court readiness to try civil cases may well be the most effective settlement-inducing device. The assertion that only the reality of imminent trial produces fast and sure settlements was made by judges and attorneys in every court visited." *Id.* at 76.

¹⁰⁴ "Computerized case tracking is essential to trial delay reduction and early case resolution." Goodman, *supra* note 8, at 256.

¹⁰⁵ The IBM System 36 (and specially designed software) used by the Hearings Division, once state-of-the-art, is now clearly surpassed by new technology. A comprehensive study suggests the development of a new software program with integration of the new calendaring system into the Hearings Program with connection to a LAN (Local Area Network) as the System 36 is phased out. See State Information Processing Services (SIPS), Office of Administrative Hearings Needs Analysis, Tab 1 (March 30, 1995) (on file with OAH). Cost of

STATISTICAL REVIEW

Statistical data has been compiled and profiled into various tables which are depicted on the following pages. The primary function of the tables is to illustrate trends by comparing statistical data between the old and new calendaring systems. The important comparison years are 1989-1990, which were the last years under the old system, and 1993-1994, which are the years for which statistical data is available under the new system. It is beyond the scope of this paper to compute statistical correlations in order to establish relationships between independent and dependent variables. However, there are certain broad conclusions which may be drawn from the trends established by the data. An explanation of these conclusions will follow.

Table 1.1 and Tables 1.2(a) and (b) address OAH time dispositions in administrative law contested cases as compared to the ABA Time Standards.

the implementation of the computer study at OAH approaches \$280,000. Legislative funding for this project was deferred to the 1996 Session of the General Assembly.

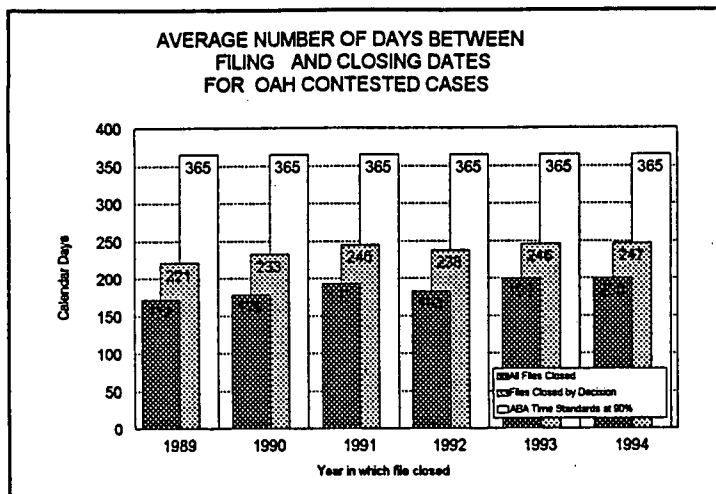


Table 1.1

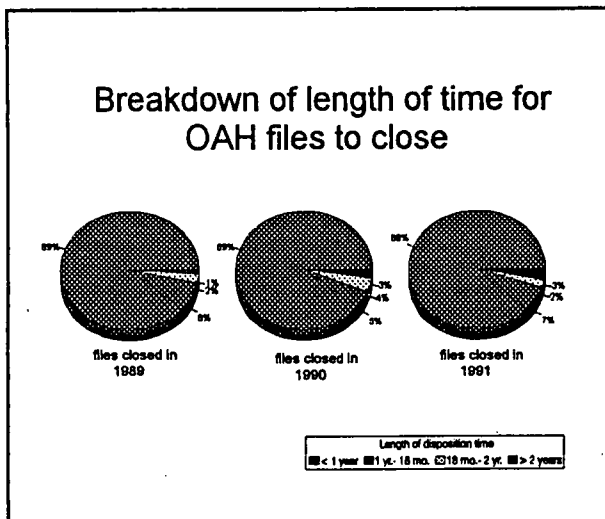


Table 1.2(a)

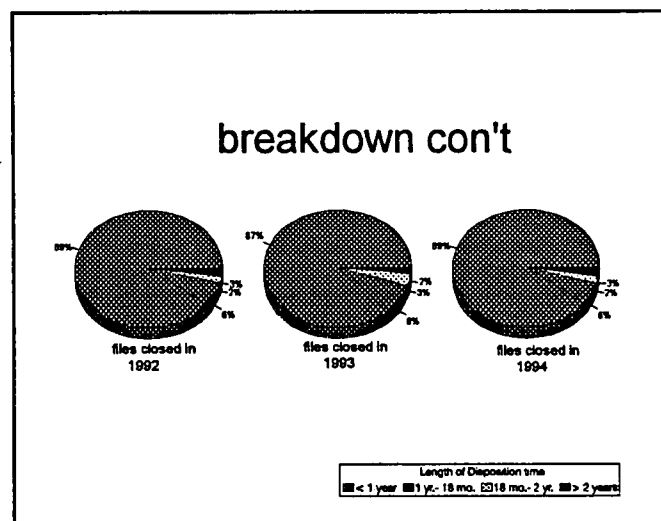


Table 1.2(b)

The ABA Time Standards are generally recognized as the benchmark for case disposition in civil courts.¹⁰⁶ Section 2.52 of the ABA Time Standards relating to trials in civil courts is in part quoted below:

- (A) General civil - 90% of all civil cases should be settled, tried or otherwise concluded within twelve months of the date of case filing;
- (B) 98% within 18 months of such filing; and
- (C) the remainder within 24 months of such filing, except for individual cases, in which the court determines exceptional circumstances exist and for which a continuing review should occur.¹⁰⁷

Tables 1.1 and 1.2(a) and (b) indicate that the Office of Administrative Hearings is in substantial compliance with the ABA Time Standards for civil case dispositions.

One feature that distinguishes administrative litigation from civil litigation is that in a civil bench trial, the presiding judge renders a conclusive decision subject only to review by an appellate court by a party who claims error. The percentage of appeals in comparison to trials is relatively small. In most

¹⁰⁶ At the aggregate or court level, however, the ABA disposition time standards provide a useful and widely accepted tool with which to determine the degree to which courts are concluding civil cases within a reasonable time period. In this study, the incidence of delay in civil litigation in a court is inferred from its performance in relation to the ABA disposition time standards. It is assumed that courts with a higher percentage of cases that exceed the ABA standards probably have more delayed cases than courts that perform better compared to the ABA standards.

GOERDT, *supra* note 4, at 36.

¹⁰⁷ AMERICAN BAR ASSOCIATION, *supra* note 5, at 11. In addition to the civil court dispositions, the ABA Time Standards also set guidelines for case dispositions in other types of litigation: Summary Civil, Domestic Relations, Felony, Misdemeanor, Persons in Pretrial Custody, and Juvenile proceedings.

central panel administrative tribunals, however, the administrative law judge renders a recommended decision which in every case must be reviewed by the administrative agency making the final decision.¹⁰⁸ The initial appeal lies with the Superior Court (North Carolina's highest level trial court) which serve as the first tier of appellate review,¹⁰⁹ and may, thereafter, be appealed as in any other civil case. These tables do not account for the time between the filing of the petition and the date of the final decision,¹¹⁰ but Table 1.1 does confirm a major OAH goal, i.e., the average disposition of all cases in a range of six to seven months. As Table 1.1 indicates, the case disposition time has increased slightly since 1992, but again, the case filings have substantially increased with the addition of 400 more cases in 1994 than in 1989.

The Governmental Performance Audit Committee, in reviewing the Office of Administrative Hearings in 1993, noted that there was an inherent delay to the citizen in this process.¹¹¹ Nevertheless, the

¹⁰⁸ It is beyond the scope of this article to discuss the policy implications of the friction between the recommended and final decision maker. See generally Hardwicke, *supra* note 21, 49-53, citing George R. Coan, *Operational Aspects of a Central Hearing Examiners Pool: California's Experience*, 3 U. FLA. L. REV. 86, 89 (1975). For a statistical summary of agency agreement with the recommended decision, see Mann, *supra* note 27, app. C (subsequently updated through 1995).

¹⁰⁹ See *supra* note 68.

¹¹⁰ See *supra* note 70.

¹¹¹ A comprehensive performance audit was undertaken for each state agency in North Carolina by the General Assembly in 1992 which included the Office of Administrative Hearings. Government Performance Audit Committee [GPAC], *Our State, Our Future, Pathways: Summary of Findings and Recommendations of the North Carolina Government Performance Audit Committee* 102 (Dec. 1992) (on file with the North Carolina General Assembly).

Office of Administrative Hearings, for its part, is consistently on the mark with the ABA Time Standards for civil trials. Actually, the new calendaring system at OAH may have initially lengthened the case disposition time slightly because the hearing date is set at least 120 days from the date of the filing of the petition in order to accommodate time for discovery. This delay was not automatically factored into the old system. However, the new system has allowed OAH to dispose of the increased case filings with the same number of ALJs with only a slight increase in the case disposition time.

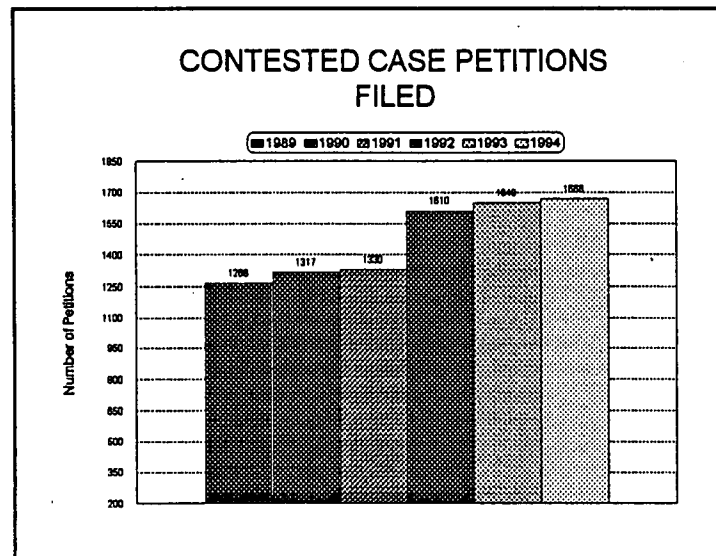


Table 2.1

Table 2.1 indicates the number of contested case petitions filed. North Carolina is not a high volume state in terms of the number of administrative filings; it is better known as a mid-size

state, albeit on the lower end.¹¹² Table 2.1 not only clearly shows the 400 petition increase since 1989, but it also illustrates the upward trend in filings over the years, particularly the sizeable jump between 1991 and 1992. Again, case filings have significantly increased but the number of administrative law judges has not changed since the creation of the Office in 1986. The same number of judges hear and decide the increased case volume which averages 50 cases per judge per year.

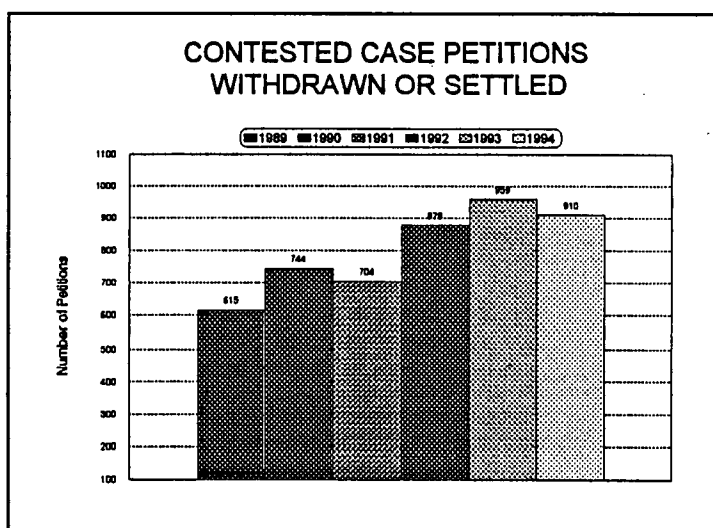


Table 3.1

Table 3.1 demonstrates the apparent success of the new calendaring system at OAH. Recall that the old system, at least as it pertained to withdrawals and settlements, required individual case settings with very few cases being calendared at the same time. The new system schedules cases in a particular region on a

¹¹² Hoberg, *supra* note 21, at 87 n.93.

calendar numbering from ten to fifteen cases per setting. Table 3.1 indicates there was a 47% to 55% increase in the number of cases withdrawn or settled in 1993 and 1994 over the number that was withdrawn or settled in 1989. The table also illustrates that the number of cases withdrawn or settled has increased steadily for every year, except for 1991.

Setting a firm trial date at the time that the Petition is filed requires lawyers to settle the case prior to hearing or be prepared to try the case as scheduled.¹¹³ The judicial administration literature stresses and reiterates the necessity of early and firm setting of trial dates.¹¹⁴ The OAH data supports the conclusion that cases will settle or be dismissed or withdrawn when parties are confronted with a firm trial date. It also serves to provide a method for quick termination of the weak case or one that is meritless. The administrative law judges take charge of their own calendars after the initial setting. Thomas Church suggests that in a system where judges take responsibility for the disposition of cases, this results in a more effective calendaring system.¹¹⁵ In the OAH system, the presiding judge takes a personal interest and responsibility for managing the calendar. The

¹¹³ "When judges efficiently manage their cases, they assist the parties in resolving their disputes. Hands-on management policies have resulted in increasing settlements within nine months of filing to nearly 85% in some courts." A Report from the President's Council on Competitiveness, Agenda for Civil Justice Reform in America, *supra* note 73, at 18.

¹¹⁴ CHURCH, *supra* note 12, at 68-69.

¹¹⁵ *Id.* at 73.

Administrative Law Judges are reviewed each year on their total case dispositions and number of decisions written.¹¹⁶ If cases are not moving through the system, the ALJ realizes that their case disposition rate will suffer. The ALJs are competitive by nature and each one strives to do the best job possible.¹¹⁷

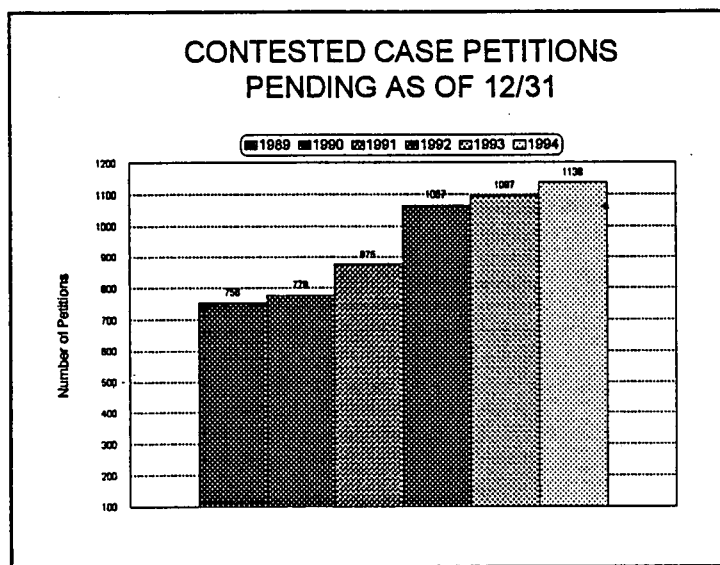


Table 4.1

Table 4.1 indicates that there is an increasing backlog of cases each year at OAH. The backlog per judge is normally an indicator of the pace at which a court system disposes of cases.¹¹⁸ The pending cases at OAH have increased at a 50% rate between 1989

¹¹⁶ "The two summary statistics commonly used to assess individual judge's performance in the individual calendar courts are the number of terminations in a given period attributable to a judge and the number of pending cases in the judge's inventory." *Id.*

¹¹⁷ *Id.*

¹¹⁸ "Size of the pending caseload per judge emerges as the strongest correlate of the pace of civil case litigation in these urban trial courts." GOERDT, *supra* note 4, at 54.

and 1994, but the ratio of pending cases to the total number of cases closed has remained relatively constant, and for each year the case dispositions have exceeded those pending at the end of the year. A ratio of one-to-one is considered by most experts as an indication of efficiency. Again, the total contested case filings have increased and the total backlog has also increased; however, the number of ALJs has remained constant.¹¹⁹ Also, the ABA Time Standards have remained relatively constant despite the increased case filings.¹²⁰ Thus, the pace of administrative litigation has not been significantly affected by pending cases per judge. The Office of Administrative Hearings will monitor the pending backlog of cases under the new continuance policy implemented in 1995 to see if the new policy reduces the rate of increase in the backlog. Under this new (but still restrictive) policy, the Administrative Law Judge will not retain control over the cases continued but will set a continued case onto the calendar of the next Administrative Law Judge who will appear in that same region the following month.

¹¹⁹ "Lack of resources, especially an insufficient number of judges to handle increased workloads, may be one reason courts develop large pending caseloads per judge." *Id.* at 67.

¹²⁰ It is noteworthy, however, that the number of filings and dispositions per FTE judge does not display a significant correlation with case processing times or court performance compared to the ABA standards. Moreover, there is little, if any, association between filings or disposition per judge and pending cases per judge. These findings suggest indirectly that factors other than judicial resources may be important in explaining the buildup of pending cases per judge and the pace of litigation.

Id.

Perhaps, this new policy of "rolling" cases will reduce the volume of pending cases by moving the case forward onto the next calendar as opposed to individually resetting a continued case.

The Office of Administrative Hearings has designated one of its employees as its Trial Court Administrator. Previously, the Clerk's Office, in coordination with the Hearings Division, was responsible for maintaining docket control. Now, with the addition of this new position, the Trial Court Administrator will be responsible for monitoring the progress of every case filed in the Office of Administrative Hearings until conclusion. If an Administrative Law Judge continues a case or if a case is not reached by the Administrative Law Judge, no longer will this Judge retain this case. It will be referred to the Trial Court Administrator and reset upon another calendar or docket. Many of the Judges in the Office of Administrative Hearings take pride in disposing of all cases assigned and are serious about resisting continuances. What may be lost in the new system, through the loss of "ownership" of each case, is that the Administrative Law Judge may not scrutinize the grounds for a continuance or take the same pride in the reduction of pending cases if the ALJ continues the case to the next calendar. What is expected to offset this phenomenon will be the contrasting efficiency gained by placing the continued case back on a calendar as opposed to returning it to an individualized scheduling system. Also, the Trial Court Administrator will oversee the calendar of each ALJ in order to

assure that cases are not being needlessly prolonged through continuances.

In order to reduce the existing case backlog, it may be necessary to place all pending cases that have not been calendared on a "clean up" calendar in 1996. Some of the pending cases have been stayed pending disposition of a companion case or an appeal. Nevertheless, a clean up calendar constructed by the Trial Court Administrator may be one method employed to reduce the backlog. One ALJ has already volunteered for this assignment. The adding of additional ALJs, although attractive, is not necessary at this point.¹²¹ The efficiencies gained in the new calendaring process since 1991 as yet have not been fully realized. Until such time as the office is operating under maximum efficiency, there will be no need to add additional Administrative Law Judges.

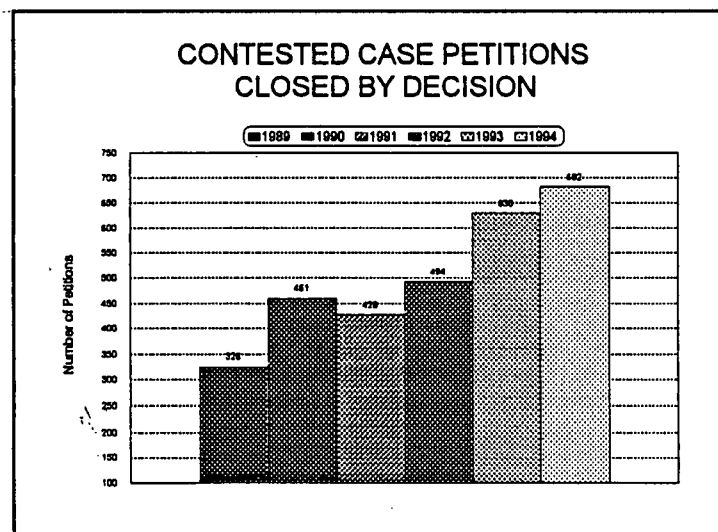


Table 5.1

¹²¹ See ZEISEL ET AL., *supra* note 60.

Table 5.1 shows the number of contested cases closed by decision. This trend clearly indicates that there are more cases reaching decision under the new system than there were under the old system. The ALJs have been able to manage the additional case load under the new scheduling system and continually are gaining efficiency. Fortunately, the ALJs are closing contested cases in higher numbers than in 1989 since the contested case petitions filed have also substantially increased. Again, the apparent increase in productivity has come in part because the number of cases available for hearing has increased because of multi-case settings. Under the new system, if between ten and fifteen cases are set for hearing during the same week, only two or three of these cases may actually be tried to conclusion. Under the old system, only one case was scheduled at a time and, therefore, the set of cases that could result in a disposition was greatly reduced.¹²²

The greatest efficiency gained under the new system is the immediate scheduling of all cases on calendars within five days of

¹²² It might be noted here that not only has the number of decisions written dramatically increased since 1989, but the quality of the decision writing has also markedly improved. Under the North Carolina system, the Administrative Law Judge is responsible for writing the recommended decision. In the trial courts, often the civil judges have the judgment prepared for them by the attorneys who prevail in the case. However, in the Office of Administrative Hearings system, although many of the attorneys assist in the preparation of these orders, the ultimate writing of the decision in most cases rests with presiding Administrative Law Judge. Over this same period of time, the judges have improved their skills in legal writing. Selected ALJ decisions are published in the North Carolina Register and are reported in *North Carolina Lawyers Weekly* (newspaper). Beginning in September of 1995, all of the Administrative Law Judges' decisions (and projected for 1996 the final agency decisions) will be published by Barclays Law Publishers and will be available by subscription.

the date that the petition is filed. This one addition is the most prominent of all of the new system's characteristics. The firm and certain trial date established in the initial scheduling order is the single most effective means of ending administrative litigation.¹²³ Notwithstanding that the Office of Administrative Hearings refers cases for prehearing settlement conferences and mediation, and that these ADR techniques may well influence the settlement rate, nevertheless, the single most effective means of bringing conclusion to litigation is the firm and certain trial

¹²³ Providing firm trial dates has several important benefits for the courts and public. Firm trial dates provide certainty to litigants and their attorneys. Greater certainty that a case will go to trial probably increases the likelihood of early settlements in civil cases and early pleas in criminal cases. Equally as important, firm trial dates reduce the number of times litigants and witnesses must go to court, thus reducing the overall cost of litigation for the public and improving the public's perception of the efficiency and effectiveness of the judicial system.

GOERDT, *supra* note 4, at 67; see also E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 313 (1986) ("Perhaps the most important single element of effective managerial judging is to set a firm trial date.").

date.¹²⁴ Many court systems that have experimented with delay reduction find that this is also true.¹²⁵

Most scheduling systems do not calendar a case until after the initial responsive pleading is filed, and often the setting is accomplished in a scheduling or prehearing conference. If there is one conclusion that may be drawn from this study of administrative litigation in North Carolina, it is that the earlier the hearing date is established, the earlier the disposition. The calendaring of a case should not wait until thirty or sixty days after the case is filed. The administrative scheme in North Carolina requires the filing of a Prehearing Statement by all parties within thirty days after the contested case petition is filed. Again, the Prehearing Statement is analogous to an answer or other responsive pleading in a civil trial. No gain is made by waiting for the filing of this

¹²⁴ As discussed above, the data produced by our interviews and by other studies indicate that fixing early and firm dates for the completion of trial preparation and for the trial itself is probably the single most effective device thus far developed for encouraging prompt and well-focused case development. There does not appear to be any consequential practical obstacle to setting these dates very shortly after an action is commenced. Several judges we interviewed reported that they routinely followed such a procedure and that it has had very beneficial effects. Other studies and commentaries have described the successful use of this approach in several federal courts.

Wayne D. Brazil, *Improving Judicial Controls Over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 875, 917.

¹²⁵ "Judges should establish an early trial date immediately after the initial pleadings are complete. Once established, the trial date should be delayed only for compelling reason or the needs of the court." A Report from the President's Council on Competitiveness, Agenda for Civil Justice Reform in America, *supra* note 73, at 15.

responsive pleading before scheduling the case, no matter how tentative that initial setting may be.¹²⁶

Efficiency is also gained by the setting of preliminary discovery deadlines in the initial scheduling order. This provides the parties ample time to conclude discovery prior to the hearing. This simple scheduling technique of setting the trial date and the discovery deadline at the time of filing might well result in the disposition of over ninety percent of the cases filed.

Cases that do not have great economic value will normally not generate much discovery. Cases of great economic value may need to be placed on a slower track because of their complexity and the need for more discovery. One response to economic value in a calendaring system is Differentiated Case Management. In the Office of Administrative Hearings, the simple cases, such as the ABC and WIC, are placed on a different track than the more complex cases, such as the Certificate of Need or Special Education cases. The need for Differentiated Case Management is not great in the Office of Administrative Hearings, and only a small percentage of the cases at the extremes of the spectrum require such treatment.

SUMMATION

Judicial efficiency is being accomplished in the Office of Administrative Hearings by the simple technique of requiring the scheduling of cases with a firm trial date and a discovery deadline

¹²⁶ See *supra* text, at 27.

within five days of filing of the petition. Trends must be monitored by the Trial Court Administrator in this process to maintain the current pace of litigation, reduce the pending cases per judge, and ensure that cases meriting continuances are moved from calendar to calendar. Delay reduction under the new system achieves due process as evidenced by the increase in the settlement and withdrawal of petitions and the number of cases reaching decision. Although the pace of litigation is increasing slightly each year with the rise of case filings, litigants are not being inordinately delayed in their pursuit of administrative due process. It should therefore follow that North Carolina's Office of Administrative Hearings delivers both justice and due process in its system of administrative adjudication.

This article is not intended to be a comparative analysis of administrative litigation among the central panel states since the only frame of reference is the North Carolina Office of Administrative Hearings; OAH is simply comparing its case processing time with the ABA Time Standards. Other administrative tribunals throughout the United States may operate more efficiently and exceed OAH's contested case disposition rate. This article does illustrate that administrative tribunals are capable of operating within the ABA Time Standards, notwithstanding Judge Broomfields's exception.¹²⁷ Due to the similarities between civil litigation and administrative litigation, particularly as to the

¹²⁷ See *supra* text, at 5.

commencement of the proceedings, OAH finds itself in a unique position to measure its relative efficiency with the ABA Time Standards, perhaps more so than other central panel systems. Administrative litigation in North Carolina has a clear point of initiation because OAH is the only central panel exclusively petition-generated. Since the contested cases are not referred from the agencies, the commencement point has a distinct beginning. In other systems, the central panel may not become involved until the actual hearing, making it difficult to consistently measure the length of time between the commencement date and the completion date.

Lastly, sometimes the goal of effective implementation is lost in focusing singularly on efficient implementation.¹²⁸ It is axiomatic that promoting a delay reduction program in a hearing system should serve the ends of justice and due process. However, speed for the sake of efficiency may also produce ineffectiveness

¹²⁸ Close observation of the six courts suggest that they succeed at something more profound and important than moving cases to disposition quickly. As is explicit in the Trial Court Performance Standards, Expedition and Timeliness is but one of five general areas in which a healthy court achieves excellence. Others are Access to Justice, Equality, Fairness and Integrity, Independence and Accountability, and Public Trust and Confidence. In the demonstration courts, management views delay both as a disease in its own right - something to treat and prevent from recurring - and as a *symptom* that may indicate a more pervasive unhealthy conditions. By maintaining and regularly examining information on delay, the demonstration courts routinely monitor the general health of the organization, something which is measurable in broad terms that are defined by the Trial Court Performance Standards.

Hewitt, *supra* note 3, at 7-8.

as an outcome.¹²⁹ The quality of the service rendered must be compatible with the delivery of efficiency in that service. Thus, Total Quality Management (TQM) has surfaced in recent years as a goal for the delivery of services to the public by administrative agencies, including courts.¹³⁰

The Office of Administrative Hearings attempts to measure the effectiveness of the delivery of this service by developing a "client" (user) survey form. This form is presented to each attorney and party at the close of each administrative hearing but before the administrative law judge renders a decision. The litigants are asked to assess the quality of the service that they received in OAH. The forms are anonymously completed and are returned confidentially to the Deputy Director of OAH in a postage pre-paid envelope.¹³¹ The Deputy Director compiles a statistical profile, based upon the returned forms. Since the recent inception

¹²⁹ DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 351 (1993) (so often efficiency studies become oriented to outcomes that the quality of the service becomes secondary).

¹³⁰ See Alexander Aikman, *TOTAL QUALITY MANAGEMENT IN THE COURTS: A HANDBOOK FOR JUDICIAL POLICY MAKERS AND ADMINISTRATORS* (1994); see The Federal Judicial Center, *MAXIMIZING PRODUCTIVITY: NEW PERSPECTIVES AND PRACTICAL STRATEGIES*, 21 (1994) ("The results of an integrated and thorough total quality service approach can be startling. All levels of staff focus on their customers' needs and become involved in assuring quality."); see Felter; *supra* note 21.

¹³¹ See Aikman, *supra* note 130, at 33 ("A relatively easy technique for identifying problems is to develop new survey forms. These can be placed on the front counter and other strategic locations. This is a technique used effectively by the Los Angeles Municipal Court, for example, as part of the management process developed for courts implementing the trial court performance standards.").

of the survey program, 49 responses have been received. The Deputy Director breaks down the information on charts and reviews the information with the applicable staff.¹³² Based upon an original assessment of the information collected by the survey, OAH appears to be delivering its adjudicatory service in a manner which is deemed effective by the public and private parties to the litigation, as well as the public and private attorneys who represent these parties. In response to the question, "Did you receive a fair hearing from the Administrative Law Judge?" 40 responses indicated "yes" and only 7 indicated "no."

The supreme purpose for which all central panel systems exists is to promote fair hearings. This guiding principle cannot be overlooked. No amount of speed in producing hearings can outweigh the commitment to fairness. Delay in reaching due process can, in fact, produce unfairness. However, negating delay does not ensure a fair hearing. North Carolina's Office of Administrative Hearings strives to achieve both goals in its system of administrative justice.

The title of this article indicates that North Carolina is "Striving" and does not indicate (nor should it be inferred) that North Carolina has achieved the ultimate efficiency in administrative litigation. What it does indicate is that North Carolina's Office of Administrative Hearings focuses on time delay

¹³² *Id.* at 33 ("If you use survey forms, to be useful they must be tabulated and the results fed back to affected staff. Simply putting them on the counter, collecting them, and then ignoring them, is not useful and does not manifest a quality program.").

in administrative litigation and approaches due process in a timely and efficient manner. If any credit is to be taken for the success of the new system, it belongs to the administrative law judges who work tirelessly each day on delay reduction in North Carolina's Office of Administrative Hearings.¹³³

(last update: September 13, 1995)

¹³³ The eight administrative law judges at OAH presently: Senior Administrative Law Judge Fred G. Morrison, Jr. and Administrative Law Judges Brenda B. Becton, Sammie Chess, Jr., Beecher R. Gray, Delores O. Nesnow-Smith, Meg Scott Phipps, Robert R. Reilly, Jr., and Thomas R. West.

TEN SECURITY MEASURES FOR ADMINISTRATIVE HEARINGS

NATIONAL ASSOCIATION OF HEARING OFFICIALS
NATIONAL TRAINING AND CONTINUING EDUCATION
CONFERENCE

MILLENNIUM HOTEL
DURHAM, NORTH CAROLINA

MONDAY, OCTOBER 17, 2005
1:30 p.m. to 3:00 p.m.

JULIAN MANN, III

CHIEF ADMINISTRATIVE LAW JUDGE
NORTH CAROLINA OFFICE OF ADMINISTRATIVE HEARINGS
RALEIGH, NORTH CAROLINA

I.

THE SECURITY FOR ADMINISTRATIVE HEARINGS IS NOT THE SAME AS SECURITY FOR JUDICIAL HEARINGS

Designing and implementing a plan for security for administrative hearings should not be confused with designing and implementing a plan for judicial hearings. Judicial branch hearings are located in courthouses and are more likely to have adequate funding to implement comprehensive security measures. Administrative hearings are located in facilities other than courthouses and are less likely to be adequately funded. Security measures for courthouses, particularly because of their criminal law component, must provide users with heightened security. Conducting administrative hearings in government buildings normally offers a less secure environment than a courthouse because the administrative hearing is ancillary to many non-judicial functions offered within the building.

By no means are all administrative hearing facilities inadequate from a security perspective. More often than not, these facilities, realistically, just do not provide the same parallel security measures as do courthouses. Litigants, witnesses, and the public entering an administrative hearing may not recognize this disparity, as many hearing rooms have the appearance of a courtroom. Understandably, these individuals may not make the distinction between a judicial trial and a quasi-judicial hearing, and this may lead to a false sense of security as the deficiencies in an administrative hearing may not be apparent. The public may not notice that there is no bailiff or armed security personnel present in an administrative hearing. Nevertheless, the public is no less

deserving of protection in an administrative hearing as in a judicial hearing in a courthouse.

The presiding administrative hearing official has then a heightened personal responsibility to monitor the administrative hearing for safety and to anticipate security breaches. The hearing official, because of the disparity between a courthouse and government building, should be more vigilant of when it is necessary to act for the protection of the public, perhaps to err on the side of caution more so than a judge presiding in a judicial hearing.

To take advantage of the security available in a courthouse, hearing officials assigned outside of the ordinary administrative hearing's central office should be placed in secured locations, when available, such as courthouses as opposed to unsecured government buildings. Unsecured locations may sometimes be easier to "book" with more convenient parking and access, but they also may have woefully inadequate security. Given a choice, security should "trump" the location decision, in favor of a courthouse, and those making assignments should secure hearing locations with a priority for security.

II.

SECURITY BEGINS WITH BUILDING DESIGN

Because of the recent violence perpetrated against judges and other court personnel, future design of courthouses and courtrooms will be even more focused on security measures than in the past. Nevertheless, administrative hearing locations from time to time are also renovated or built as part of new facilities. If the designing architect is made aware of the need for heightened security in administrative hearings, that

architect can design fundamental security features into the new space. If existing hearing space provides a deficient security design, then this omission should not be carried forward into a newly designed space. Inform the architect! The architect must know that an administrative hearing is a quasi-judicial proceeding in as much of need of security as a courtroom. It is the architect's responsibility to assess the needs of all users, which includes security, in the design of a new government building, and security must be made a top priority for the architect.

The most fundamental aspect of courtroom security is the need for a design that separates the judiciary from the public. This concept has been around for centuries. Anyone visiting a colonial courtroom immediately notices that the bench is so elevated that the judge remains exaggeratedly inaccessible to everyone in the courtroom. Separation for witnesses testifying from the witness stand is also exaggerated.

This same conceptual design for separation remains true today; judges should have similar protections such as an elevated bench and a separate entrance into a courtroom from a protected hallway that does not flow into the public hallway. The public should enter the courtroom by a separate entrance. The judge should sit on an elevated (sometimes a bullet proof) bench that provides a physical barrier to access by litigants and the public. The witness should sit slightly lower than the judge, making the witness less accessible to others in the courtroom and making it difficult for an angry witness to reach the judge. The design should also incorporate a lobby space, large enough to accommodate security equipment to screen the public entering the building. The hearing room should have a conscious design to achieve these security goals which should be communicated to the designing architect.

The public seating area should always be separated or barred from the litigation space in the hearing room. This is where the expression, "passing the bar," originated. Only licensed attorneys were permitted into the litigation space protected by a railing from the public seating area. Thus, when lawyers were admitted to practice, they "passed the bar," and were now allowed into the litigation area beyond the railing. This same concept remains true today for hearing rooms, and the architect should design hearing space to separate the public seating area from the litigation area.

Other design factors to be considered by architects include: design for adequate lighting and ventilation, (avoid, however, transparent windows where the proceedings may be observed near the ground outside), design a separate seating area for witnesses apart from the public seating area, design accessible conference rooms for lawyers to confer with clients, and design handicap accessibility into all aspects of the hearing room.

In addition to the courtroom design, the architect should build security into the exterior building design with separate ingress and egress for judges and the public. The exterior design should also include: adequate lighting, protective buffers for the building entrance with related landscaping (including avoiding planting shrubbery that can conceal or hide persons next to a building), outside handicap accessibility, outside security systems, surveillance cameras, and separation between exterior public and judicial parking.

More subtle design issues should include a user friendly building (reduces stress), incorporating art and sculpture in common areas, incorporating an interior planting design with fountains, eliminating overcrowding or bottleneck spaces, incorporating natural lighting and selecting soft colors for walls.

III.

POLICIES AND PROCEDURES MANUAL

Every hearing system should have a policy manual written for courtroom security. The manual should be developed and written after input from a number of sources including the chief presiding official, lawyers, litigants, security employees, and others who routinely utilize the courtroom, such as clerks and recording assistants. Of paramount importance before reducing the manual to writing is the indispensable need for a security assessment, performed by professionals who are trained in making such assessments.

Once the manual is composed, then all employees and others involved in the hearing system should have a numbered copy of the manual and also receive training on content and execution. This is a sensitive document and should not be readily available to the general public. This manual should address and identify the security measures with explanation, as for example, the purpose for separate entrances into the courtroom. Also, the manual should cover individual emergency procedures and where employees should go in case of an emergency situation for purposes of being accounted for and for the identification of places for safe haven. The manual should not only address courtroom violence and prevention, but also related incidences such as bomb threats, fire, and weather emergencies with orderly evacuation procedures. This manual should also address expected courtroom decorum, clothing that is not permitted, and other standard procedures such as limiting access to the judge's bench, courtroom civility among lawyers, the location and operation of duress alarms, location of separate exits from the courtroom for officials and the public, limiting access to the hearing room after hours,

records protection, mail delivery, high profile cases, press admission, and limiting weapons and firearms.

IV.

FIREARMS IN THE COURTROOM

Inasmuch as administrative hearings ordinarily do not involve criminal law issues, administrative hearings should be even less tolerant of the presence of firearms in the hearing room. Some administrative security systems provide a zero tolerance for firearms in the hearing room, and others permit them only by police officers and other security personnel who are lawfully permitted to carry weapons. Aside from these individuals, no others in the courtroom should possess firearms and certainly no one from the public should be permitted to enter the courtroom with a firearm, either concealed or otherwise. Most public buildings have a statutory prohibition for the possession of unauthorized firearms inside such a building. If police officers and other security personnel are permitted to carry weapons, then these weapons should be secured in such a manner where they cannot be removed from holsters or fired without some added protective measure (holster and trigger locks). The presence of any firearm in a courtroom is arguably a bad policy. However, the presence of a firearm in the possession of a security officer may also clearly be a deterrent to violent activity. Nevertheless, when a weapon can be forcibly removed by overpowering the security officer, then the perpetrator poses an imminent threat to every person in the courtroom who is without a firearm. This is a situation that calls for either the elimination of all firearms in the hearing space or permitting more than one person in the courtroom to have a weapon. Some have argued

this as a rationale for the presiding official to have a concealed weapon as a means of a last resort to deter violence.

V.

SECURITY SCREENING

A single public entrance to the hearing room or multiple hearing rooms should be controlled by a security officer with a screening device. The entrance should be clearly labeled that a screening and search will be undertaken before proceeding into the hearing rooms. Generally, most, if not all, courthouses today have such screening devices that are manned by security officials. However, many administrative hearings systems may not have the luxury of a screening point to eliminate the potential of concealed weapons. If such screening devices, including walk-through metal detectors, are not affordable or otherwise impractical, then at a minimum, signs should be placed at the single entrance to the building prohibiting the carrying of firearms and other weapons such as knives or other mechanical tools similar to weapons into the hearing room. In the event that a security officer is not affordable or is otherwise unavailable, a metal detector monitored by an administrative hearing's employee may be an effective secondary measure. Metal detectors are not as expensive as full-time security employees but they can be highly effective in identifying when metal is entering the hearings room area and may be monitored by non-security employees. A wand metal detector can also be effective and is far less expensive than a walk-through metal detector. An employee has to be responsible for monitoring and refusing entrance to any person carrying a forbidden weapon with the ability and means to enforce the policy.

VI.

THE HEARING OFFICIAL IS IN CHARGE OF SECURITY

The hearing official, either by expressed or implied authority, must take responsibility for courtroom security while presiding over the administrative hearing. The judge's gavel, seldom used, is a symbol of the judge's authority to maintain order in the courtroom. The presiding official, who observes from an elevated bench, should be in a position to clearly see all individuals in the courtroom and not just the litigants, lawyers, and witnesses. Judges should use their best abilities to anticipate contentious situations. Admonishments from the bench are effective to curb escalating behavior, not only as to argumentative counsel, but to others who may be disruptive or potentially disruptive. This is one of the judge's main lines of defense and is an important responsibility for the judge to be constantly vigilant.

Preventing a contentious situation from escalating is a role that judges should learn. Most judges who have experienced violence in a courtroom say that the violence is often unforeseen and erupts without anticipation. However, hearing officials should look for potentially violent situations and once identified, not permit the situation to escalate. In the event that the tension is escalating, the presiding official should in a calm fashion exert control. For example, the presiding official may simply call a recess and admonish everyone to reduce the emotional level in the courtroom; call the representatives into chambers to indicate that the judge is uncomfortable with the conduct in the courtroom; or impose sanctions or threaten contempt. If this is not effective, then an adjournment may be necessary. Judges should not remain in any situation, particularly in light of lack of courtroom security, where their personal safety and the safety of others may be at issue.

If there is the element of violence or such tension that could lead to violence, then the presiding judge must perceive this and take the appropriate steps to abate any resort to violence.

VII

PROTECTIVE DEVICES IN THE COURTROOM

Silent duress alarms at the judge's bench can be very effective in responding to sudden violence in the courtroom. However, if there is not adequate security personnel to respond to the duress alarm or those that are monitoring these devices are not regularly present, then these alarms may provide a false hope of rescue. Nevertheless, this device, if properly monitored, can provide protection to the hearing official and others in the hearing room by summoning early responders to an unanticipated violent act.

Loud alarms should sound throughout a building when members of the public enter protected areas. Signs should be visible above those doors warning that unauthorized access will trigger an alarm.

Other simple security measures should be available for entrance and exit to the courtroom. Access codes known only to judges and employees should prevent the public from entering non-public passageways. In addition, night alarms should be set to prevent tampering with the hearing room, in addition to regular security surveillance of the building by cameras or patrol.

VIII

PARKING LOTS

Parking areas should be well-lighted and separately divided between the public and court officials. Separate entrances should also be provided from the parking areas to

the building for the public and court officials. A well-lighted parking lot can reduce the potential for any confrontation in darkness for court officials going to and from their automobiles. The parking lot should not identify any person by sign as being a judge or any official in the building. This will reduce the possibility of anyone who might want to engage an official into a hostile confrontation or to plant an explosive device in an automobile parked beneath a sign marked "Judge."

IX

SECURE THE JUDGES CHAMBERS AND OTHER OFFICES ANCILLARY TO THE COURTROOM

The hearing official's office or chamber should be considered an extension of the hearing space. Security measures designed for the courtroom should also be present in the chambers, particularly with duress and emergency alarms. If these devices are not now present, budget officers should submit a detailed budget request for a specific appropriation or add them as a cost for a new or renovated design. Access to judicial offices should be restricted and regulated by a receptionist or security personnel who can monitor traffic between office and hearing room. The judge's office should not only provide a place for consultation between counsel and judge, but can also serve as a first line of defense for retreat by the judge and other court personnel. The judge's office, if adequately designed to be locked from the interior, can provide a safe harbor if a violent individual is threatening the hearing space. The judge's office should provide limited access to the courtroom. The judge in the courtroom can also exit into chambers through a door that, if properly designed, will not permit anyone to follow the judge out of the courtroom. All telephones and other means of communication should provide very clear

instructions on how to contact responders in the event of emergencies. All of the above suggested procedures should be detailed in the emergency manual.

X

INCIDENT TRACKING

If an incident of violence does occur in the courtroom, reporting of that incident to the appropriate police authority should be made in addition to reporting the incident to the internal safety officer. There should be a log of all violent acts that occur. This can be effective in deterring future acts of violence and to prevent future incidences of a similar nature. Appropriate charges should be made against all those individuals threatening or committing acts of violence.

CONCLUSION

Fortunately, in most instances, administrative hearings are less likely than courthouses to see acts of violence. Courthouses are more adept to handle security breaches because of equipment and the presence of law enforcement officers. By contrast, administrative hearing rooms are generally more lax in security measures and the presence of law enforcement officers. Administrative officials should exercise heightened vigilance during the hearing as ultimately more responsibility is placed upon them to compensate for the absence of courtroom security. Taking a recess or leaving the courtroom can be a simple security measure that can diffuse and deter potentially violent behavior. The presiding official should know exactly what to do in case of violent situations of either an escalating or sudden variety. The ten measures suggested in this paper can be helpful, but are only a guide. Each hearings' system presents a different set

of security issues, and an individual security assessment should be made, as appropriate, for each unique location.

SOURCES

1. Judith S. Kaye, *Coping with Disaster* 85 Judicature 112 (2001).
2. Administrative Office of the Courts, *N.C. Court Security Guidelines* (September 1998).
3. National Center for State Courts, *Emergency Management for Courts* (2003)
4. Amanda C. Murer, *Communication Is Key in Court Security*-National Center for State Courts (2002).
5. Richard W. Carter, *Keeping A Secure Courthouse*, 76 Judicature 314 (1993).
6. Jack Hagan, *Courting Disaster, The Dangerous Precedent of Judicial Protocol*, Cleveland Plain Dealer (May, 2005)
7. Jesse Hathcock, *Improving Security of the Missouri Trial Courts*, Institute for Court Management (2001).
8. James C. Drennan, *Responsibility For The Security of North Carolina's Courts*, Popular Government (Summer 1999).
9. John Stevenson, *Judges: May be Biased in Cases With Youths In 801 Brotherhood*, The Herald – Sun, (September 11, 2005).
10. Don Hardenbergh, *Future Trends In State Courts, 2004 The Future of Court Security*, National Center for State Courts (2004).
11. John P. Yochum, *Security For The Department Of Administrative Hearings*, The Wackenhut Corporation (2005).

§ 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) The Industrial Commission.
- (5) The Employment Security Commission.
- (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.

(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.
- (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 Department of Correction, with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees.
- (7) The North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan in administering the provisions of Parts 2, 3, 4, and 5 of Article 3 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 under the State Medicaid Program.

(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. 143B-454(a)(11).

(12) Reserved.

(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.

(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, effective July 23, 1993.
- (3) Repealed by Session Laws 2001-474, s. 35, effective November 29, 2001.
- (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) The Department of Revenue.
- (7) The Department of Correction.
- (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(13aa) shall be conducted pursuant to the provisions outlined in G.S. 122C, Article 4, Part 7.
- (12) The North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan with 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 Teachers' and State Employees' Comprehensive Major Medical Plan 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 Crime Control and 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.

(f) **[Effective until December 31, 2006]** 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.

(f) **[Effective December 31, 2006]** Exemption from all but Judicial Review. -- No Article in this Chapter except Article 4 applies to The University of North Carolina.

PROPOSED CORRECTIVE ACTION

- 1) Restore the Hearings Division of the Office of Administrative Hearings to minimum 1989 levels by:
 - a. Restoring the Trial Court Administrator position.
 - b. Restoring one Administrative Law Judge position for general trial jurisdiction and adding one Administrative Law Judge dedicated to Special Education Contested Cases.
 - c. Restore Administrative Assistant.
 - d. Restore clerk typist position.
- 2) Provide for safe and secure hearings for administrative contested cases in courthouses in North Carolina.
- 3) Provide for new administrative facilities that will accommodate modern administrative hearings in Wake County to replace inadequate facilities now located in Raleigh's Blount Street Historic District that will be soon sold to a private developer.
- 4) Restore fiscal resources to the Office of Administrative Hearings on a par with other quasi-judicial tribunals such as the Industrial Commission and Utilities Commission.

VISITOR REGISTRATION SHEETJOINT LEGISLATIVEADMINISTRATION PROCEDURE OVERSIGHT

January 12, 2006

Name of Committee

Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE CLERK

<u>NAME</u>	<u>FIRM OR AGENCY AND ADDRESS</u>
Julie Brinefield	OAH
Dana Sholes	OAH
Lisa Johnson	OAH
Molly Bruegh	OAH
Cheryl Winston	OAH
Michael Guilford	OAH
Nadine Pfeiffer	DHHS / DFS
Bobby Bryan	OAH
Nathan Knuffman	OSBM
Susan Driol	DHHS / DSS
Carlotta Dixon	DHHS / DSS
ELIE SPENKEL	ODI
Denise Stanford	Dental Board
W. STAN HARTSEY, DDS	NC STATE BOARD OF DENTAL EXAMINERS
Casie Smith	NC St. Bd. of Dental Examiners
Terry Friddle	NC St Bd of Dental Examiners
Bobby D White	NC State Bd of Dental Examiners
JOE DELUCA	NC OAH / RRC
Sammi Chess	NC OAH
Conna Wilson	SST
Tuhan Mann	OAH
William H. Potts Jr	NCDC
Colleen Kochanek	NCDHA
John Moly	Gov Office
Lucius W. PULLEN	ATTORNEY

**JOINT LEGISLATIVE
ADMINISTRATIVE PROCEDURE
OVERSIGHT COMMITTEE**

February 9, 2006
10:00 a.m. – Room 544
MINUTES

The Joint Legislative Administrative Procedure Oversight Committee met on Thursday, February 9, 2006 in Room 544 of the Legislative Office Building. Members present included: Co-Chairs, Rep. Goodwin and Senator Nesbitt, Senators Dorsett, Purcell, Stevens, and Webster, and Representatives Eddins, Jones, Justus, and Stiller.

Rep. Goodwin called the meeting to order, welcomed the members and staff, and had visitors identify themselves.

The next order of business was approval of the January 12, 2006 Minutes. Senator Nesbitt so-moved and the motion passed.

Co-Chair Goodwin recognized Joe Deluca, Counsel to the Rules Review Commission (RRC), to give the committee an overview of the commission.

As an example of the RRC's process, Mr. Deluca described two on-going lawsuits involving the RRC: The Pharmacy Board lawsuit and the Environmental Management Commission lawsuit.

In 1999, the Pharmacy Board proposed a rule that was before the RRC requiring pharmacies to allow pharmacists a break after six hours work. The RRC felt that the rule was really directed at the pharmacies, rather than the pharmacists, and the rule wasn't approved. The Board took the RRC to court in June, 1999 for a Preparatory Judgment action, essentially seeking a ruling that it did have authority to regulate pharmacies and, beyond that, the Board asked the court to declare the RRC unconstitutional, in its ability to prevent rules from taking effect. The Board also raised an issue about the constitutionality of the legislative review of administrative rules. In January, 2004, the case reached a Superior Court hearing and in February the court decided that the Board did not have the authority over pharmacies to make this rule. The judge said that she did not need to decide the complaint on the constitutional issues. So the Board appealed that decision and in October of 2005, in a two to one decision, the Court of Appeals agreed with the Superior Court that the Board had no authority to regulate the working conditions of pharmacists. There was, however, one dissent that said that the Board did have the right to regulate working conditions of pharmacists, so based on that one dissent, the Board had the right to appeal the decision in the Superior Court, and it did. In addition, the Appeals Court unanimously agreed that the Superior Court had properly "not acted" on the constitutional issues and the Appeals Court decided unanimously that the Pharmacy Board can Petition for Discretionary Review before the Supreme Court asking them to consider that issue. That is where the case is now, waiting for the Supreme Court's decision whether or not to grant the petition.

The second lawsuit involving the RRC is essentially settled, except for one problem. The Environmental Management Commission (EMC) sued the RRC over rules regulating stormwater. In the fall and winter of 2003 - 2004, the RRC reviewed rules collectively referred to as "the stormwater rules." Eventually, it returned them to the agency with the idea that the EMC needed to start over on that rule. That presented a problem for the EMC and the state, in that the federal government required that the state have a stormwater run-off program in effect by a certain deadline and these rules were meant to address that. So

the Legislature enacted temporary legislation in that expires in 2011 to address that issue and satisfy the federal requirement. But in March of 2004, the EMC filed a lawsuit against the RRC essentially asking for a Declaratory Judgment saying that the RRC made the wrong decision and should have either approved the rules or continued to review them.

Simultaneously, four environmental groups filed lawsuits against the RRC. They had the same complaint as the EMC, but in addition to that, they also raised the same constitutional questions that were raised in the Pharmacy Board lawsuit. The environmental groups made a motion to consolidate their lawsuit with the EMC's lawsuit, but that was turned down by the Wake County Superior Court, and in addition, the court ruled that their lawsuits should be held in abeyance until a final judgment was rendered in the EMC case. A few months later, in Superior Court, on a Motion for a Summary Judgment and a ruling on the substance of the case, a judge stated that the RRC should have continued its review of the stormwater rules in order for the Commission to continue that review. He said that the agency always had the right to respond to any objection of the RRC and that they should be given that opportunity. The RRC did not appeal that decision and started in August of 2005 to review the environmental rules. There were a number of objections on ambiguity grounds and the agency attempted to and did satisfy those objections. In November 2005, the set of rules was approved and is now awaiting legislative review. There has been no further action on the environmental lawsuits.

When Mr. Deluca concluded his comments regarding the lawsuits, he called the members attention to a handout entitled "Role of the Rules Review Commission," copy of which is attached to these Minutes as Attachment I.

Mr. Deluca described how the RRC works. He talked about its statutory creation, the four standards of the RRC for approval or disapproval of rules, the actual process, and the approval and filing with the Office of Administrative Hearings. (See Attachment I)

Rep. Jones wondered if the RRC, or some other group or commission monitors changes in federal law and regulations that may have an impact on state law. Mr. Deluca said the RRC might look at a federal law to determine whether the rules an agency is making are within the grant of authority in that law. Most of the time, however, the RRC deals with state law. Also, commissions like the Environmental Management Commission know that there will be federal laws coming from the Environmental Protection Agency or congress, and it usually monitors those to determine if the commission needs to get involved in rule-making.

There was further discussion about the RRC, how it was formed, were there specific qualifications required of the members, how the chair is designated and how it handles a "tie" vote.

Mr. Deluca said the RRC is appointed by the Legislature, five members by the House Speaker, five members by the Senate Pro Tem. These appointments are for a two year period, and some are staggered terms so that there will be some continuity when new members are appointed. There are no statutory qualifications for commissioners and both attorneys and non-attorneys serve on the Commission. Members elect the chair and can have an election at any time. In case of a tie vote, that would depend on the motion. If the motion was to accept the staff's recommendation to approve or to disapprove a rule, and there is a tie, they hope that someone will make another motion that would pass.

Senator Dorsett wondered if new members on the Commission were given a formal orientation. Mr. Deluca said there was no formal orientation, probably because the Commissioners are not all appointed at the same time. When there is a new member, he and/or a Commissioner usually go to new member and brief him with the same information he has shared with this committee.

When Mr. Deluca had concluded his comments, members of the committee requested that members of the Commission be identified.

Ms. Jennie Hayman of Raleigh, Chair of the Rules Review Commission, who has served on the Commission since 1991, gave the committee the names and locations of Commissioners. These members include: Lee Settle – Pinehurst, NC, Jim Thunderburk – Gastonia, NC, Thomas Hilliard – Raleigh, NC (Attorney) Bob Saunders – Chapel Hill, NC (Attorney) Dr. John Tart – Goldsboro, NC who is retired from NCCC System, Jeff Gray – Raleigh, NC (Attorney), Dana Simpson – Raleigh, NC (Attorney), David Twiddy – Manteo, NC, and Graham Bell of Charlotte, NC

Discussion of Proposed Dental Board Rules Regarding Examination of Dental Hygienists was the 4th Agenda Item. Rep. Goodwin said that, as she understood it, the question before the committee is “whether or not the Dental Board has the authority, under the current statutes, to delegate the dental hygiene exam to a third party.”

She recognized Susan Spears Ellis, Dental Hygiene Program Coordinator, Fayetteville Tech. Community College. Ms. Ellis said those at Fayetteville Tech did not have a firm grasp of what “C I T A” actually is and, while they embrace change for improvement, they feel that this change is being pushed through too quickly. That is a concern, as well as the question of the regional board. The first time they heard about this was in the fall, and it was to be voted on in October. No more was heard about this about this except for e-mail discussion among the various programs. Then, at Christmas, Ms. Ellis received a notice that the Dental Board was going to hold a meeting in Greensboro, NC on December 30, 2005, but because of the short notice, neither she nor anyone on behalf of Fayetteville Tech was able to attend. However, she received follow-ups from educators from other schools who were able to attend.

In January Ms. Ellis received a letter from Dr. Kinlaw, which enclosed a letter from Betsy Hardin with the NC DHA stating, “enclosed is an endorsement from the North Carolina Hygienist Association.” Their local component was very concerned about that language because, as members of the North Carolina Dental Hygienists Association, neither she nor they had been notified or asked for their opinions.

One of their major concerns is the high percent of students who are on financial aid. Ms. Ellis said they had had students in the past that had to sell their cars to find the money to take the exam. With only a 90-day notice of the proposed C I T A’s increased fees, this is a real hardship on the students. She said understands that some of the members of the Dental Board across the state are having fund raisers to help with the increased fee, but this not the case in the Fayetteville area. There is a very short “turn-around time” to do this and she is concerned is that they do not have all the documentation that they need or the time to prepare their students.

Ms. Ellis told the committee that they were concerned if the current class would fall into these criteria, she doesn’t feel that it is appropriate to assess these students with the increased fee. These students were told from the time they entered into the program what the state board exam was going to cost, as that is required before a student can enter the program. That is provided in writing so students can budget their funds. The new proposal is a total surprise to these students. So if this is going to be implements, she would ask that the current class be “grandfathered” in. The other question she asked was, has the North Carolina statutory law been changed?” that they can be a member of a regional board. She wasn’t sure that had happened. But if it has, and if the Board of Examiners wants to join a regional board, why did it join a regional board with just one other member, when it could have joined the Southeast Regional Board or the Northeast Regional Board that have tract-records. More information before she and other can speak with more authority on this proposal.

Rep. Goodwin said that Ms. Ellis had posed a question about the Board's authority to join a regional board, and she recognized committee co-counsel, Karen Cochrane-Brown, to answer that question.

Ms. Cochrane-Brown said that, as discussed at the last meeting, the Dental Board had made no request for amendments to the Dental Hygiene Practice Act, but it did, in the last session, obtain an amendment to the Dental Practice Act with regard to dentists, to specifically authorize them to contract with the outside agency to do the C I T A exam. No similar change has been requested or made to the Dental Hygiene Practice Act.

Sen. Dorsett asked what would be a reasonable time frame to move from the current exam to the C I T A exam. Ms. Ellis said she did not have the authority to answer to the time frame, but she thought it should be more than ninety day, more than three months. A regional exam certainly is a cost saver for students that are taking the exam. Ms. Ellis said she had taken the Northeast Regional Board exam when she graduated from UNC several years ago. There are twelve states that belong to that Regional Board. As it currently stands, the proposed C I T A exam would it would only be good for North Carolina and Mississippi. A student could, for the same price, take the Northeast Regional exam vs. the C I T A that would mean twelve states versus two states. In addition to taking a regional board exam, Ms. Ellis said that it was her understanding that when moving to another state, the hygienist would still have to pay a state licensing fee, and still would probably have to take the "ethics and Jurisprudence" test in that state.

Rep. Goodwin asked how long were the programs and Ms. Ellis told her that programs other than UNC, were two years, and a student would receive an Associate Degree. UNC, however, is a 4-year program.

Rep. Jones asked how often the test was administered. Ms. Ellis said the test would be given in June, and if a student failed the test, there were other opportunities where he/she can be retested.

Rep. Goodwin called on Sonya Hicks, a student at Fayetteville Tech. Community College to speak to the committee. Ms. Hicks said that she was a second year student, whose husband was deployed to Afghanistan. She said he volunteered to go to help her with the expense of the dental hygienist program. She and other students were not against C I T A, but the cost increase makes it very difficult for students and she said they would like to be grandfathered in. Also, they need additional information and are often told to go to the Internet.

Betsy Hardin, President of the North Carolina Dental Hygienists Association, was recognized to address the committee. She wanted to clear up a "misunderstanding." She said that her letter was not a formal endorsement of C I T A, although the Association agrees in concept. She said that at the December 30, 2005 Dental Board meeting, it was her understanding, if they wanted to be licensed in North Carolina, that there would be no other exam but the C I T A exam. That was it. She agreed with the other speakers that this process was "rushed" and did not understand how the Board came up with the fee that it did. It is also a concern that if you took this exam you would only be able to work in North Carolina and Mississippi. However, they were told that there were other states joining C I T A in 2006. So, that was why the Association has not contested C I T A. They tried to help understand and to work with components so that they can help subsidize students. When she took her exam she had to go from one end of the state to the other to complete it. She felt that the C I T A exam is better than what is in place now.

Senator Nesbitt asked about her comment about the C I T A exam being superior to the exam offered in the past. Ms. Hardin said that she thought it would be superior because a number of things will be tested in a different manner. One of the things that she really liked was that part of the exam could be taken "on-line" before taking clinicals at Chapel Hill. The students will also be able to look in the patient's mouth and determine which areas they want to be graded on when they take their clinical exam. In the

past, it is her understanding that a student had to find a patient and they did not know which quadrant or quadrants they would be asked to scale and to show their skills on. So this new exam is superior because students will know what is expected of them.

Senator Purcell asked Ms. Hardin how much of the exam would be taken on-line. Ms. Ellis said it was her understanding that the Jurisprudence, as well as some pathology questions, can be taken ahead of the time of the exam. So all a student has to do is just the clinical part of the exam.

Senator Purcell wondered why the on-line exam would cost \$700 to administer. Ms. Hardin said that the clinical portion was not on-line and would be just like the current exam.

Rep. Goodwin asked Ms. Hardin if any portion of the current exam was on-line, to which Ms. Hardin answered, "not to her knowledge."

Rep. Jones asked about reciprocity. Ms. Hardin

Rep. Still asked about the 170 test. Is that the baseline cost or the student cost.

KCB said that currently in the statute, the Dental Board has the authority to charge up to \$350 for dental hygienist examinations. For several years, they have only charged \$170 for the examination. But the Board has told the committee that the \$170 doesn't fully cover the cost of the exam and that has been subsidized by other resources that the Board collects for several years.

The entire exam process costs \$170 currently, both the written exam and the clinical exam that the state has been giving for a number of years.

Rep. Stiller asked if \$700 pays for the entire exam? *Ms. Cochran-Brown* KCB said that is her understanding, and also that the Board ~~is~~ proposed to add an additional fee of \$75. Mr. Stiller wondered who would pay the difference? Is the Board asking for money from the general fund?

Mr. Bobby White, Chief Operations Officer with the NC State Board of Dental Examiners was recognized. He distributed a handout to the committee, which is attached to these Minutes as Attachment II. He referred to exhibit 2 in the Handout, which documents the hygiene examination expenses.

He discussed the Dental Hygiene Act and felt that the language within that Act gave the Board the statutory authority to allow a third party examining community to offer the hygienists exam. He compared the language in the Dental Hygiene Act with some other boards that are governed by Chapter 90 of the NC General Statutes, which are generally medical-type boards, particularly The Medical Board and the Physician Assistant (PA) exam where there is no particular mention of the PA in the statutes. Another example was the Chiropractic Board and the Physical Therapy Board. (See Tab 3 of Attachment II).

Mr. White referred to Tab #4 of Attachment II was the U.S. Department of Labor, Mean Annual Income Statistics for North Carolina outlining the mean salary range of Teachers, dental Hygienists, and Judges, Magistrate Judges, Magistrates which indicates that the mean salary for Dental Hygienists (\$56,390) and he felt that a one-time \$700 examination fee is very reasonable. He noted that problems that this may have in the short-term.

Senator Purcell referred to the hygiene examination expenses and noted that the Board has run a deficit for the last three years, and he wondered, with the Board having the statutory authority to charge \$350, why it had not done that.

Mr. White said that the Board has been as careful as possible and overall have had other budget items that covered the deficit.

Senator Nesbitt commented that on the long-term, the change in exams may be fine, but in the short-term, it is not. He wondered why the Board didn't continue offering the exam for North Carolina and the C I T A exam for a couple of years.

Mr. White said that was certainly an option. He said there were three other states interested in joining the C I T A testing organization.

Senator Dorsett told the committee that she had heard from dentists and students in her district who are supportive of the regional exam. She asked Mr. White how this proposal got on such a fast track. She said that people that would be affected by this initiative say they have not had enough information or time to absorb and lastly, time to share the information with the students.

Mr. White responded that a lot has happened in the last year developing a nationally normed exam.

Dr. Stan Hardesty with the Dental Board was recognized. He said the Board has been a member of National Association of Dental Examiners, and about two years ago, the trend began moving toward a uniform national clinical examination, both in dentistry and dental hygiene. A group was formed called American Board of Dental Examiners and its intent was to develop these examinations so they would be uniform across the fifty states. What the NC Board tried to do was to help foster this process by attending meetings, providing input, and providing representation. Unfortunately, the politics involved with some of the larger test agencies that are "for profit" prevented that from occurring. It was a quick rush to the table to try and develop that process. The Board saw the good in that and that eventually it would occur so they backed up and took some of the fruits of everybody's labor and decided. Unfortunately, had North Carolina joined one of the other regionals, the Board would have the direct input as board members to further development and refinement of these exams. That is something that the NC Board is not willing to give up. So the Council of Interstate Testing Agencies was developed. Yes, there are currently only two members, North Carolina and Mississippi, but Alabama, Louisiana, and Puerto Rico are associate members at the current time. Their current statutes don't allow them to accept the results of the C I T A examination as they are independent states, as North Carolina has been, until the Board got the statute changed last year.

Rep. Goodwin wondered how they could be "associate members" . Dr. Hardesty these states are planning to join, but have to have the state statutes changed.

Senator Dorsett – grandfathering – is there any discussion of grandfathering the current class, or any discussion as to how this group may be assisted, and should the students decide to take the C I T A, could some of that cost be absorbed by the Board.

Mr. White said there are fundraising efforts underway in private agencies to help defer the costs to students who take the C I T A exam. The Board could consider using its own fees to defer the cost of the C I T A exam, if it feels that is appropriate.

Senator Stevens wondered what the state policy should on the setting of fees for agencies and licensing boards.

Ms. Ellis mentioned that there were other costs for students in taking the exam. The

C I T A fee plus the additional fees it's going to cost most students in excess of \$1000 and that is after paying \$145 for the National Board Exam that has to be taken first.

Senator Nesbitt said it is very hard to bring closure to these kinds of things and asked for suggestions from Mr. White as to what would take the pressure off of this situation. He also said that the statute clearly states that the fee can only be as much as \$350 and that is the law. He suggested that Mr. White work on something to relieve the pressure on current group of something and report back to the committee at its next meeting. He said he also had concerns about C I T A and how it would be recognized in other states.

Staff was recognized to speak about options and time frames. 56 Boards, 56 are doing different things. Important to remember that the current law is that now the board only has the authority to charge \$170 for the existing, Board administered clinical exam. What we are discussing is a proposed rule that has not gone into effect yet. That rule currently hasn't even been adopted by the Dental Board yet, their public comment period expires on February 13, 2006 and it is her understanding that the Board will meet sometime after that to adopt the rule, sometime in late February. If it is within sufficient time they could get the rule, if it is adopted, to the RRC for its meeting in March. If the RRC, at that meeting, approved the rule, it then would be subject to go into effect. However, Ms. Cochrane-Brown said that it was her understanding that the RRC has already received at least ten letters objecting to the rule, so that means this rule will be held in abeyance until the legislative session. So, given that time-line, it is highly doubtful that this rule could go into effect in time to be administered for the June exam. In the Board's deliberations, it will be important to keep in mind that if they continue on a course of attempting to pursue these rules, in all likelihood it would be difficult for them to go into effect in time for this year's exam. They need to come up with a different solution, regardless of any action the committee takes.

Rep. Goodwin said that if there were no objections from the committee, this issue will be carried over to the committee's next meeting agenda and wait for a report back from the Dental Board. There were no objections.

Agenda Item 5, Discussion of the Probable Cause Hearing Process of the Board of Chiropractic Examiners was before the Committee. Rep. Goodwin told the members that Ms. Barbara Nelson, who had appeared before the APO committee last year to complain about the way her claim against a chiropractor was treated by the Board. She claimed that the doctor acted negligently in his treatment of her condition. The Board conducted a probable cause hearing and dismissed the claim. Ms. Nelson states that there was conflicting and false evidence presented by the doctor and she has requested a new hearing on this claim. The Board has denied her another hearing and suggested that she could be subject to legal action if she continues to pursue this matter.

Ms. Nelson has requested that the APO committee direct the Board to hold a hearing that insures she has an opportunity to challenge the doctor's evidence. Ms. Nelson has been advised that this committee can only recommend legislative changes.

Rep. Goodwin recognized Ms. Nelson. A copy of Ms. Nelson's testimony is attached to these Minutes as Attachment III.

Senator Webster had serious concerns about this issue and asked what the committee could do about it.

KCB said that she did not believe that the committee had the authority to do anything in this issue and the things that Ms. Nelson has requested in her letter are beyond the committee's authority. Ms. Cochrane-Brown suggested that the civil court system against the chiropractor might be the appropriate forum for Ms. Nelson.

There was discussion to liquidate the board. Ms. Nelson made that request.

Senator Nesbitt said that certainly the General Assembly could liquidate the Board. However, the committee has the authority to review how the Board is passing or implementing rules, and that the committee is rules review process, not necessarily the disciplinary process. It is not what the committee does. Civil litigation is a possibility, but Senator Nesbitt said there is nothing the committee can do.

Vance C. Kinlaw, Counsel to the Board of Chiropractic Examiners, was recognized. He said this was actually the second time that Ms. Nelson had appeared before the committee in connection with this matter, that she was also here January a year ago. So this, he said, is becoming an annual event. He said he would be happy to respond to any questions that the committee has concerning the Board's procedures, rules and statutes, in this particular case or in any case. He said he always appreciates the opportunity to come before the committee and have it scrutinize what they are doing and receive the guidance that the committee can impart. He offered to respond to any questions.

Senator Webster asked if there were two sets of records (as Ms. Nelson had stated)? Mr. Kinlaw said that actually there were three. Senator Webster wondered if those records were made available to Ms. Nelson, and Mr. Kinlaw said that they were, that she attained those additional sets because the Board insisted that the physician provide them to her. It was as a result of the probable cause hearing and the Board's realization that there were some discrepancies in the records, that she was first alerted as to the existence of the discrepancies and the Board was not able to get copies of those records on the day of the hearing, but it directed the physician to supply every version of her records to her. It was on the basis of the documentation that the Board insisted the physician provide that she poured over these records and identified what she believed were material discrepancies.

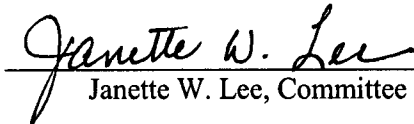
Senator Webster had further questions about why the multiple sets of records were not disclosed to Ms. Nelson. Mr. Kinlaw said that it was more complicated than that, that what the doctor generated is what is called a "travel card" which is basically coded information. It is short-hand which is common for physicians to use. These travel cards are actual physical cards that are marked up, checked off, a standardized, noted quotation of the services that were performed. That data, which would be incomprehensible to anyone outside the profession unless the code itself was explained, was taken to a chiropractic assistant who was responsible for actually developing a narrative type record that anyone could look at. This particular physician, as many do, used a computer program to generate these narrative records, which involves, as Ms. Nelson indicated, collaring in squares and boxes in various locations that the computer reads and produces records. What the Board discovered as a result of its inquiry was that there were discrepancies between the version of the record that was generated by the computer that the doctor sent to her in advance of her hearing, at her request, and the narrative version of the records that the doctor himself presented. And he acknowledged that discrepancy and explained it to the Board's satisfaction. He also produced, at the hearing, the travel cards themselves, the encoded data, and the physicians members of the Review Committee examined those line-by-line and were satisfied with the doctor's explanation as to why these discrepancies existed. This was all news to Ms. Nelson and, ultimately, after she had a chance to independently pour over these narratives, but he said he did not think the travel cards were made available to her, she made her own independent determination that these were material discrepancies. But the physicians members of the Review Committee were satisfied that the discrepancies that did exist, which the doctor acknowledged, were either immaterial or otherwise harmless and that is why it was not necessary that any discrepancies in the records be evaluated to make a determination in this case, because there was no dispute about the underlying chronology of treatment, about the dates and number of office visits, about what occurred at each office visit. Basically, if you will look at your handout you will see that in her original complaint and the Board's letter presenting the determination of lack of probable cause, the Board cited the facts and the facts cited correspond almost

100 percent with the narrative that Ms. Nelson outlined in her original complaint. So her version of events was the version of events that the Board used in making its determination. The whole problem with the discrepancies and the narrative version of the records was incidental and tangential, but it was thoroughly reviewed in the Review Committee hearing. That is why these hearings are held. Sometimes these hearings reveal things that are of interest to the Board, which are really not of interest to the complainant. Not the gravement of the complaint. He said if you will look at the original complaint, it was not in anyway predicated on any defects in record keeping. In the Board's view this was a situation in which Ms. Nelson became frustrated that her original complaint did not produce the outcome that she expected and that she decided to be very persistent in trying to play a game of "got-cha" with the doctor and basically she insisted and is now demanding that the Board use the powers that the legislature had granted to it in order to play that game. He said he thought that is analogous to the victim of a crime demanding the right to tell a policeman when, where, at whom and how many times to fire his gun. He said the Board stands on the record in this case as it did a year ago. He said the file is open and he is willing to answer any questions.

The date for the next meeting of the committee was set for March 9, 2006 at 10:00 a.m.

The meeting was adjourned 12:15 p.m.


Rep. Melanie Wade Goodwin, Presiding


Janette W. Lee, Committee Assistant

ROLE OF THE RULES REVIEW COMMISSION

Joseph J. DeLuca, Jr.
Commission Counsel
North Carolina Rules Review Commission
Office of Administrative Hearings

919-715-8455

I. DESCRIPTION OF AGENCY

- **Statutory Creation**

The Rules Review Commission was created by the General Assembly in 1986. While there have been frequent changes since then, most of them have been technical in nature. However, there have been two significant changes. In 1995 the APA was dramatically altered. Prior to the 1995 changes the RRC was, in effect, an advisory body. After those changes the RRC became the last executive branch hurdle the rulemaking agencies would have to clear. This change provided that unless a rule was approved by the RRC, it could not take effect. It also significantly altered the rulemaking timeline and other procedures.

In 2003 the legislature made further major, as well as minor, changes to the APA. One was to return rulemaking to the pre-1995 timeline where a rule could take effect the month after it was approved by the RRC. [There was added a proviso that if enough people objected to that happening the post-1995 timeline was in effect]. And while the permanent rulemaking timeline was accelerated, the temporary rulemaking timeline was braked. Not only was the timeline braked, the RRC was given approval authority over temporary rules. Prior to this an agency could put temporary rules into effect without any approval except its own.

The statutory authority for all this is found in two places. The authority for the RRC itself is G.S. 143B-30.1 and following. The Commission's substantive review procedures are set by the General Assembly and are codified in the Administrative Procedures Act (the APA), Chapter 150B, Articles 1 and 2A.

The RRC consists of ten commissioners appointed by the General Assembly, five on the recommendation of the President Pro Tempore and five on the recommendation of the Speaker of the House. They meet at least once a month – more often depending on temporary rulemaking filings – and must have six members for a quorum.

- **Statutory Process**

The RRC does not have rules published in the N.C. Administrative Code, the way most state agencies do. [That exception is set out at 150B-1(d)(1)]. It does not need many rules since its major procedures, rights, authority, and limitations have been statutorily set by the legislature. However, there are some procedural rules that have been followed by the RRC, and their substance is set out below.

II. SCOPE OF REVIEW

The majority of the statutory provisions concerning the RRC are found in Part 2 of Article 2A, 150B-21.1 and following. For the purposes of this part of the presentation, I will focus on the four standards the Commission uses in reviewing all rules before it.

- Authority

The first standard is whether a rule is within the authority delegated to the agency by the General Assembly. (G.S. 150B-21.9(a)(1))

This means we review the substantive statutes cited by the agency as their authority to enact a given rule to verify that the legislature has, in fact, authorized or required an agency to enact this rule.

Note that it is not enough that the federal government tells the state, or even an agency to do something. If the state has not granted an agency the specific or general authority to either 1) do the specific act cited, or 2) carry out any federal requirements in relation to the program, then the agency has no authority to respond to the federal mandate.

As an example look at a possible [or hypothetical] rulemaking situation concerning diet in some type of adult care facility. In making the determination of whether or not the agency has the authority to oversee the diets within the facility, we will look to see whether there is a broad grant of authority to do just about anything (e.g., "the agency shall make whatever rules are necessary concerning the operation of an adult care facility"); whether the agency has been specifically authorized or directed to tackle the specific subject ruled on (e.g. "the agency shall make rules concerning the menu at each adult care facility"); whether there is some potentially limiting language in the statute (such as "the agency shall not place any limits on the diet of the residents"); whether, to our knowledge, there is a limitation in another statute ("no agency shall make any rules, other than sanitary rules, concerning meals served in any facilities, including adult or child care facilities") and, possibly the most arguable, whether there is a limitation implied in the statute.

This last one is sometimes the hardest to determine. It most often comes about when a statute directing an agency to make rules starts listing areas to make rules about, and does not specifically allow them to make "any other rules necessary" or some such language. There will also be similar examinations when a grant of authority allows rules to "carry out the purposes of this chapter". If the rule goes beyond the specific purposes set out in the statute, then there will be questions raised.

- Clarity

All rules must be clear and unambiguous. G.S. 150b-21.9(a)(2).

The example I will use to illustrate this standard came across my desk some time in the past as I prepared the first version of this presentation. It is, in my opinion, a clear example of unclear language. Please don't take this as singling out DHHS for any attack.

Take 10 NCAC 14K .0103(11) and the (A) and (B) components of "atypical development." One is forced to ask what is the difference between "diagnosed ... behavioral disorder" in (A) and "identified ... behavioral disorders" in (B). Further in (B), what is the difference between a "failure to respond to most ... interactions" and a "persistent failure...?"

In (18) the rule defines "...supervision" partially by reference to a "qualified ... professional." Until the RRC raised questions concerning who or what a "qualified professional" was, that term was undefined. That ultimately means that there is an unclear standard about whether or not the supervision was proper and within the required limits. You are talking about whether or not someone is entitled to a job here.

- **Necessity**

A rule must be reasonably necessary to fulfill a duty delegated to the agency by the General Assembly. (G.S. 150B-21.9(a)(3))

In the past we did our best to avoid passing judgment on this standard. However, the legislature has made it clear that it wants us to at least subject rules to a "reasonably necessary" scrutiny.

It is clear that if an agency sends us a rule that repeats the statute, or does not actually impose a requirement, or forbid some action, then we may use this provision of our statute to object to it.

- **Compliance with the Procedural Requirements**

In addition to reviewing rules for meeting the standards of authority, clarity, and necessity, we also review rules to make sure an agency has complied with the procedural requirements for enacting those rules (N.C.G.S. 150B-21.9(a)(4)). Entry of a rule in the NCAC after review by the RRC is presumptive evidence that the rule was adopted in compliance with the procedural requirements of Article 2A (G.S. 150B-21.9(a)).

III. THE ACTUAL PROCESS

- **Filing and Deadline**

All rules must be filed by the 20th day (or the close of the first business day thereafter if it's a holiday) of a given month for review at the following month's meeting. If it comes in after 5:00 P.M. of the 20th, then the rule will be reviewed in two months. 5:01 P.M. is after 5:00 P.M.

- **RRC Meeting**

The Commission must meet once a month and that meeting is almost always on the third Thursday of each month.

- **Staff Review**

One of the RRC's staff attorneys will review the rule to see if it meets the above standards, including compliance with the procedural requirements. We also review it for any typographical, grammatical, or stylistic problems.

- **Technical Changes**

If we discover problems of a less substantial nature, such as a typographical error, or using "should" instead of "shall" or "may," we send, usually within two weeks, a Request For A Technical Change. That request may also embody more substantive problems, but ones we perceive an agency will immediately see are problems that it did not notice, but are not likely to argue about, such as unclear or undefined terms. Those corrections need to be made immediately and returned to us before the meeting.

- **Staff Opinions**

The staff attorneys review all rules received and usually recommend to the Commissioners that they either approve or object to each rule. Occasionally we will recommend studying the rule further or make comments without making a direct recommendation. Those recommendations carry heavy weight but are not at all conclusive. At least once per month (and the pace may be accelerating) the Commissioners will do the opposite of what the staff recommends.

About the time an agency receives the technical change request, or a couple of weeks before the Commission meeting, the APA coordinator, as well as anybody else, may call the office to determine the staff opinions on the agency's various rules before us.

The agencies typically may not rewrite rules to meet an anticipated objection prior to the meeting and prior to any official objection by the RRC, although they will still be allowed to make any technical changes that have been requested prior to the meeting. They also are generally not allowed to withdraw a rule once it has been filed with the RRC. The major exception would be if the staff's (or agency's) problem is with either a new rule (adoption), or with new language in an existing rule, and not the existing language. The other major circumstance allowing an agency to withdraw a rule before the RRC would be if there was a fatal flaw in the agency's procedure in adopting the rule that would not entitle them to be at RRC in the first place.

- **Commission Meeting and Procedures**

The RRC meets at least once each month, usually the third Thursday, and considers all rules filed by the 20th of the preceding month. It must consider all the rules before it that month and has three options: approve a rule, object to a rule, or extend the period of review on a rule. If it does either of the latter two, then the rule will be considered again at the next meeting. Eventually, the RRC must either approve or object to a rule.

The RRC now must also review temporary rules before they become effective. This review may be done by a committee of at least three commissioners, rather than the full commission. However the timeline requires that these rules be reviewed within 15 business days (usually three calendar weeks) of filing with the RRC. The RRC must review responses to objections within 5 business days of receiving the response. This could require the RRC to schedule a second meeting in one month.

- **Objections and Rewritten Rules**

If the RRC objects to a rule, then the agency must respond and either attempt to satisfy the Commission's objection by rewriting the rule or inform the Commission that it will not change the rule and ask for it to be returned. (G.S. 150B-21.12). No rule that the RRC has objected to may be filed in the NCAC. If a rule is objected to because of existing language, then the agency will have to satisfy the objection or the rule will be removed from the Code.

Please note: Any rewritten rule has to come from the agency itself, and not from the agency staff. However, the RRC does not generally make its own determination of where the rewritten rule is coming from. In other words, if the agency wishes to delegate authority to its staff to rewrite a rule to meet RRC objections, that is the agency's business. So it is up to the agency itself as to how much authority to give its staff in rewriting rules without them going back to the full board or commission. This also does not take into consideration any public meeting requirements or obligation to notify the public of an intent to make a change to the rule.

If the rule is rewritten to satisfy the RRC's objections, then it will be approved and filed with the OAH.

- Approval and Filing with OAH

When a rule is approved, we transmit the rule to OAH where it is entered into the NCAC. I am not going into the timetable for inclusion in the NCAC, since there are a number of different combinations. You should know that the general rule is that it will become effective on the 1st day of the next month following approval by the RRC.

If 10 people file written objections with the RRC, then you should know that the law is that it will become effective on the 31st legislative day of the next regular session of the General Assembly (held more than 25 days after the rule was approved by the RRC). The agency may file a temporary rule in this case if the basis for a temporary rule existed at the time the agency began rulemaking.

C:\docs\rrc_description

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

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JOSEPH S. BURNHAM, D.D.S., Secretary-Treasurer
BENJAMIN W. BROWN, D.D.S., Past President
ZANNIE P. EFIRD, Consumer Member



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CLIFFORD O. FEINGOLD, D.D.S.
RONALD K. OWENS, D.D.S.
NEPLUS S. HALL, R.D.H.

BOBBY D. WHITE, Chief Operations Officer

MEMORANDUM

To: Joint Legislative Administrative Procedure Oversight Committee

From: North Carolina State Board of Dental Examiners

Date: February 9, 2006

Re: Proposed Rules for the NC Dental Hygiene Examination

Thank you for this opportunity to submit these additional exhibits for your information.

Tab 1

Authorizing statutes that the NC Dental Board, on the advice of legal counsel, considered sufficient to allow the Board to offer a regional or national dental hygiene examination. In particular, N.C.G.S. 90-221(e) in the Dental Hygiene Act defines the term "Board" and refers to N.C.G.S. 90-22 in the Dental Practice Act. N.C.G.S. 90-22 states that this article "shall be liberally construed." This principal of liberal statutory interpretation combined with the broad language of N.C.G.S. 90-223 and 90-224 provided the basis for the good faith belief that the Board has statutory authority to offer a regionally or nationally based hygiene examination.

Tab 2

Dental Hygiene Examination Income/Expenses for the past three years.

Tab 3

Examples and brief review of national examinations as utilized by other licensing boards governed by Chapter 90 of the North Carolina General Statutes. It does not appear that licensing boards control or publish the costs of national examinations in either statute or rule.

**THE NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS' EXHIBITS
SUBMITTED TO THE JOINT
LEGISLATIVE ADMINISTRATIVE
PROCEDURE OVERSIGHT COMMITTEE**

FEBRUARY 9, 2006

Tab 4

U.S. Department of Labor income statistics for selected NC professions. Although not a controlling factor, a one-time examination fee of \$700 does not seem unreasonable in light of potential income.

**North Carolina General Statutes
Chapter 90
Article 16**

Dental Hygiene Act

90-221. Definitions.

(a) "Dental hygiene" as used in this Article shall mean the performance of the following functions: Complete oral prophylaxis, application of preventive agents to oral structures, exposure and processing of radiographs, administration of medicaments prescribed by a licensed dentist, preparation of diagnostic aids, and written records of oral conditions for interpretation by the dentist, together with such other and further functions as may be permitted by rules and regulations of the Board not inconsistent herewith.

(b) "Dental hygienist" as used in this Article, shall mean any person who is a graduate of a Board-accredited school of dental hygiene, who has been licensed by the Board, and who practices dental hygiene as prescribed by the Board.

(c) "License" shall mean a certificate issued to any applicant upon completion of requirements for admission to practice dental hygiene.

(d) "Renewal certificate" shall mean the annual certificate of renewal of license to continue practice of dental hygiene in the State of North Carolina.

(e) "Board" shall mean "The North Carolina State Board of Dental Examiners" created by Chapter 139, Public Laws of 1879, and Chapter 178, Public Laws of 1915 as continued in existence by G.S. 90-22.

(f) "Supervision" as used in this Article shall mean that acts are deemed to be under the supervision of a licensed dentist when performed in a locale where a licensed dentist is physically present during the performance of such acts and such acts are being performed pursuant to the dentist's order, control and approval. (1945, c. 639, s. 1; 1971, c. 756, s. 1; 1981, c. 824, s. 1.)

90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.

(a) The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

90-222. Administration of Article.

The Board is hereby vested with the authority and is charged with the duty of administering the provisions of this Article. (1945, c. 639, s. 2.)

90-223. Powers and duties of Board.

(a) The Board is authorized and empowered to:

- (1) Conduct examinations for licensure,
- (2) Issue licenses and provisional licenses,
- (3) Issue annual renewal certificates, and
- (4) Renew expired licenses.

(b) The Board shall have the authority to make or amend rules and regulations not inconsistent with this Article governing the practice of dental hygiene and the granting, revocation and suspension of licenses and provisional licenses of dental hygienists.

(1) Any rule adopted under this Article shall be distributed to all licensed dentists and all licensed dental hygienists within 30 days of final approval by the Board.

(2) The Board shall issue every two years a compilation or supplement of the Dental Hygiene Act and the Board rules and regulations, and, upon written request therefor, a directory of dental hygienists to each licensed dentist and dental hygienist.

(c) The Board shall keep on file in its office at all times a complete record of the names, addresses, license numbers and renewal certificate numbers of all persons entitled to practice dental hygiene in this State.

(d) The Board shall, in addition to any other requirements for Board approval of a school or program of dental hygiene for purposes of this Article, require that any school or program in North Carolina develop and implement a procedure for advanced placement of potentially qualified persons. This procedure shall be designed to encourage and allow credit for any person who has attained special capabilities in dental work through military service, on-the-job training or working experience, or other means not otherwise qualifying the person to be immediately eligible for licensure. The procedure shall include these elements: public announcement of the procedure, a method for persons who have special capabilities through training or experience to make application to the school or program for advanced placement, personal counseling on obtaining advanced placement, administration of specially prepared written and clinical examinations for all parts of the curriculum otherwise required for graduation, exemption from course requirements when results of the examinations so indicate, and appropriate modification of curriculum requirements, when necessary, to facilitate individual advancement in education programs. The procedure for advanced placement shall not be approved by the Board unless it is fairly designed to facilitate the substitution of military or civilian training and experience for regular

curricula, taking into account that the special nature of military and certain civilian training and experience may be equivalent without necessarily being identical to the courses of the school or program.

(e) The Board shall have the authority to provide for programs for impaired dental hygienists as authorized in G.S. 90-48.3. (1945, c. 639, s. 3; 1971, c. 756, s. 2; 1973, c. 871, s. 2; 1979, 2nd Sess., c. 1195, s. 14; 1987, c. 827, s. 1; 1999-382, s. 2; 2000-189, s. 7.)

90-224. Examination.

(a) The applicant for licensure must be of good moral character, have graduated from an accredited high school or hold a high school equivalency certificate duly issued by a governmental agency or unit authorized to issue the same, and be a graduate of a program of dental hygiene in a school or college approved by the Board.

(b) The Board shall have the authority to establish in its rules and regulations:

- (1) The form of application;
- (2) The time and place of examination;
- (3) The type of examination;
- (4) The qualifications for passing the examination.

NORTH CAROLINA DENTAL HYGIENE EXAMINATION EXPENSE

Tab 2

		2003	2004	2005	
	RDH	256	280	248	
Number of Candidates					
Fee		\$125.00	\$170.00	\$170.00	
Total Income		\$32,000.00	\$47,600.00	\$42,160.00	
ONE TIME EXPENSES					
Computer Programming (On-line testing)				3,725.00	
Consulting		9,780.77			
Exam Development				7,390.79	
Interpreter for deaf candidate		539.78			
Lab Coats (extra larger sizes)		486.00			
Laptop Computer		2,044.50			
Parscore agreement		75.00			
Radio/Walkie Talkie			394.00		
Scanner Padding		8.25			
Shredder & Portfolio		77.57			
TOTAL ONE TIME EXPENSES		13,011.87	394.00	11,115.79	
RECURRING EXPENSES					
Applications		85.00	95.20	82.34	
Background Checks (SBI and Safehands)		12,096.00	14,571.80	9,771.20	
Board Members		2,965.06	4,780.97	4,046.46	
CD Presentation		200.00	298.85	419.16	
Deputy Examiners		8,384.58	7,301.87	9,253.32	
Hotel		6,936.99	5,697.53	7,496.34	
ID Badges		190.95	208.85	184.98	
In-House Printing (candidate/deputy manuals)		206.90	226.29	200.43	
Law Books		1,280.00	1,400.00	0.00	
Meals		3,703.28	4,339.18	3,549.91	
Postage		822.44	899.54	925.25	
Staff Compensation & Expenses		1,869.32	2,137.77	1,926.32	
Standardization		1,153.46	2,362.50	2,732.25	
Supplies (folders, paper, pens, licenses, id badges, etc.)		4,258.19	2,213.22	3,630.80	
Tents/Tables/Rentals		413.80	413.80	502.84	
UNC & UNC Personnel Compensation		13,757.68	15,360.92	16,252.91	
TOTAL RECURRING EXPENSES		58,323.65	62,308.29	60,974.51	
GRAND TOTAL		71,335.52	62,702.29	72,090.30	
NET INCOME		-39,335.52	-15,102.29	-29,930.30	

At the previous meeting of the Joint Legislative Administrative Oversight Committee, the question was raised about how other licensing boards handle the issue of national examinations and their associated costs.

A brief review of North Carolina statutes and administrative code reveals that several licensing boards utilize national examinations as a component of their licensing requirements. Authorizing language in the statutes varies from very specific to fairly broad. Generally, the applicant is expected to bear the cost of these national exams and the costs are not directly referenced in the controlling statutes or regulations.

Some examples:

- The Medical Board accepts the results of the United States Medical Licensure Examination (USMLE). This is a three-part examination the cost of which is born by students during and at the finish of their medical education. The authorizing statute states in pertinent part: "In lieu of the above examination, the Board may grant a license to an applicant who...has passed such other examination which the Board deems to be equivalent to the examination given by the Board..." N.C.G.S. 90-10.

The Federation of State Medical Boards offers the examination. Total cost for all three parts is just over \$2,500. No mention of the cost of the examination occurs in the statutes or regulations governing the Board. Applicants are expected to take and pass this examination before applying to the Board for a NC medical license.

- Physician Assistants must successfully complete "a licensing examination approved by the Board." 21 NCAC 32 S .0102(3). The initial examination cost is \$425. However, all Physician Assistants must also pass a re-certification exam every sixth year of practice. The cost of the re-certification exam ranges from \$300 to \$475. No mention of the cost of the examination occurs in the statutes or regulations governing the Board. Applicants are expected to take and pass this examination before applying to the Board for a NC physician assistant license
- Chiropractors take a five-part examination provided by the National Board of Chiropractic Examiners. N.C.G.S. 90 – 143(b) states that: "The Board may include as part of the examination any examination developed and administered by the National Board of Chiropractic Examiners or its successor organization that the Board considers appropriate, and the examination may be administered by a national testing service."

Parts 1 & 2 cost \$900. Parts 3 & 4 cost \$800. The Special Purpose Examination for Chiropractic (SPEC) costs \$400. No mention of the cost of the examination occurs in the statutes or regulations governing the Board. Applicants are expected to take and pass this examination before applying to the Board for a NC chiropractic license.

- Physical Therapy established a national examination in 1994. The authorizing statute N.C.G.S. 90-270.26(1) provides that the general powers and duties of the Board shall be: "Examine and determine the qualifications and fitness of applicants for a license to practice physical therapy in this state..."

From this statute the Board has developed rules that require students to take and pass a national computer based examination administered by the National Testing Agency. Cost of the exam is \$350 plus \$50 to \$75 for each state to which copies of final scores are sent. 21 NCAC 48 B .0102 mentions that the physical therapy exam fee must be paid by the applicant. 21 NCAC 48 D .0112 states that the test shall be administered by the National Testing Agency. No mention of the cost of the examination occurs in the statutes or regulations governing the Board.

However, N.C.G.S. 90-270.33 states that where the Board uses the service of a national testing agency, "the Board may charge the applicant the actual cost of the examination services in addition to its other fees." Applicants are expected to take and pass this examination before applying to the Board for a NC physical therapy license.

U.S. Department of Labor

Mean Annual Income Statistics for North Carolina

(www.bls.gov/oes/current/oes_nc.htm)

Teachers:

Kindergarten	\$37,820
Elementary	\$37,980
Middle	\$38,400
Secondary	\$39,050
Librarians	\$45,200

Dental Hygienists:	\$56,390

Judges, Magistrate Judges, Magistrates	\$59,220

**USE OF OUTSIDE TESTING AGENCIES BY OCCUPATIONAL
LICENSING BOARDS**

1. Landscape Architects – G.S. 89A-6

"In all instances where the Board uses the services of a testing service for preparation, administration, or grading of examinations, the Board may charge the applicant the actual cost of the examination services, in addition to its other fees."

2. Certified Public Accountants – G.S. 93-12(7)

"To charge for each examination provided for in this Chapter a fee not exceeding four hundred dollars (\$400.00). In addition to the examination fee, if the Board uses a testing service for the preparation, administration, or grading of examinations, the Board may charge the applicant the actual cost of the examination services. The applicant shall pay all fees and costs associated with the examination at the time the application is filed with the Board."

3. Appraisers – G.S. 93E-1-6(b)

"Each application for registration as a trainee or for State licensure or certification as a real estate appraiser shall be accompanied by a fee of one hundred fifty dollars (\$150.00), plus any additional fee as may be necessary to defray the cost of any competency examination administered by a private testing service."

4. Cosmetologists – G.S. 88B-20(a)

"The Board may charge the applicant the actual cost of preparation, administration, and grading of examinations for cosmetologists, apprentices, manicurists, estheticians, or teachers, in addition to its other fees."

5. Psychologists – G.S. 90-270.18(b)(2)

"Fees for the national written examination shall be the cost of the examination as set by the vendor plus an additional fee not to exceed fifty dollars (\$50.00). The Board may require applicants to pay the fee directly to the vendor."

**THE PROBABLE CAUSE HEARING PROCESS OF THE BOARD OF
CHIROPRACTIC EXAMINERS**

*Prepared by Karen Cochrane Brown, Committee Counsel
February 9, 2006*

BACKGROUND

In 2003, Ms. Barbara Nelson filed a complaint with the Chiropractic Board alleging that her chiropractor was negligent. After conducting a hearing, a committee of the Board dismissed Ms. Nelson's complaint. Ms. Nelson is dissatisfied with the process used to investigate her complaint. She states that the probable cause hearing and the dismissal of the complaint did not explain how the committee resolved discrepancies between her evidence and that of the doctor.

In 2005, Ms. Nelson appeared before the APO committee seeking review of the Board's dismissal. She was informed that this committee could only recommend legislative changes and she was directed to present her proposal in writing to the committee. Ms. Nelson filed a second complaint with the Chiropractic Board alleging that the doctor had negligently maintained records, falsified records and lied to the Board regarding the discrepancies in the evidence. The Board dismissed this complaint without a hearing. Ms. Nelson has now submitted a written proposal requesting that the APO committee direct the Board of Chiropractic Examiners to hold a hearing on her second complaint and that the hearing be conducted in a manner which Ms. Nelson deems more appropriate.

THE PROBABLE CAUSE HEARING PROCESS

The Board of Chiropractic Examiners is authorized to discipline chiropractors who engage in any of 20 prohibited acts enumerated in G.S. 90-154. The statute does not define the process for investigating and disposing of complaints against licensees, but authorizes the Board to adopt rules to define the process. The Board has adopted rules for investigating complaints in 21 NCAC 10 section .0500. The rules authorize the secretary of the Board to review and determine whether a complaint is "major or minor". The rules do not provide any standards for the secretary to use in making this determination. If the secretary determines that the complaint is minor, the secretary shall attempt to resolve the matter by informal communication with the complainant and the chiropractor. If the complaint is major, the secretary must assist the complainant in filing a formal complaint. Under the rules, formal complaints are investigated by the Chiropractic Review Committee, which is composed of the secretary, the Board's attorney, and a licensee selected by the secretary. The Committee conducts a probable cause hearing after giving notice to the chiropractor complained against. The rule states, *"the probable cause hearing shall be informal, and the secretary may establish at his discretion such procedures as are necessary to facilitate examination of the evidence. The Review Committee may consider evidence at the probable cause hearing which would not be admissible if offered in a contested case."*

After the hearing, the committee may dispose of the complaint (1) by dismissal, if it finds no probable cause to believe a violation has occurred, (2) by directing the licensee to cease and desist from committing the violation, if the licensee admits the charge, or (3)

by presenting the complaint to the Board of Examiners for a decision on the merits, if the charge is denied. If the complaint is sent to the Board, it must follow the procedure for a contested case set forth in Art. 3A of Chap. 150B.
A copy of the relevant rules and statutes is attached.

SECTION .0500 - INVESTIGATION OF COMPLAINTS

21 NCAC 10 .0501 FILING COMPLAINTS

(a) General. Any person who has reason to believe that a Doctor of Chiropractic has violated the laws governing chiropractic may file a complaint with the Board of Examiners. Complaints should be filed with the secretary of the Board of Examiners.

(b) Form of Complaint. Complaints may be formal or informal, but must be in writing:

- (1) Informal Complaints. Any written communication, construed most favorably to the complainant, which appears to allege a violation of the laws governing chiropractic shall be considered an informal complaint.
- (2) Formal Complaint. A formal complaint shall be executed in writing under oath upon a form provided by the secretary. It shall specify the statute or rule allegedly violated and shall contain a short statement of the acts or omissions constituting the alleged violation including the dates of said acts or omissions.

(c) Secretary's Response to Complaints. The secretary shall review any complaint to determine whether a major or minor violation has been alleged. If the secretary determines that the alleged violation is minor, he shall attempt to resolve the complaint by informal communication with the complainant and the chiropractor complained of. If the secretary determines that the alleged violation is major, he shall assist the complainant in filing a formal complaint.

*History Note: Authority G.S. 90-142; 90-154;
Eff. February 1, 1976;
Readopted Eff. January 27, 1978;
Amended Eff. December 1, 1988; January 1, 1983; December 20, 1979.*

21 NCAC 10 .0502 UNLAWFUL PRACTICE

*History Note: Authority G.S. 90-147; 90-148;
Eff. February 1, 1976;
Readopted Eff. January 27, 1978;
Repealed Eff. December 1, 1988.*

21 NCAC 10 .0503 DETERMINATION OF PROBABLE CAUSE

(a) General. Formal complaints shall be investigated by the Chiropractic Review Committee. The committee shall hold a hearing to determine whether there is probable cause to believe a violation of the laws governing Chiropractic has occurred.

(b) Composition of Review Committee. The committee shall be composed of:

- (1) the secretary of the Board of Examiners,
- (2) the attorney for the Board of Examiners,
- (3) a licentiate selected by the secretary from among those who, at the most recent election held pursuant to 21 NCAC 10 Rule .0103(c), were elected candidates for Board membership but were not appointed to the Board.

(c) Notice of Hearing. The secretary shall provide notice of the probable cause hearing to the chiropractor complained against by certified mail at least 15 days in advance of the hearing.

(d) Conduct of Probable Cause Hearing. The probable cause hearing shall be informal, and the secretary may establish at his discretion such procedures as are necessary to facilitate examination of the evidence. The Review Committee may consider evidence at the probable cause hearing which would not be admissible if offered at the hearing in a contested case.

(e) Action by the Review Committee. After examining the evidence presented at the probable cause hearing, the Review Committee may dispose of each charge in the formal complaint as follows:

- (1) If no probable cause exists to believe that a violation of G.S. 90-154 has occurred, the charge may be dismissed.
- (2) If the respondent admits the charge, he may be directed to cease and desist from commission of those acts which violate the provisions of G.S. 90-154.
- (3) If a charge is denied and probable cause is found, or if a charge, while admitted, is of such gravity as to make the imposition of punitive sanctions appropriate, the complaint shall be presented to the Board of Examiners for its decision on the merits in accordance with the statutes governing contested cases.

*History Note: Authority G.S. 90-142; 90-154;
Eff. December 1, 1988.*

§ 90-154. Grounds for professional discipline.

(a) The Board of Chiropractic Examiners may impose any of the following sanctions, singly or in combination, when it finds that a practitioner or applicant is guilty of any offense described in subsection (b):

- (1) Permanently revoke a license to practice chiropractic;
- (2) Suspend a license to practice chiropractic;
- (3) Refuse to grant a license;
- (4) Censure a practitioner;
- (5) Issue a letter of reprimand;
- (6) Place a practitioner on probationary status and require him to report regularly to the Board upon the matters which are the basis of probation.

(b) Any one of the following is grounds for disciplinary action by the Board under subsection (a):

- (1) Advertising services in a false or misleading manner.
- (2) Conviction of a felony or of a crime involving moral turpitude.
- (3) Addiction to or severe dependency upon alcohol or any other drug that impairs the ability to practice safely.
- (4) Unethical conduct as defined in G.S. 90-154.2.
- (5) Negligence, incompetence, or malpractice in the practice of chiropractic.
- (6) Repealed by Session Laws 1995, c. 188, s. 1.
- (7) Not rendering acceptable care in the practice of the profession as defined in G.S. 90-154.3.
- (8) Lewd or immoral conduct toward a patient.
- (9) Committing or attempting to commit fraud, deception, or misrepresentation.
- (10) Offering to waive a patient's obligation to pay any deductible or copayment required by the patient's insurer.
- (11) Failing to honor promptly a patient's request for a copy of any claim form submitted to the patient's insurer.
- (12) Rebating or offering to rebate to a patient any portion of the funds received from the patient's insurer, unless the sum rebated constitutes the refund of an overpayment to which the patient is lawfully entitled.
- (13) Advertising any free or reduced rate service without prominently stating in the advertisement the usual fee for that service.
- (14) Charging an insurer or other third-party payor a fee greater than a patient would be charged for the same service if the patient were paying directly.
- (15) Charging an insurer or other third-party payor a fee greater than the advertised fee for the same service.
- (16) Violating the provisions of G.S. 90-154.1.

- (17) Physical, mental, or emotional infirmity of such severity as to impair the ability to practice safely.
 - (18) Violating the provisions of G.S. 90-151 regarding the extent and limitation of license.
 - (19) Concealing information from the Board or failing to respond truthfully and completely to an inquiry from the Board concerning any matter affecting licensure.
 - (20) Failing to comply with a decision of the Board that is final.
- (c) If a licensee is found guilty in a contested case arising under subsection (b) of this section, the Board may assess the licensee the reasonable cost of the hearing held to make such a determination if the Board finds that the licensee's defense at the hearing was dilatory or not asserted in good faith.

§ 90-154.3. Acceptable care in the practice of chiropractic.

(a) It shall be unlawful for a doctor of chiropractic to examine, treat, or render any professional service to a patient that does not conform to the standards of acceptable care.

(b) For purposes of disciplinary action, the Board of Chiropractic Examiners may adopt rules that establish and define standards of acceptable care with respect to:

- (1) Examination and diagnosis;
- (2) The use of chiropractic adjustive procedures;
- (3) Physiological therapeutic agents;
- (4) Diagnostic radiology;
- (5) The maintenance of patient records; and
- (6) Sanitation, safety, and the adequacy of clinical equipment.

(c) If the Board has not defined a standard of acceptable care by rule, then the standard of acceptable care shall be the usual and customary method as taught in the majority of recognized chiropractic colleges.

(d) Nothing in this section shall alter the lawful scope of practice of chiropractic as defined in G.S. 90-143 or the limitation of license as defined in G.S. 90-151.

STATE OF NORTH CAROLINA
COUNTY OF WakeNORTH CAROLINA STATE BOARD
OF CHIROPRACTIC EXAMINERS

DISCIPLINARY COMPLAINT

COMPLAINANT

CHIROPRACTOR COMPLAINED
AGAINSTNAME: Barbara A. Nelson
ADDRESS: 2042 Englewood Drive
CITY: Apex
STATE: NC ZIP: 27539
TELEPHONE: 919-712-1354NAME: Dr. Ira Rubin
ADDRESS: 1125 Kildaire Farm Rd.
CITY: Cary
STATE: NC ZIP: 27511
TELEPHONE: 919-467-7191*****
I, THE UNDERSIGNED complainant, do hereby charge the Doctor of Chiropractic identified
above with negligencewhich I believe to constitute a violation of General Statute 90-154.3; 90-154.5(1)
that said Doctor of Chiropractic, on or about the _____
day of April through May, 2003

STATEMENT OF ACTION

Please see attached statement.State of North Carolina
County of WakeBarbara A. Nelson, being first duly sworn, deposes and says:
That she is the Complainant in the foregoing action; that the same is true of her
own knowledge except as to those matters and things therein stated on information
and belief and as to those, she believes the same to be true.Barbara A. Nelson
COMPLAINANTSworn to and subscribed to before me this 25 day of
June 10 2003Notary Public Kathleen M. Kelly (SEAL)My commission expires: 4-11-2004

I began treatment for lower back pain with Dr. Rubin in August 2002. By the first of 2003, I was doing well and on maintenance appointments every six weeks.

In April 2003 I began to experience a tingling sensation in my left leg and a "pins and needles" sensation in my foot. On April 17 I received an adjustment. The symptoms continued so I had another adjustment on April 24. Upon leaving the office, I still had the symptoms so I returned. Dr. Rubin said that the adjustment had been good and I should wait a few days.

I then began to experience pain while driving. The pain originated in my left hip, traveling down the outside of my thigh into my calf. I went for a treatment on May 8.

The pain persisted. On May 22 I told Dr. Rubin that the treatments weren't helping and that the pain was becoming more intense. After performing an adjustment, without checking my muscle tone, he told me that my muscles were not strong enough to maintain the alignment. He asked if I had been doing the exercises that he had prescribed. When I told him that I had been doing comparable exercises in the water, he stated, "Then you aren't doing the exercises." He then gave me a second sheet of exercises using an exercise ball.

Throughout the months of treatment I had continued to participate in water aerobics classes on the average of five times a week. I routinely did exercises to strengthen my abdominal, gluteus maximus, and thigh muscles and did additional exercises to maintain flexibility in my back and pelvis.

After my appointment on May 22 I did not only the water aerobics, but the original exercises he prescribed on a daily basis. Then I began to experience pain while standing and walking as well as sitting. I made an appointment for a consultation on June 2. He concluded that I had a disc problem and suggested that I contact my physician to obtain a cortizonal prescription.

For the past five weeks I have experienced intense unrelenting pain. The pain is relieved only when I am lying flat on my back.

Given that:

1. the tingling in my leg was a new symptom
2. the symptoms got progressively worse
3. the adjustments did not relieve the symptoms
4. my muscle tone was good
5. my alignment was good,

Dr. Rubin was negligent in not identifying a serious disc problem sooner.

Barbara A. Nelson
2042 Englewood Drive
Apex, NC 27539

VANCE C. KINLAW
ATTORNEY AT LAW

101 S. ELM STREET, SUITE 215
GREENSBORO, N.C. 27401

TELEPHONE: (336) 272-7341
FAX: (336) 272-8602

November 10, 2003

Barbara A. Nelson
2042 Englewood Drive
Apex, NC 27539

Ira Rubin, D.C.
1125 Kildaire Farm Road
Cary, NC 27511

Re: Complaint of Ms. Nelson dated June 25, 2003

Dear Ms. Nelson & Dr. Rubin:

This letter will serve to notify you of the decision of the Chiropractic Review Committee with respect to the above-referenced complaint. A probable cause hearing was held in this matter on November 7 at Research Triangle Park.

The complaint alleges that Dr. Rubin was negligent in failing to make a timely diagnosis and referral after Ms. Nelson began experiencing symptoms of disc protrusion. The facts presented at hearing were as follows: Ms. Nelson began treating with Dr. Rubin for low-back pain in August, 2002. She improved under chiropractic care; and by early 2003, treatment consisted of maintenance visits approximately once every six weeks. In April 2003, she began to experience "tingling and pins and needles" but not acute discomfort in her left leg. Dr. Rubin saw her on April 17, April 24, May 8, and May 22. She told him that her symptoms were progressively worsening, but his treatment remained the same; and he emphasized the need for her to be conscientious about exercising.

On June 2, Ms. Nelson scheduled a consultation when her leg pain, which had previously occurred only when she had been sitting, began to occur while she was standing or walking as well. At that point, Dr. Rubin told her he suspected a disc problem and referred her to an M.D. The M.D. first rendered conservative treatment for about three weeks, but when her symptoms did not improve, an MRI was made on June 25. The MRI confirmed the diagnosis of disc protrusion at L5-S1; surgery was performed on June 27.

The legal issue presented by the complaint is whether a reasonable practitioner would have suspected Ms. Nelson's disc problem in less than the six weeks and four office visits it took Dr. Rubin to refer her out. In the opinion of the Review Committee, Dr. Rubin's differential diagnosis and referral was made within an acceptable period of time. We note that the M.D. who received the referral took almost four weeks to arrive at a definitive diagnosis even though Ms. Nelson's symptomology was much more acute in June than in April.

Based on the foregoing evidence, we find no probable cause upon which to refer this complaint to the full Board of Chiropractic Examiners. No adverse entry will be made in Dr. Rubin's licensure records, and this letter will conclude our investigation.

Yours truly,



Vance C. Kinlaw
Attorney for the North Carolina
Board of Chiropractic Examiners

cc: Joseph B. Chambliss Jr., Esq.

I filed a complaint of negligence against a chiropractor with the NC Board of Chiropractor Examiners. At a probable cause hearing held in November, 2003, two members of the Board noted discrepancies between the patient records that I had submitted with my complaint and the patient records that the chiropractor had brought with him. The two members did not disclose what the discrepancies were nor did they provide me an opportunity to examine the second set of records. My complaint was dismissed. In dismissing my complaint the Board failed to employ the definition for "acceptable care" found in G.S. 90-154.3 and referred to results from diagnostic tests which had not been performed.

After obtaining a copy of the second set of records I informed the Board that the patient records had been falsified. Results from diagnostic procedures that had not been performed and statements attributed to me that I had not made had been added. Treatments and assessments had been changed. It was evident to me that the chiropractor used the information in my complaint to alter the records in such a way so as to discredit my complaint. The Board denied that any "changes or tampering" had been done. They reiterated the chiropractor's explanation that the discrepancies resulted from his assistant's failure to darken spaces on a Scantron sheet. The chiropractor uses a system of patient records which involves darkening spaces with a number two pencil on Scantron sheets. These sheets are then "read" by a scanner and the notes are printed. The process is similar to scanning the barcode of a can of peas at a grocery store and having "DM Peas--\$.79" appear on the receipt. I have used various Scantron sheets in academia for decades and therefore am able to determine whether the changes and additions could have resulted from his assistant's oversight.

I informed the Board that in order for the changes to occur on the second set of records, someone would have had to either erase a mark from one space and place a mark in a different space or replace the original sheet with a substitute. I also informed the Board that the majority of additions would not be options on the Scantron sheet and would require someone typing in the additions. I also sent a list of the changes. The Board did not respond to any of these correspondences. In addition, a Board member refused to meet with me so that I could show him the two sets of records. No one representing the Board showed up for a meeting on March 23, 2004 called by the Governor's Office of Boards and Commissions to attempt to resolve this.

Even though the two Board members who had access to both sets of records would have no way of knowing whether the chiropractor actually performed the diagnostic procedures which he added to the second set of notes and even though the changes and additions were obvious, occurred in the records for the dates cited in my complaint and could not have occurred the way the chiropractor said that they did, the Board repeatedly denied the existence of the changes and refused to examine the records.

I then sent a second formal complaint to the Board alleging negligence in maintaining patient records. Based on the chiropractor's testimony at the probable cause hearing, the first set of notes were created when I asked for a copy one month after my last appointment. This means that during the entire ten months that I was in treatment, no patient records existed. I also included allegations of falsifying records and lying to the Board concerning how the discrepancies had occurred. Without either a probable cause hearing or a review by a duly constituted review committee as specified in Title 21, chapter 10 of the administrative code this complaint was dismissed as "frivolous". In addition to dismissing this complaint, the Board threatened me with civil action or criminal prosecution for filing this complaint. The Board also threatened that if I do not "cease and desist" from attempting to generate additional disciplinary proceedings against the chiropractor, the Board will forward copies of my recent complaint to the chiropractor's attorney.

It is my understanding that your committee is charged with determining whether the Board exercised its authority in a way that is inconsistent with legislative intent.

Was it the intent of the legislature in establishing the Professional Boards that a Board should:

1. Refuse to objectively examine evidence and evaluate testimony.
2. Fail to abide by definitions in general statutes and deny due process as defined in Rules, and
3. Threaten a complainant with legal retaliation to prevent the complainant from seeking redress from your committee?

I request that you instruct the Board of Chiropractic Examiners to hold a hearing into my allegations that the chiropractor was negligent in maintaining patient records, falsified records and lied to the Board, during which I be allowed to question the chiropractor about the two sets of records.

I further request that:

1. All testimony be under oath and that the chiropractor be informed of specific consequences if he lies under oath.
2. The chiropractor bring copies of the Scantron sheets which he used while I was in treatment so that members of the Board will better understand this system of maintaining patient records
3. The chiropractor's assistant who is being held responsible for the discrepancies be available for questioning.
4. That the Board not send the chiropractor a copy of my second complaint. The chiropractor used the information in my first complaint to falsify his records. According to the President of the Board, the Board did not retain a copy of the notes that the chiropractor presented to the Board. Therefore there is nothing to prevent the chiropractor from again altering his records.
5. I be allowed to audio tape the hearing if I so wish.

At your request I will send you any documentation that you need and/or show the two sets of records to you or your designee.

Thank you for your careful consideration of this complaint.

Barbara A. Nelson, Ph.D.
2042 Englewood Drive
Apex, NC 27539

919 772-1354
barbnel2@aol.com

I filed a complaint of negligence against a chiropractor who failed to diagnosis a serious condition that developed while I was under his care with the Board of Chiropractor Examiners. At a probable cause hearing held in November, 2003, two members of the Board noted discrepancies between the patient records that I had submitted with my complaint and the patient records that the chiropractor had brought with him. The two members did not disclose what the discrepancies were nor did they provide me an opportunity to examine the second set of records.

The chiropractor uses a system of patient records which involves darkening spaces with a number two pencil on Scantron sheets. These sheets are then "read" by a scanner and the notes are printed. Scantron sheets are frequently used in academia to quickly score multiple choice tests. The way scanning is done is analogous to a cashier scanning the bar code on a can of peas. The scanner reads the barcode and prints DM peas--79 on the receipt.

The system that the chiropractor uses produces generic patient records.

People with the same constellation of marks would have the same patient record

It is not possible to record unique or rare symptoms or information that is specific to an individual

It is also not possible to record information that has a great deal of variability such as a history of symptoms or the results from diagnostic procedures.

Examples of discrepancies

April 24 Plan

Original—"The initial protocol is to remain as previously detailed."

Altered—"The patient will be continually monitored. Her treatment is now a PRN basis. Her home participation instruction is changed to ice.

All the symptoms were in my left leg

April 24 under treatment

Original—"A specific spinal adjustment to the right sacroiliac joint

Altered—"To the left sacroiliac joint a specific spinal adjustment

Not only were there discrepancies between the two sets of records, there were also discrepancies between what I said and the second set of records.

April 17, 2003

I stated that I had begun to experience tingling in my left leg and pins and needles sensations in my foot

Original records -Assessment--"From my observation the patient's symptoms are exhibiting measurable improvement

Altered records "It is my determination that the patient's symptoms have worsened relatively.

The only two ways that these types of changes could have been made are either someone erased the mark in one space and marked a different space or someone substituted a second Scantron sheet for the original

These changes appeared only in the records for the dates cited in my complaint

In addition to the discrepancies items were added that would not have been options on the Scantron sheet.

April 17 and 24 Results from six diagnostic procedures were added. The results would have been too variable to be options on the Scantron sheets.

April 24--"The patient came in after treatment and was told to wait a couple of days"

May 22—"The patient was given ball exercises and told to stop water aerobics."

These additions would have been too unique to be options on the Scantron sheet.

In order for these additions to appear, someone would have had to type these into the records.

There were a total of 10 changes and 12 additions that would have not been options on the Scantron sheet that appeared in the records for the 4 dates cited in my complaint

My complaint was dismissed. In dismissing ^{page 6} my complaint the Board failed to employ the definition for "acceptable care" found in G.S. 90-154.3. The default criterion for determining acceptable care is the "usual and customary method as taught in the majority of recognized chiropractic colleges". The criterion that the Board used was the frequency of visits. Even though the chiropractor failed to document my symptoms, failed to take a history, failed to perform any diagnostic tests, failed to have notes from previous visits, made an incorrect diagnosis of poor muscle tone, and prescribed exercises which had I performed them would have resulted in intense pain and possibly additional nerve damage the Board concluded that the chiropractor was not negligent because I had seen him 4 times in 6 weeks.

After obtaining a copy of the second set of records I informed the Board that the patient records had been falsified. Results from diagnostic procedures that had not been performed and statements attributed to me that I had not made had been added. Treatments and assessments had been changed. It was evident to me that the chiropractor used the information in my complaint to alter the records. In a letter dated Jan 20, 2004 the Boards Executive Secretary stated that "The doctors serving on the committee reviewed both sets of daily notes carefully and agreed there was no tampering or changing of the records." "In an attempt to furnish the information to you quickly, it appears assistants in the chiropractor's office failed to darken all circles adequately making some portions of a daily note unprintable."

I informed the Board that the changes and most of the additions could not have resulted from the chiropractor's assistant failure to darken spaces. I sent a list of the changes with a copy of the relevant pages from the second set of notes to the Board. I requested that the Board reconsider its decision. The Board did not respond to any of these letters. In addition, a Board member refused to meet with me so that I could show him the two sets of records. No one representing the Board showed up for a meeting on March 23, 2004 called by the Governor's Office of Boards and Commissions.

Even though the two Board members who had access to both sets of records would have no way of knowing whether the chiropractor actually performed the diagnostic procedures which he added and even though the changes and additions were obvious, occurred in the records for the dates cited in my complaint and could not have occurred the way the chiropractor said that they did, the Board repeatedly denied the existence of the changes and refused to examine the records.

I then sent a second formal complaint to the Board based on the information that I obtained after the probable cause hearing. According to the Board, the "issues raised in your recent complaint were thoroughly investigated at the probable cause hearing on your original complaint. We consider this res judicata and therefore decline to make any further investigation or initiate any new disciplinary action against the chiropractor." These issues could not have been "thoroughly investigated" weeks before I raised them. In addition the letter summarizing the findings of the probable cause hearing did not address any of these issues and, in fact, did not even note that there were two sets of records.

In this second complaint:

1. I alleged that the chiropractor was negligent in maintaining patient records. Based on the chiropractor's testimony, the first set of records was created when I asked for a copy which was one month after my last appointment. This means that during the entire ten months that I was in treatment, no patient records existed. The Board did not dispute the fact that the original records were not created until I requested them. Therefore the issue before the Board was whether failing to have any records during the entire course of treatment would be considered negligence in maintaining patient records according to the default criterion of the usual and customary method as taught in the majority of recognized chiropractic colleges. The Board did not address this issue.

I alleged that the chiropractor had altered the records that he had submitted to the Board and again listed some of the changes that had been made. It seems logical that a thorough investigation of this charge would involve examining the two sets of records. There is no evidence that The Board did this.

I alleged that the chiropractor lied to the Board when he said that the discrepancies resulted from his assistant's failure to darken the spaces before creating the records. The Board did not dispute the fact that the chiropractor stated that the discrepancies resulted from his assistant's oversight. Therefore the issue before the Board was whether this explanation could account for the changes and additions. It seems logical that a thorough investigation into this issue would include asking someone familiar with the Scantron sheets to determine how the changes and additions were made. There is no evidence that the Board did this.

Failing to have any records during the course of treatment and altering records were not listed specifically as grounds for disciplinary action in the General Statutes. My fourth allegation, that the chiropractor charged an insurer more than a patient who pays directly, is listed specifically as grounds for disciplinary grounds. The Board did not address this issue.

a determination of whether the complaint is major or minor
Without either a probable cause hearing or a review by a duly constituted review committee as specified in Title 21, ^{Section 1058c} Chapter 10 of the administrative code this complaint was dismissed as "frivolous" and retaliatory. The Board accused me of having a personal vendetta against the chiropractor. In addition, the Board threatened me with civil action or criminal prosecution for filing this complaint. The Board also threatened that if I do not "cease and desist" from attempting to generate additional disciplinary proceedings against the chiropractor, the Board will forward copies of my recent complaint to the chiropractor's attorney who they are confident will act as aggressively as the law permits to protect the chiropractor's interests.

Falsifying patient records is
not listed specifically as grounds for disciplinary
action in the US. The Board decided that this allegation
was frivolous. Two other allegations are listed
specifically as grounds for disciplinary action. Procedures
are in place for the Board to dismiss these without holding

It is my understanding that your committee is charged with determining whether the Board exercised its authority in a way that is inconsistent with legislative intent.

Was it the intent of the legislature in establishing the Professional Boards that a Board should:

- Fail to disclose the nature of discrepancies that they discovered in the evidence *bury a probable cause hearing*
- Refuse to examine evidence and evaluate testimony
- Summarily dismiss allegations without specifying ^{new} the allegations were investigated and the conclusions reached. *fail to follow procedures and*
- Fail to abide by definitions in general statutes and deny due process as defined in Rules, and
- Threaten a complainant with legal retaliation to prevent the complainant from seeking redress from this committee?

I request that you instruct the Board of Chiropractic Examiners to hold a hearing into the allegations stated in my second complaint during which I be allowed to question the chiropractor about the two sets of records.

If making such a request is not an option but if you decide that the Board has exercised its authority in a way that is inconsistent with legislative intent, I respectfully urge you to withdraw the authority to adjudicate complaints from this Board. It would be irresponsible for this Committee to continue to allow the Board this authority if the Committee believes that the Board is either unwilling or unable to fairly and competently hear complaints.

~~Fail to use criterion establish~~

Fail to abide by definitions, to follow procedure for determination of probable cause and deny due process as defined stated in general statutes and rules

VANCE C. KINLAW
ATTORNEY AT LAW

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FAX: (336) 272-8602

November 10, 2003

Barbara A. Nelson
2042 Englewood Drive
Apex, NC 27539

Ira Rubin, D.C.
1125 Kildaire Farm Road
Cary, NC 27511

Re: Complaint of Ms. Nelson dated June 25, 2003

Dear Ms. Nelson & Dr. Rubin:

This letter will serve to notify you of the decision of the Chiropractic Review Committee with respect to the above-referenced complaint. A probable cause hearing was held in this matter on November 7 at Research Triangle Park.

The complaint alleges that Dr. Rubin was negligent in failing to make a timely diagnosis and referral after Ms. Nelson began experiencing symptoms of disc protrusion. The facts presented at hearing were as follows: Ms. Nelson began treating with Dr. Rubin for low-back pain in August, 2002. She improved under chiropractic care; and by early 2003, treatment consisted of maintenance visits approximately once every six weeks. In April 2003, she began to experience "tingling and pins and needles" but not acute discomfort in her left leg. Dr. Rubin saw her on April 17, April 24, May 8, and May 22. She told him that her symptoms were progressively worsening, but his treatment remained the same; and he emphasized the need for her to be conscientious about exercising.

On June 2, Ms. Nelson scheduled a consultation when her leg pain, which had previously occurred only when she had been sitting, began to occur while she was standing or walking as well. At that point, Dr. Rubin told her he suspected a disc problem and referred her to an M.D. The M.D. first rendered conservative treatment for about three weeks, but when her symptoms did not improve, an MRI was made on June 25. The MRI confirmed the diagnosis of disc protrusion at L5-S1; surgery was performed on June 27.

The legal issue presented by the complaint is whether a reasonable practitioner would have suspected Ms. Nelson's disc problem in less than the six weeks and four office visits it took Dr. Rubin to refer her out. In the opinion of the Review Committee, Dr. Rubin's differential diagnosis and referral was made within an acceptable period of time. We note that the M.D. who received the referral took almost four weeks to arrive at a definitive diagnosis even though Ms. Nelson's symptomology was much more acute in June than in April.

Based on the foregoing evidence, we find no probable cause upon which to refer this complaint to the full Board of Chiropractic Examiners. No adverse entry will be made in Dr. Rubin's licensure records, and this letter will conclude our investigation.

Yours truly,



Vance C. Kinlaw
Attorney for the North Carolina
Board of Chiropractic Examiners

cc: Joseph B. Chambliss Jr., Esq.



174 Church Street, North
Concord, North Carolina 28025
(704) 793-1342

January 20, 2004

Ms. Barbara Nelson
2042 Englewood Dr.
Apex, NC 27539

Dear Ms. Nelson:

As you are aware, the complaint you filed against Ira Rubin, DC was scheduled and heard November 7, 2003. You will recall stating in your complaint that you were on maintenance status every 6 weeks at Dr. Rubin's office. In April 2003 you began experiencing "pins and needles" in your left leg and foot and was treated by Dr. Rubin on April 17, 2003. The tingling sensation continued and you received another treatment April 24, 2003. You later began experiencing pain while driving and again saw Dr. Rubin May 8, 2003 and May 22, 2003. Following your appointment on May 22nd, you made an appointment for a consultation June 2, 2003 at which time Dr. Rubin diagnosed a possible disc problem and referred you to your medical physician. The charge filed was that of unacceptable care in that you felt Dr. Rubin did not cause your problem, but he should have diagnosed it earlier so you would have experienced the pain a shorter period of time.

During the hearing a discrepancy was found between the permanent daily notes and notes you presented with your complaint. This appears to remain a concern of yours, therefore a liaison from the Governor's office requested that we contact you to again explain why the two sets of notes differed. The doctors serving on the committee reviewed both sets of daily notes carefully and agreed there was no tampering or changing of the records. Dr. Rubin utilizes an optical note reading program wherein circles are darkened and notes reproduced through the computer. Should a circle not be darkened enough, it would not be read by the machine and therefore that portion would not be printed. In an attempt to furnish the information to you quickly, it appears assistants in Dr. Rubin's office failed to darken all circles adequately making some portions of a daily note unprintable.

Hopefully this will assist in explaining the matter to you. If we can be of further assistance, please advise.

Sincerely,

Carol Hall

N.C. Board of Chiropractic Examiners

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January 26, 2005

Ms. Barbara A. Nelson
2042 Englewood Drive
Apex, NC 27539

Ms. Nelson:

This will confirm that the Board of Chiropractic Examiners has received your disciplinary complaint dated January 10, 2005. Both this complaint and your original complaint have been reviewed by the current Secretary of the Board, Dr. Dennis Hall, and by the undersigned.

Dr. Hall and I believe that the issues raised in your recent complaint were thoroughly investigated at the probable cause hearing on your original complaint. We consider this matter *res judicata* and therefore decline to make any further investigation or initiate any new disciplinary action against Dr. Ruben.

We note that over the past year, you have attempted to obtain reversal or reconsideration of the Chiropractic Review Committee's decision in a number of public forums where jurisdiction did not lie (i.e., the offices of the Governor, the Attorney-General, the President Pro Tem of the Senate, and the Joint Legislative Administrative Procedure Oversight Committee of the General Assembly). The one tribunal which the law contemplates as a potential source of relief for you, the civil judicial system, is the one tribunal you have avoided. In our view, your actions are indicative of bad faith.

It would appear that you are engaging in a personal vendetta against Dr. Ruben. It is our responsibility to protect the legal authority of the Board of Examiners from being misused for such a purpose. We believe that your complaint of January 10, 2005 is frivolous and retaliatory. In our opinion, you have crossed a legal boundary with the filing of your second complaint and have exposed yourself to civil and perhaps criminal liability for malicious prosecution.

If you do not cease and desist from your efforts to generate additional disciplinary proceedings against Dr. Ruben, we will have no choice but to forward copies of your recent complaint to his attorney. I am confident that if called upon to do so, Mr. Chambliss will act as aggressively as the law permits to protect Dr. Ruben's interests.

This letter is the final communication you will receive from the staff of the Board.

Yours truly,



Vance C. Kinlaw

Copy of Vance C. Kinlaw's Comments before the
Joint Administrative Procedure Legislative Oversight Committee

February 9, 2006

Vance C. Kinlaw, Counsel to the Board of Chiropractic Examiners, was recognized. This is actually the second time that Ms. Nelson had appeared before this committee in connection with this matter, she was also here January a year ago. So this is becoming an annual event. I would be happy to respond to any questions that the committee has concerning the Board's procedures, rules and statutes, in this particular case or in any case. I always appreciate the opportunity to come before the committee and have it scrutinize what they are doing and receive the guidance that the committee can impart.

Senator Webster asked if there were two sets of records (as Ms. Nelson had stated)? There actually were three. Senator Webster wondered if those records were made available to Ms. Nelson, and Mr. Kinlaw said that they were, that she attained those additional sets because the Board insisted that the physician provide them to her. It was as a result of the probable cause hearing and the Board's realization that there were some discrepancies in the records, that she was first alerted as to the existence of the discrepancies and the Board was not able to get copies of those record on the day of the hearing, but it directed the physician to supply every version of her records to her. It was on the basis of the documentation that the Board insisted the physician provide that she poured over these records and identified what she believed were material discrepancies.

Senator Webster had further questions about why the multiple sets of records were not disclosed to Ms. Nelson. Mr. Kinlaw said that it was more complicated than that, that what the doctor generated is what is called a "travel card" which is basically coded information. It is shorthand, which is common for physicians to use. These travel cards are actual physical cards that are marked up, checked off, a standardized, noted quotation of the services that were performed. That data, which would be incomprehensible to anyone outside the profession unless the code itself was explained, was taken to a chiropractic assistant who was responsible for actually developing a narrative type record that anyone could look at. This particular physician, as many do, used a computer program to generate these narrative records, which involves, as Ms. Nelson indicated, collaring in squares and boxes in various locations that the computer reads and produces records. What the Board discovered as a result of its inquiry was that there were discrepancies between the version of the record that was generated by the computer that the doctor sent to her in advance of her hearing, at her request, and the narrative version of the records that the doctor himself presented. And he acknowledged that discrepancy and explained it to the Board's satisfaction. He also produced, at the hearing, the travel cards themselves, the encoded data, and the physicians members of the Review Committee examined those line-by-line and were satisfied with the doctor's explanation as to why these discrepancies existed. This was all news to Ms. Nelson and, ultimately, after she had a chance to independently pour over these narratives, but he said he did not think the travel cards were made available to her, she made her own independent determination that these were material discrepancies. But the physician members of the Review Committee were satisfied that

the discrepancies that did exist, which the doctor acknowledged, were either immaterial or otherwise harmless and that is why it was not necessary that any discrepancies in the records be evaluated to make a determination in this case, because there was no dispute about the underlying chronology of treatment, about the dates and number of office visits, about what occurred at each office visit. Basically, if you will look at your handout you will see that in her original complaint and the Board's letter presenting the determination of lack of probable cause, the Board cited the facts and the facts cited correspond almost 100 percent with the narrative that Ms. Nelson outlined in her original complaint. So her version of events was the version of events that the Board used in making its determination. The whole problem with the discrepancies and the narrative version of the records was incidental and tangential, but it was thoroughly reviewed in the Review Committee hearing. That is why these hearings are held. Sometimes these hearings reveal things that are of interest to the Board, which are really not of interest to the complainant. Not the gravement of the complaint. If you will look at the original complaint, it was not in anyway predicated on any defects in record keeping. In the Board's view this was a situation in which Ms. Nelson became frustrated that her original complaint did not produce the outcome that she expected and that she decided to be very persistent in trying to play a game of "got-cha" with the doctor and basically she insisted and is now demanding that the Board use the powers that the legislature had granted to it in order to play that game. That is analogous to the victim of a crime demanding the right to tell a policeman when, where, at whom and how many times to fire his gun. The Board stands on the record in this case as it did a year ago. The file is open and I am willing to answer any questions.

VISITOR REGISTRATION SHEET
JOINT LEGISLATIVE
ADMINISTRATION PROCEDURE OVERSIGHT February 9, 2006

Name of Committee

Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE CLERK

<u>NAME</u>	<u>FIRM OR AGENCY AND ADDRESS</u>
Art Britt	NC DOL
Jennifer Chrischon	NC DOL
Jennifer Haignwood	NC DOL
Vance Kankas	NC BOE
Bobby White	NC Dental Board
Terry Friddle	NC Dental Board
Cherie Smith	NC Dental Board
DR. Stan Hildebruy	NC Dental Board
DR. Ron Brown	NC Dental Board
Dr Barbara Nelson	Complainant
Sonja Hickey	FTCC Dental Hygiene Student
Susan Pell	FTCC D.H. Program Coordinator
SALLY MAURIELLO	UNC School of Dentistry, Chapel Hill
Shawn Tanner	NCCCS
JOE DELUCA	NC OAH/RRC
LEE SETTLE	NC RRC
Jennie J. Hayman	NC Rules Review Comm
Bobby Bruan	NC OAH/RRC
Colleen Kochanek	NC BHA
Betsy Hardin	NC OHA
Debra A. Parker	NCCCS - Office
ELLEN SPRINGER	NC OAH
Molly Masich	OAH
Dana Shotes	OAH
Julian Mann	OAH
Elliot A. Ruching	NE Dept. of Secretary of State
K. Paul Williams	NC HBSA
Angela Williams	FTCC

Date _____

FIRM OR AGENCY AND ADDRESS[illegible]

**JOINT LEGISLATIVE
ADMINISTRATIVE PROCEDURE
OVERSIGHT COMMITTEE**

March 9, 2006

10:00 a.m. – Room 544

MINUTES

The Joint Legislative Administrative Procedure Oversight Committee met on Thursday, March 9, 2006 in Room 544 of the Legislative Office Building. Members present included: Senator Nesbitt Co-Chair, Senators Dorsett, Hartsell, Purcell, Stevens, Webster, and Representatives Eddins, Gibson, Jones, Justus, and Stiller.

Senator Nesbitt called the meeting to order, welcomed members, visitors, and staff and entertained a motion for approval of the February 9, 2006 Minutes. Rep. Gibson so moved and the motion carried.

The issue of proposed Dental Board rules regarding examination of dental hygienists was before the committee. Senator Nesbitt recognized Mr. Bobby White, Chief Operating Officer of the NC Board of Dental Examiners. As requested at the last meeting, Mr. White brought the committee a proposal to address concerns raised regarding the Board's use and acceptance of a third-party regional dental hygiene examination. *See Attachment I.*

That proposal included three recommendations:

- That the Board offer both the traditional NC exam, with the Council of Interstate Testing Agencies (CITA) exam offered completely as an option. The NC exam would cost \$170 and the CITA exam would cost \$700.
- That the Board be allowed to accept the results of either exam in 2006 as a component of the licensing process and to allow the hygiene rules as currently published to proceed through the rule making process.
- That a member or members of the Oversight Committee introduce legislation in the upcoming session that would clear up any perceived ambiguity as to statutory authority for the Board to allow testing by a third party. (Proposed statutory changes are included in *Attachment I.*)

Mr. White explained that the language he submitted in the proposal is language taken from other statutes that give the authorization for boards to accept the results of third-party regional or national exams. He emphasized that the Board was looking for guidance and was not interested in being confrontational. He said the Board had moved forward with the CITA exam because it felt that it had the authority to do so, but if that is not the case, he asked the committee to give the Board that authority.

Mr. White said that on February 22, 2006, the Board "over-nighted" to all dental hygiene schools in the state notice that it would be offering both the North Carolina exam and the CITA exam. The deadline to apply for the NC exam was March 9, 2006, while the deadline to apply for the CITA exam is May 9, 2006.

Members were concerned about how applicants were notified and about the short notice they were given to apply to take the NC exam.

Mr. White said he received a letter from Community College President Martin Lancaster asking that the deadline be extended, and the Board would be happy to do that if it had the statutory authority to do so. (*See Attachment II*)

Senator Dorsett asked Mr. White whether the in-state exam would be phased out after this year. Mr. White said that the rules, as proposed, would keep both in place and the Board would decide which exam would be offered.

Senator Stevens said that if the end-goal of the CITA initiative is to get more hygienists in the state, he wasn't certain that taking a test that only allows one to practice in North Carolina, Mississippi, and Puerto Rico gets us to that point. He suggested that it would be better to take a year, go through the legislative process, and give people plenty of notice. By that time, perhaps other states would have come into the multi state process.

Mr. White said there is urgency at the national level with regard to the development of national and regional exams. The CITA organization has two other members, Alabama and Mississippi. Louisiana, which is awaiting authorizing legislation, has joined as an associate member, as has Alabama. The urgency is that CITA wants to become a player in the national examination process.

Senator Dorsett noted that as it stands now, there are only two other members in CITA. Mr. White said that was correct.

Senator Dorsett also asked how CITA arrived at the \$700 fee, particularly since the reciprocity did not extend beyond two states.

Mr. White said that CITA arrived at that fee because that will be the fee that the American Board of Dental Examiners (ADEX) will charge. When ADEX was unable to produce their product as they said they would by this time of the year, the NC Board decided it needed to develop a regional exam that will mirror, as closely as possible, the developing national exam, so when the ADEX exam is finalized, the Board will be able to argue that North Carolina students have essentially taken that kind of exam and should receive reciprocity nationally.

Senator Dorsett agreed with Senator Stevens that this process was going too quickly and asked if the Board considered that since it is moving toward a national exam, that in the interim it could take the time to wait and use the national instead of moving toward a regional exam.

Mr. White said that they were hoping that the national exam would be in place, but the process faltered and in the meantime, the CITA organization, Mississippi and North Carolina, said that it could develop a similar exam and argue that it is, in fact, the equivalent of that exam. Then when the national process gets back on track, NC will be on track with them.

Senator Webster asked for clarification about the costs involved.

Bobby White said that, this year, the NC exam will cost \$170, but if the Board continues to offer that exam, the fee is going to have to be increased. But the CITA exam, being at a regional and a national level, would be \$700. The reason for this is legal defensibility which requires the Board to take the exam through psychometric analyses and legal verification. Those things are tremendously expensive to make certain that the exam is legally defensible, so that is why going to a regional exam with shared expenses makes more sense to the Board.

Senator Nesbitt asked Mr. White, how many of the current 248 (out of a possible 250) applications the Board has received asked to take the NC exam and how many asked for CITA. Mr. White said that probably because of the cost, less than ten percent of the applicants were going for the CITA exam.

Senator Webster wondered what the exam needed to be defended against.

Mr. White explained that if an applicant failed, the Board would need to be able to defend the exam to say that it is a valid test.

Senator Stevens wondered why the newly-formed CITA group was chosen when there are established testing agencies that have been doing this for 35 years. There are, for example, the Central regional Dental Testing Services, Northeast Regional Board, the Southern Regional Testing Agency and the Western Regional Examination Board.

Mr. White said that CITA is being formed by traditionally independent states like North Carolina that have been left out of the process. Had the Board chosen one of those large regional testing entities, individual Board members would have no input in examinations. The NC Board believes that in order to protect the public, it must have a "hands-on" approach, with oversight and quality assurance.

Senator Nesbitt recognized Susan Spears Ellis, Dental Hygiene Program Coordinator at Fayetteville Tech Community College. She said she was before the Committee to represent the position of the community colleges and in defense of Dr. Martin Lancaster's letter to Mr. White. She gave members a history of the issue, that in the fall of 2005, at a program coordinator's meeting they were informed that CITA was being considered and that there were still many details to work out. Shortly before Christmas, they were informed that "it was a done-deal." Students had very short notice to prepare and that was one of their issues the last time they were before the committee.

Ms. Ellis reminded the members that accreditation standards require that they inform, not just students, but applicants of the cost of the 2-year program. Students were informed two months prior to the examination date that the cost would not be \$170, but would be \$700 instead and with that fee and other related fees, the licensing exam would cost in excess of \$1,000.

On the reciprocity issue, Ms. Ellis said that if CITA exam is taken, as it is now, one could transition to Louisiana, Mississippi, Puerto Rico, or Alabama. Alabama is sort of the "laughing stock" in the country right now, with questionable training and licensure requirements.

In particular, she was concerned, as expressed in Dr. Lancaster's letter to Mr. White that students were given only two weeks to make a decision to take the NC state exam. The exams will be given June 8th (NC Exam) and June 9th (CITA) and there were two months difference in the deadline to get in the applications, March the 9th for the NC exam and May 9th for CITA.

Ms. Ellis said that students have been given a chance to take the state exam this year, but they don't know at this time, if some fail the exam, whether or not there will be a make-up exam, nor do they know if they will be given a choice next year.

Regarding reciprocity, Ms. Ellis said that in a lot of states with regional boards, it is expensive to take a regional board, but in most states, it is not required that the regional board be taken. There is credentialing, there is reciprocity, a hygienist can take an Ethics and Juris Prudence exam, or whatever, and can get licensed in other states.

She said it is the position of the NC Community Colleges that the Board should continue to offer both exams to the candidates and they should be able to take the NC exam if they want. She said there weren't many students in the community college programs that want to move around. Their goal is not to position students to be licensed and then move out of North Carolina, but rather to be licensed so they can stay in North Carolina. She asked that the candidates continue to be offered a choice and delay implementation of CITA until it can truly be a regional board.

Senator Nesbitt talked about what to do to extend the deadline and acknowledged that the Dental Board's rules require that applications be received 90 days prior to the exam, but under CITA, there is no such rule so they can allow those to come in later although the exams are given one day apart.

Discussion about the make-up exam followed. Senator Dorsett asked whether it was necessary to take the entire exam over or just the parts that the candidate failed.

Ms. Ellis said that for dental students, it is her understanding that they can take different sections. However, for the dental hygiene, there is a clinical and a written. The written can be taken on-line, like the CITA and that can be re-done just about any time, but the clinical is from start to finish.

Senator Webster asked about the background checks.

Ms. Ellis said that most of the licensing Bureaus in health fields require a background check.

Martha Taylor with the NC Dental Hygienists Association was recognized. She referred to a letter she had written to the committee which clarified the Association's position on the CITA issue. (*See Attachment III*)

Senator Nesbitt asked Ms. Taylor what she considered to be a good time frame to phase in the CITA exam. She couldn't be specific, but said definitely not this year.

Senator Dorsett asked how the Association would feel about the Board's continuing to offer both exams.

Ms. Taylor said she has been led to believe that this is the only year that the NC exam will be offered. After this year, the CITA exam will be the only exam offered. She felt that the Board should continue to offer both exams until things are at a point that the students are prepared economically, and until the Association has enough information to say that the CITA exam, or whatever regional exam is chosen, will meet the needs of the citizens of North Carolina.

Sen. Nesbitt asked if the regional exam gave the candidates something, such as reciprocity with surrounding states, would there be any need to offer both.

It was Ms. Taylor's understanding that other regional boards charged significantly more than \$170 to take the exam. In time, students should be able to factor in the additional funding to pay for a regional exam. The problem is that they did not have that opportunity for this year.

Rep. Jones asked how many hygienists come from other states, and what would be the requirement to become licensed in NC. Ms. Taylor said that at this time they would have to sit for the NC Board for licensure. However, there is a process whereby a person with enough experience, could be "licensed by credentials."

Discussion followed with regard to the current fee for Licensing by Credential.

Committee Staff Karen Cochrane Brown told the committee that although the statute gives the Board the authority to charge a maximum fee of \$1500, the Board adopted a rule charging \$750 for Licensing By Credentials so that is all that they can currently charge. The Board would have to adopt a rule to raise that amount.

Senator Purcell asked that the Chair define the role of the committee. Senator Nesbitt said that it was the committee's role to spot check rules that affect people to see that agencies and boards are not going outside their statutory authority and are abiding by the technical requirements of making rules. When dealing with a problem like dental hygienist licensing, there is the question, did the Dental Board have the authority to increase the fee to \$700 when the statute says that it can charge up to \$350. The Board was going to implement the CITA and give its examination authority to CITA, was that outside the rules? He felt that this plan violates the spirit of the law and that it is the committee's duty to tell the General Assembly about this and suggest a change in the law or rule, or whatever the committee feels is appropriate.

Senator Nesbitt said it was the Board's duty to look at this situation, and he felt that they had responded, in part, by allowing the NC exam to be taken for \$170 this year like they did last year. That was the committee's initial concern. Now the question is, does more need to be done. He said the issue put before the committee might be the deadline for application issue. That could be accommodated retroactively by introducing legislation in the short session to solve this problem. That is not the preferred way of doing business, but it is a way. If there are people who are unable to be licensed to practice their profession because of confusion about when a test was going to be given and what test would be given, the committee needs to address that.

The next question is what test will be given and Senator Nesbitt felt that was on the edge of the committee's authority.

Karen Cochrane-Brown agreed with Senator Nesbitt's comments about the committee's charge. She called attention to Mr. White's recommendations and said the committee might choose, in part, to accept or reject those recommendations.

There were concerns about the deadline and Senator Nesbitt said the committee would not want people left out. He asked Mr. White to report back to the committee at its next meeting as to whether anything needs to be done about extending the deadline.

Senator Dorsett said it was still not clear as to the intent of the Board whether it will continue to give the two exams.

Mr. White was reluctant to speak for the Board, but felt that the intent would be that, as the Board sees development on the national level with regard to the dental and dental hygiene exams, it will move to a regional exam next year, if not with CITA, then with one of the others. He said if it is the will of the committee to say that both exams should be offered, then the Board would listen to that very carefully.

Senator Nesbitt said the way the proposal is drawn, it would give the Board the authority to choose either or both exam and the Board would have the discretion to do whatever it wanted to do.

Senator Purcell thought that the Committee should not be dictating to the Board what kind of test it should give.

Senator Stevens said that as he understands it, all applicants are going to take the State exam this year. He would like for the Board to choose to not have the CITA exam this year. The Committee could go on and introduce the proposed legislation. The Board would have time to put everything in place and the students could be prepared.

Mr. William (Piggy) Potter representing the NC Dental Society was recognized. He said that the NC Hygienists' exam cost has been kept artificially low by the Board as requested by the Dental Society, and for various reasons. Part of that subsidy is taken from the renewal fees paid by dentists and hygienists. The other supplement has been that the exams for dentists and hygienists are given together, partly at the same time with some overlap so that the examiners there for dentistry can help with setting up the procedures. The Dental exam has been changed and will not be given in this context anymore, so the actual cost of giving the NC exam to hygienists will be much higher in the future, no matter what. So it is a false premise to say that the cost of the hygienist exam can remain at \$170.

Senator Nesbitt said that it may be necessary to introduce legislation to allow the Board to offer both exams this year, if the premise is correct that they didn't have the authority to do this to start with, to charge the \$700 fee. Another choice may be to do nothing until the Board builds consensus and asks for the committee's help.

Senator Nesbitt said the committee could help them have the other exam this year, but when the statute says that the Board can only charge \$350, that provision doesn't go away. He suggested that Ms. Cochrane-Brown draft three proposals for the committee to review at its next meeting. One of those proposals will be what the Board asked for, another regarding the dual testing this summer and one about extending the deadline.

Rep. Stiller suggested that committee consider changing the proposed language from "In lieu of" to "in addition to." He didn't have a problem with the last proposal, because the student would not have to take the regional exam.

Senator Webster said he would like to have a report at the next meeting of how many of the applicants are in state and out-of-state, and how many have requested to take the CITA exam and how many have requested to take the NC exam.

Senator Nesbitt said that the committee also needed to know if the Board received applications after March 9, 2006.

Discussion of the proposal to allow accredited Ocular prosthetists to be eligible for Medicaid reimbursement was the next order of business and Senator Nesbitt recognized Patrick L. Boyd, President, Carolina Eye Prosthetics, Inc. to address the committee. Mr. Boyd distributed a handout to the committee which is a part of these Minutes as *Attachment IV*.

Mr. Boyd said he represented probably the smallest occupation in the State, that there are five ocularists in the state, three of which are employed by Carolina Eye Prosthetics. They are located in Graham, NC primarily to be close to Duke University Hospitals, Wake Forest University Hospitals, UNC Hospitals for which he said they have a sole-source contract to provide ocular prosthetists services. For the past eighteen years, they have taken care of the working poor and indigent of North Carolina. He explained that on July 1, 2005, the State of NC began paying for ocular prostheses (artificial eyes) through Medicaid. Up until that point, the working poor had to use Services for the Blind and various charitable organizations for pay for these medically necessary prostheses.

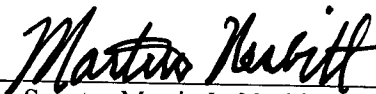
When North Carolina devised the guidelines for participating providers, they opted for a standard that was different from the Medicare Modernization Act of 2003 which was the Federal Guideline. He said that Carolina Eye Prosthetics complies in full with the federal requirements that require accreditation. However, North Carolina's statute specified that ocularists (artificial eye fitters) be Board Certified.

Mr. Boyd said that a correction remedied this in SB 602 that passed the House last year. However that bill was not ratified, so the problem still exists and Carolina Eye Prosthetics has not been compensated by Medicaid since last summer. He said they will continue providing free service until this problem is solved.

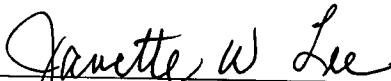
Senator Nesbitt asked if Mr. Boyd thought that this was an oversight and Mr. Boyd thought it was. Senator Nesbitt asked if anyone had objected to the change and Mr. Boyd wasn't aware of objection.

There was discussion about the provision and how the committee should proceed. Senator Nesbitt asked Ms. Cochrane-Brown to draft proposed legislation to make the necessary statutory change to remedy this situation. He also wanted to make certain that the Division of Medical Assistant had no objections to this change.

There being no further business, the meeting was adjourned at 12:20 p.m.



Senator Martin L. Nesbitt, Presiding



Janette W. Lee, Committee Assistant

Report of the North Carolina State Board of Dental Examiners

To the

Joint Legislative Administrative Procedure Oversight Committee

March 9, 2006

At its February meeting the Administrative Oversight Committee requested that the Dental Board prepare a recommendation that would address concerns raised regarding the Board's use and acceptance of a third-party regional dental hygiene examination. It is the Board's belief that the following recommendations address these concerns.

1. At the next scheduled dental hygiene exam in June 2006, the Board will offer the traditional North Carolina Exam with the Council of Interstate Testing Agencies (CITA) exam offered completely as an option. **Students may freely choose which exam they wish to take.** The North Carolina exam will cost the same as last year: \$170. The CITA exam will cost \$700 and scholarships from private sources will be available.
2. Allow the Board to accept the results of either exam in 2006 as a component of the licensing process. Allowing the hygiene rules as currently published to proceed through the rule making process should accomplish this goal.
3. Have a member or members of the Oversight Committee introduce legislation in the upcoming session that will clear up any perceived ambiguity as to statutory authority for the Board to allow testing by a third party. Proposed statutory changes are included as Attachment 1.

A member or members of the Oversight Committee suggested each of these points during our previous meetings. The Board is grateful for the suggestions, believes they will address the concerns of all parties, and urges the Committee to adopt them in full.

ATTACHMENT 1

Proposed Changes to the Dental Hygiene Act To be introduced in the 2006 Legislative Session

[Proposed changes are underlined.]

90-224. Examination.

(a) The applicant for licensure must be of good moral character, have graduated from an accredited high school or hold a high school equivalency certificate duly issued by a governmental agency or unit authorized to issue the same, and be a graduate of a program of dental hygiene in a school or college approved by the Board.

(b) The Board shall have the authority to establish in its rules and regulations:

- (1) The form of application;
- (2) The time and place of examination;
- (3) The type of examination;
- (4) The qualifications for passing the examination.

(c) In lieu of offering its own examination, the Board may grant a license to an applicant who is found to have passed an examination given by a board-approved regional or national dental hygiene testing agency, provided that the Board deems the regional or national examination to be substantially equivalent to or an improvement upon the examination given by the board, and the applicant meets the other qualifications set forth in this article

(d) ~~(e)~~ The Department of Justice may provide a criminal record check to the Board for a person who has applied for a new or renewal license through the

Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection. (1945, c. 639, s. 4; 1971, c. 756, s. 3; 2002-147, s. 10.)

90-232. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules not exceeding the following:

- (1) Each applicant for examination 350.00
- (2) Each renewal certificate, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dental hygienist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dental hygienist..... 250.00

- (3) Each restoration of license..... 150.00
- (4) Each provisional license..... 150.00
- (5) Each certificate of license to a resident dental hygienist desiring to change to another state or territory..... 50.00
- (6) Annual fee to be paid upon license renewal to assist in funding programs for impaired dental hygienists..... 80.00
- (7) Each license by credentials..... 1,500.00

In all instances where the Board uses the services of a national or regional testing service for preparation, administration, or grading of examinations, the Board may require applicants to pay the actual costs of the testing service in addition to the Board's other fees.

In no event may the annual fee imposed on dental hygienists to fund the impaired dental hygienists program exceed the annual fee imposed on dentists to fund the impaired dentist program. All fees shall be payable in advance to the Board and shall be disposed of by the Board in the discharge of its duties under this Article. (1945, c. 639, s. 11; 1965, c. 163, s. 7; 1967, c. 489, s. 2; 1971, c. 756, s. 12; 1987, c. 555, s. 2; 1999-382, s. 3; 2002-37, s. 6; 2003-348, s. 2.)



NORTH CAROLINA COMMUNITY COLLEGE SYSTEM

H. MARTIN LANCASTER
PRESIDENT

February 22, 2006

ALAMANCE COMMUNITY COLLEGE
ASHEVILLE-BUNCOMBE TECHNICAL COMMUNITY COLLEGE
BEAUFORT COUNTY COMMUNITY COLLEGE
BLADEN COMMUNITY COLLEGE
BLUE RIDGE COMMUNITY COLLEGE
BRUNSWICK COMMUNITY COLLEGE
CALDWELL COMMUNITY COLLEGE & TECHNICAL INSTITUTE
CAPE FEAR COMMUNITY COLLEGE
CARTERET COMMUNITY COLLEGE
CATAWBA VALLEY COMMUNITY COLLEGE
CENTRAL CAROLINA COMMUNITY COLLEGE
CENTRAL PIEDMONT COMMUNITY COLLEGE
CLEVELAND COMMUNITY COLLEGE
COASTAL CAROLINA COMMUNITY COLLEGE
COLLEGE OF THE ALBEMARLE
CRAVEN COMMUNITY COLLEGE
DAVIDSON COUNTY COMMUNITY COLLEGE
DURHAM TECHNICAL COMMUNITY COLLEGE
EDGEcombe COMMUNITY COLLEGE
FAYETTEVILLE TECHNICAL COMMUNITY COLLEGE
FORSYTH TECHNICAL COMMUNITY COLLEGE
GASTON COLLEGE
GUILFORD TECHNICAL COMMUNITY COLLEGE
HALIFAX COMMUNITY COLLEGE
HAYWOOD COMMUNITY COLLEGE
ISOTHERMAL COMMUNITY COLLEGE
JAMES SPRUNT COMMUNITY COLLEGE
JOHNSTON COMMUNITY COLLEGE
LENOIR COMMUNITY COLLEGE
MARTIN COMMUNITY COLLEGE
MAYLAND COMMUNITY COLLEGE
MCDOWELL TECHNICAL COMMUNITY COLLEGE
MITCHELL COMMUNITY COLLEGE
MONTGOMERY COMMUNITY COLLEGE
NASH COMMUNITY COLLEGE
PAMLICO COMMUNITY COLLEGE
PIEDMONT COMMUNITY COLLEGE
PITT COMMUNITY COLLEGE
RANDOLPH COMMUNITY COLLEGE
RICHMOND COMMUNITY COLLEGE
ROANOKE-CHOWAN COMMUNITY COLLEGE
ROBESON COMMUNITY COLLEGE
ROCKINGHAM COMMUNITY COLLEGE
ROWAN-CABARRUS COMMUNITY COLLEGE
SAMPSON COMMUNITY COLLEGE
SANDHILLS COMMUNITY COLLEGE
SOUTH PIEDMONT COMMUNITY COLLEGE
SOUTHEASTERN COMMUNITY COLLEGE
SOUTHWESTERN COMMUNITY COLLEGE
STANLY COMMUNITY COLLEGE
SURRY COMMUNITY COLLEGE
TRI-COUNTY COMMUNITY COLLEGE
VANCE-GRANVILLE COMMUNITY COLLEGE
WAKE TECHNICAL COMMUNITY COLLEGE
WAYNE COMMUNITY COLLEGE
WESTERN PIEDMONT COMMUNITY COLLEGE
WILKES COMMUNITY COLLEGE
WILSON TECHNICAL COMMUNITY COLLEGE

Mr. Bobby D. White
Chief Operations Officer
NC State Board of Dental Examiners
15100 Weston Parkway, Suite 101
Cary, NC 27513

Dear Mr. White:

I am in possession of your letter to Susan S. Ellis with regard to requiring our dental hygiene students to make an election between the traditional NC dental hygiene exam and the Council of Interstate Testing Agencies exam by March 9. I would respectfully request that that deadline be extended to March 31. It will be impossible for us to communicate this information to all of our students and have them act by such a short deadline. Since the consequences of their failure to act by then will result in their being able to register only for the multi-state exam, we feel very strongly that this extension should be granted.

We sincerely appreciate your agreeing to the proposal made by Representative Martin Nesbitt that students be able to elect the exam which they will take, since we do not believe any appreciable number of North Carolina hygiene students will be interested in practicing dental hygiene in Mississippi or Puerto Rico. Of course, years from now when the Council has enlisted the participation of many states, there may be a financial incentive for paying \$700 to take a multi-state exam. Until then, we believe that most of our students will want to elect the less expensive option, knowing that they will only be able to practice in North Carolina.

Please be informed that the North Carolina Community College System and its dental hygiene programs will resist your moving to a mandatory multi-state examination if the cost remains at such a high

Mr. Bobby D. White
February 22, 2006
Page 2

figure. We will also resist going to a multi-state exam until it is truly multi-state, giving significant value to the dental hygienist who must pay for the exam.

Thank you for your full consideration of this request.

With kindest regards, I am

Sincerely,

A handwritten signature in black ink, appearing to read "H. Martin Lancaster". The signature is fluid and cursive, with the first name "H. Martin" and the last name "Lancaster" clearly distinguishable.

H. Martin Lancaster

HML:phm

- c: Joint Legislative Administrative Procedure Oversight Committee
- State Board of Community Colleges
- President Ray Bailey, Asheville-Buncombe Technical Community College
- President Eric McKeithan, Cape Fear Community College
- President Cuyler Dunbar, Catawba Valley Community College
- President Matthew Garrett, Central Carolina Community College
- President Tony Zeiss, Central Piedmont Community College
- President Ron Lingle, Coastal Carolina Community College
- President Deborah Lamm, Edgecombe Community College
- President Larry Norris, Fayetteville Technical Community College
- President Garry Green, Forsyth Technical Community College
- President Don Cameron, Guilford Technical Community College
- Acting President Joy Cooley, Halifax Community College
- President Bill Carver, Nash Community College
- President Frank Sells, Surry Community College
- President Steve Scott, Wake Technical Community College
- President Ed Wilson, Wayne Community College
- Mr. William H. Potter



North Carolina Dental Hygiene Association

P.O. Box 40787

Raleigh, NC 27629-0787

(919) 569-0624

E-mail: info@ncdha.org • www.ncdha.org

March 7, 2006

Joint Legislative Administrative Procedure Oversight Committee

Senator Martin L. Nesbitt, Jr., Co-Chair
300-B Legislative Office Building
Raleigh, NC 27603-5925

Dear Senator Nesbitt:

The North Carolina Dental Hygiene Association (NCDHA) represents the interests of dental hygienists throughout North Carolina and seeks to improve the profession. Although we were not consulted initially about a regional exam, we were invited to discuss the Board's decision to require the Council of Interstate Testing Agencies (CITA) exam for dental hygiene candidates in North Carolina in June, 2006. We understand that this issue has been before your committee on at least two occasions and wanted to provide the position of the North Carolina Dental Hygiene Association with you.

NCDHA supports the concept of a regional exam for dental hygienists. We believe that a regional exam will promote professionalism and allow hygienists greater flexibility. However, we have concerns regarding the development of a new regional exam, the cost of the CITA exam and the timeline for implementation. Currently in the United States there are four regional exams. The regional exams are the North East Regional Board (NERB), the Southern Regional Testing Agency (SRTA), the Central Regional Testing Services (CRDTS) and the Western Regional Examining Board (WERB). NERB is accepted in 20 states, SRTA in 24 states, CRDTS in 24 states and WERB in 27 states. We question why the North Carolina State Board of Dental Examiners (NCSBDE) would want to consider accepting a new regional exam when there are four well established regional exams to choose from. It is also our understanding that at the present time North Carolina does not have the statutory authority to accept the CITA exam and that the CITA exam has only been accepted by Mississippi.

The cost of the CITA exam is also an issue. The dental hygiene students graduating this spring did not have the opportunity to adequately prepare financially for the CITA exam. The educators were officially informed of the cost on December 30, 2005. Many students, especially those on financial aid, plan far in advance to cover the cost of their education including taking the NCSBDE administered exam. An increase from \$170.00 to \$700.00 is nearly impossible to accommodate into an already tight budget. We acknowledge that any regional exam will cause a substantial increase in cost; however, information about the increased costs should be provided well in advance.

And finally, the implementation timeline for the CITA exam is very short. CITA was incorporated on July 15, 2005 as a 501C-3 non-profit corporation and the Board wanted to require the CITA exam for June, 2006. We do not understand the urgency of this and feel that there should be a more open forum for dental hygienists, dentists, educators, students and other experts to decide which regional exam would be best, when to start the exam in North Carolina, how to adjust our statutes and rules to allow for the exam in North Carolina and how to educate and transition to the higher fees.

The North Carolina Dental Hygiene Association supports the concept of North Carolina joining a regional exam. We are concerned; however, about using CITA as the regional exam, the timing of the exam and the increased costs. Please feel free to contact me with any questions you may have or contact our legislative representative:

Colleen Kochanek
Smith Moore, LLP
Post Office Box 27525
Raleigh, North Carolina 27611
(919) 755-8741 direct phone line
(919) 838-3164 direct fax line
colleen.kochanek@smithmoorelaw.com.

Thank you for your consideration.

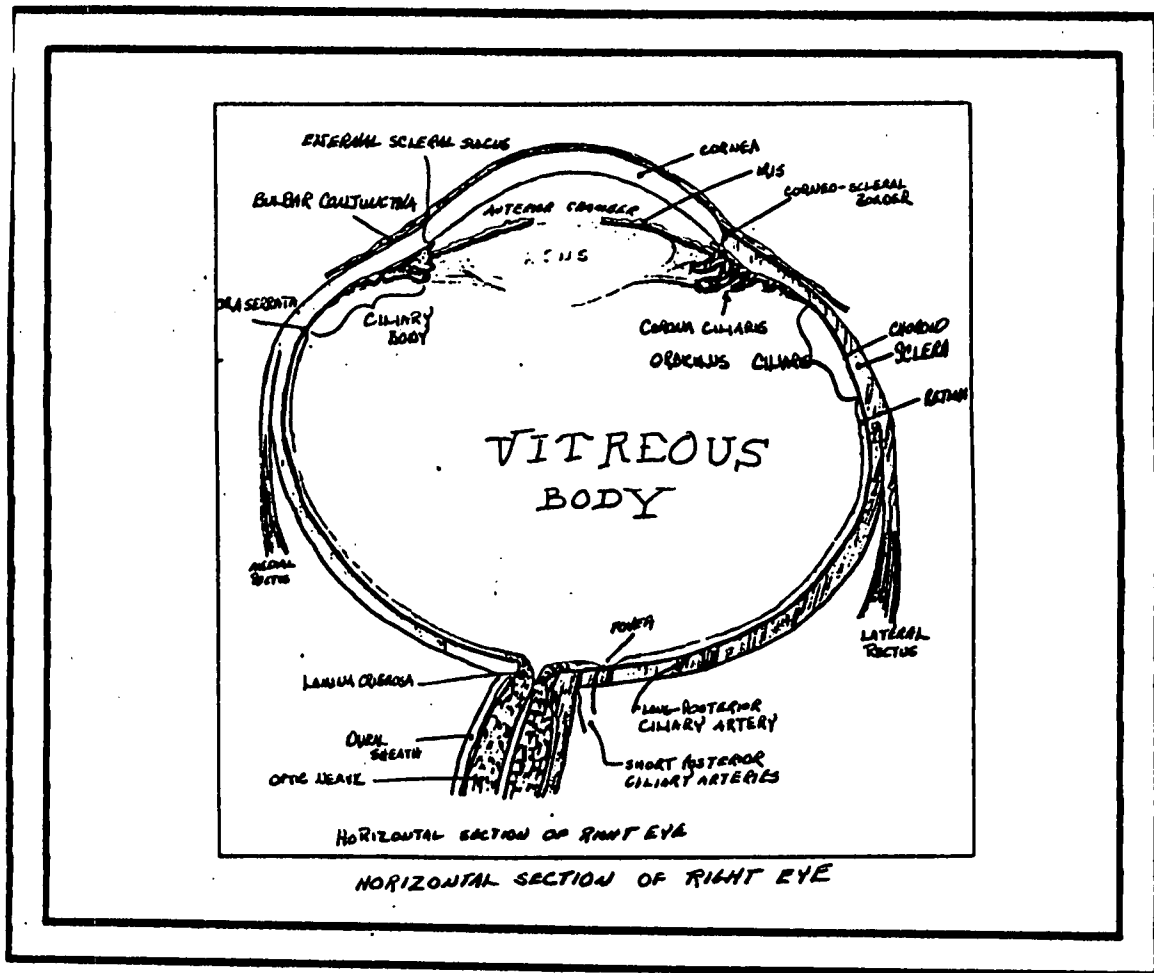
NC Dental Hygiene Association

Martha Sexton Taylor

Martha Sexton Taylor, RDH, MBA, MHA
Governmental Affairs Chair

Carolina Eye Prosthetics, Inc.

*Nationally Accredited
Exemplary Providers of Custom Fitted
Artificial Eyes*



Patrick L. Boyd, President
Michael W. Boyd, Senior Ocularist
Anna Boyd Jefferson, Ocularist

CAROLINA EYE PROSTHETICS, INC.

Patrick L. Boyd
Accredited Ocularist

Anna Boyd Jefferson
Accredited Ocularist

Michael W. Boyd
Accredited Ocularist

February 7, 2006

Jan Lee
Administrative Procedure Oversight Committee Clerk

Dear Ms. Lee,

On July 1, 2006, the State of North Carolina began paying for ocular prostheses (artificial eyes) through Medicaid. Up until this point, the working poor had to use Services for the Blind and various charitable organizations to pay for these medically necessary prostheses.

When North Carolina devised the guidelines for participating providers, they opted for a standard that was different from the Medicare Modernization Act of 2003 which was the Federal Guideline. Carolina Eye Prosthetics complies in full with the federal requirements that require accreditation. North Carolina's statute specified that ocularists (artificial eye fitters) be Board Certified.

The correction addressed in bill S-602, which was passed by the House last year, remedies this situation.

We have been providing services to North Carolina's working poor for nearly 20 years and because we chose ACCREDITATION instead of Board Certification, our patients are denied access to our services. We are currently providing free care for our youngest and most needy patients, which has been very difficult since we are such a small office.

We respectfully request that the technical corrections Bill (S-602) be prioritized to be passed in the upcoming session.

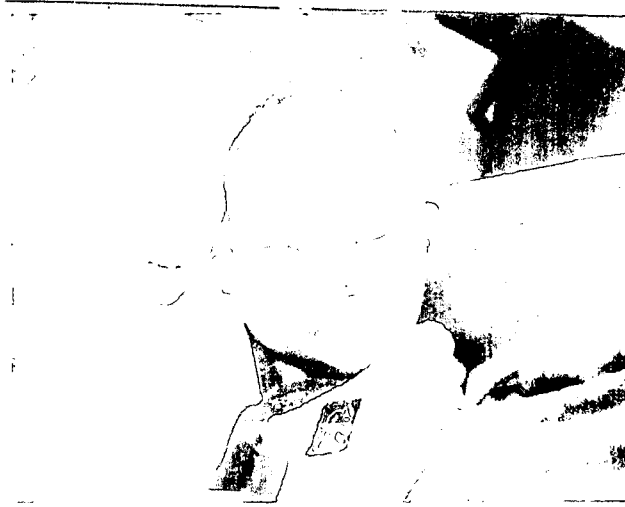
Sincerely,

Patrick L. Boyd
President, Carolina Eye Prosthetics, Inc.

SECTION 88.5. Section 10.11(a)(23) of S.L. 2005-276 reads as rewritten:

"(23) Medically necessary prosthetics or orthotics. – Reimbursement in accordance with the State Plan approved by the Department of Health and Human Services, except that in order to be eligible for reimbursement, providers must be ~~Board certified~~ Board certified, or in the case of ocular prosthetists Board certified or accredited, not later than July 1, 2005. Medically necessary prosthetics and orthotics are subject to prior approval and utilization review."

Children are especially needful of ocular prostheses (artificial eyes). Prostheses are required to help the bony orbital growth that will support the entire side of the face and brow. The sooner we can help children with their prosthetic needs, the better the prognosis for more normal development. Early intervention can reduce future reconstructive surgeries, and more expense.



This young lady was seen last year after being refused treatment by a Board Certified Ocularist in Benson, North Carolina. That ocularist, who could not fit her with a properly fitting conformer referred her to an ocularist in Texas. Since this patient has Medicaid, there wasn't anyway her parents could afford to seek treatment in another state.

We are currently working with her in conjunction with Dr. Sharon Freedman at Duke Eye Center. We are doing this work gratis.

This young lady lost her eye due to retinoblastoma and was referred to us by Dr. Wright at UNC Chapel Hill. Because she is a Medicaid patient, she was accorded treatment free of charge. She was an amazing patient because she was so cooperative.



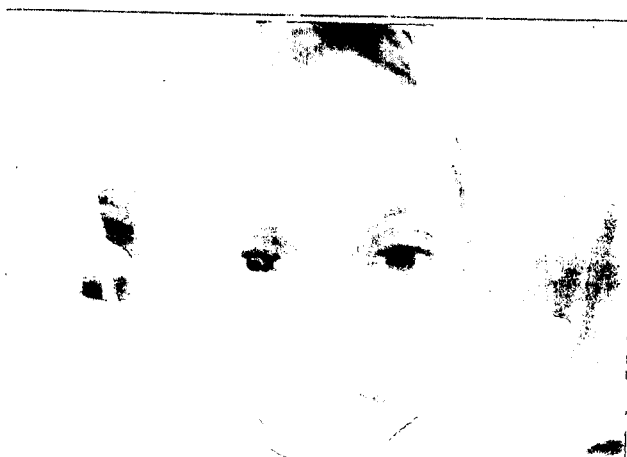
BEFORE

AFTER





This Medicaid patient outgrew her present prosthesis and required a refitting to open her eyelids to accomodate orbital bony growth. Our work was provided free of charge.



This child suffers from microphthalmos and required a prosthesis to stimulate bony orbital growth.



This Medicaid patient is a victim of retinoblastoma and her parents could not afford a prosthesis. We provided free assistance.



This medicaid patient suffered from diabetic retinopathy and severe edema. Her custom fitted prosthesis was provided free of charge.

**A Short History of Ocularistry
and
Carolina Eye Prosthetics, Inc.**

We have been non-participating Medicaid providers for many years and are requesting to become participating providers to ensure continuity of service to our many patients.

The problem lies in the fact that despite having served the working poor, and just plain poor people in our state for nearly twenty years with funding from Services for the Blind, the State Legislature has decided we are no longer qualified to do so since we are not Board Certified by the National Examining Board of Ocularists (NEBO). NEBO is not recognized by either North Carolina Blue Cross/Blue Shield or the Medicare Modernization Act of 2003.

In order to understand why we do not feel the necessity of being involved with NEBO means you have to suffer through a short history of ocularistry.

One of NEBO's founding organizers was Lee Allen, of Iowa City, Iowa. He developed the famous Iowa Implant used for many years by the surgeons performing enucleations throughout the world. Mr. Allen also was largely responsible for the development of the Modified Impression Technique which is arguably the most time consuming, but we feel the best method (regarding comfort and cosmesis) of fitting artificial eyes.

Ocularists do not attend schools to learn the craft. Apprentices study under a practicing ocularist and after years of practice under the watchful eye of the master, only then, will they be qualified to work alone.

Michael Boyd, our senior ocularist, apprenticed under Lee Allen in Iowa and was Board Certified when Carolina Eye Prosthetics was founded in 1987. During the ensuing years, we found that the money spent on travel to the meetings and the time spent away from the office treating our patients was lost time and money.

NEBO's practical examination, is mainly concerned with copying a pre-formed model whereas with our method, there is no copying. We have to have the patient on hand to fit a custom eye.

There are many methods of making eyes, from the crude stock eye pulled out of a suitcase to the Modified Impression Technique. To study and be tested on a method that has no bearing on our work is a waste of our resources and the cost would have to be passed on to the patients.

NEBO requires attendance at two meetings a year, usually held at expensive resort areas. For example, the last meeting we attended was held in Las Vegas, Nevada. The approximate cost was \$6000.00 over 12 years ago!

At our last attendance of the NEBO meeting, a class on the agenda was labeled "ETHICS." The main lesson taught was that it was necessary to wash hands between patients. There was no mention of overcharging, false procedure code usage, the use of previously used eyes in poor patients, or the insertion of stock right eyes into a patient's left socket.

We have seen ALL of these ethically debatable practices in discouraged patients who have come to our office in despair after being so poorly treated by other ocularists, some of whom were indeed, Board Certified.

Mr. Allen, in working with NEBO initially did so to improve the quality of the ocularists work, regardless of the method.. We do not feel that at this time, NEBO fulfills that need.

Following Mr. Allen's quest for perfection, we have done ground breaking work with Duke University for the Hydroxyapatite Implant, the most commonly used implant today.

We have been practicing in North Carolina since October of 1987. We are the first Accredited Ocularist Laboratory in the United States and are in Network with BLUE-CROSS BLUE SHIELD of North Carolina as well as non-participating providers in the North Carolina Medicare Program.

We have, since opening our doors, worked with Services for the Blind to ensure that no one will go without the necessary ocular prosthesis and we have built solid, trusting relationships with our youngest and most needy patients and their parents through that program.

Through our continued contacts with the surgical teams at Duke University Hospital, UNC School of Medicine at Chapel Hill as well as Wake Forest University Eye Center, we have been in the forefront of providing consistent, necessary pediatric ocular prosthetic care that begins with infants and continues on through the adult years.

We are considered part of the curriculum of Duke University's Ophthalmic Technician's program, with the students visiting our Graham office every year to study our method of making artificial eyes. We have also hosted staffs from Wake Forest University Eye Center and University Hospital at Chapel Hill..

We were invited to submit an article for the first edition of THE JOURNAL OF FACIAL AND SOMATO PROSTHETICS. (Copy included).

We have operating room visiting privileges with Duke Eye Center, Wake Forest Eye Center and UNC Chapel Hill, to conduct Evaluations under Anaesthesia with the presence of the referring surgeon.

As Mr. Allen did in "thinking outside the box" by his hopeful work with NEBO, we are looking toward the future and we feel the future is accreditation by a *independent*, nationally recognized accrediting body, such as the COMPLIANCE TEAM which the Centers for Medicare and MEDICAID Service formally recognized as being one of only four accrediting bodies acceptable for their purposes..

We chose the COMPLIANCE TEAM because of the high standards they expect from their providers. The cost is \$1500.00/year, which is much more in line with a small business's budget.

To be accredited with THE COMPLIANCE TEAM we have to prove that we are OSHA and HIPAA compliant (which NEBO doesn't address). We are also registered with the FDA and the COMPLIANCE TEAM conducts an annual on site inspection that lasts the entire day during which the inspector has access to every file, speaks candidly with every patient and ensures we are compliant in universal sanitation standards. The COMPLIANCE TEAM, also tracks our patient results throughout the year in order to insure we are constantly striving for quality control and improvement of patient confidence.

We are, we think, the ONLY ocularists in the state to have worked with the indigent on a regular basis. Our quality is unsurpassed in the Southeastern United States and we, at this moment, have dozens of children and their parents awaiting your decision so that we may continue their prosthetic care.

We invite you to our office to see the quality of the work and the pleasure our patients derive from having quality, ethical ocular prosthetic care.



DUKE UNIVERSITY MEDICAL CENTER

Department of Ophthalmology

May 9, 1997

BCBS
P. O. Box 2291
Durham, NC 27702-2291
Att: Colleen Carothers

Dear Ms. Carothers:

I am an Oculoplastic and Orbital surgeons on the faculty of the Duke University Eye Center. As such I perform more than 100 enucleations per year, and have well over a thousands patients with anophthalmic sockets requiring care for their prosthetic eyes. Since 1990 Michael and Patrick Boyd from Carolina Eye Prosthetics Incorporated in Graham, North Carolina have been the sole providers of prosthetic care for my patients. As you know, there are very few ocularist's in the State of North Carolina, capable of providing this services. The Boyd's have demonstrated their ability to manufacture outstanding prosthetic products with compassionate, timely and efficient handling of our patients.

If I can provide you with any further information please do not hesitate to call my office.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Jonathan J. Dutton".

Jonathan J. Dutton, M. D., Ph. D.
Oculoplastic, Orbital and Oncology Service

JJD/cl

cc: Carolina Eye Prosthetics

The Bowman Gray
School of Medicine

WAKE FOREST
UNIVERSITY
EYE CENTER

Department of Ophthalmology

May 13, 1997

(910) 716-4091

L. Frank Cashwell, M.D.
Glaucoma and Cataract Surgery

Jerry G. Ford, M.D.
Corneal and External Diseases
Cataract Surgery

Craig M. Greven, M.D.
Diseases and Surgery of
the Retina and Vitreous
Uveitis and Intraocular Tumors

Timothy J. Martin, M.D.
Neuro-Ophthalmology

John W. Reed, M.D.
Corneal and External Diseases
Cataract Surgery

Madison Slusher, M.D.
Diseases and Surgery of
the Retina and Vitreous

Keith A. Walter, M.D.
Corneal and External Diseases
Cataract and Refractive Surgery

Richard G. Weaver, M.D.
Diseases of the Retina
Neuro-Ophthalmology
Consultative Ophthalmology

R. Grey Weaver, Jr., M.D.
Pediatric Ophthalmology
Strabismus

R. Patrick Yeatts, M.D.
Ophthalmic Plastic Surgery
Orbital Surgery
Oncology

Research Staff

Andrew J. Sweatt, Ph.D.
Visual Science Research

BC/BS of North Carolina
Attention: Collen Carothers
PO Box 2291
Durham, NC 27702-2291

Dear Ms. Carothers:

It is my understanding that Carolina Eye Prosthetics has been discussing with you the possibility of becoming a preferred provider of ocularist services in North Carolina. Both Michael and Patrick Boyd have performed these services for the patients at the Wake Forest University Eye Center since 1992. Both Michael and Patrick have shown the utmost professionalism in caring for patients who have had the unfortunate experience of eye loss. The Boyds through there prosthetic work have assisted me greatly in restoring normal appearance to these patients and hence restoring patient confidence and function in their daily lives. There work is superb and I can recommend them to you unconditionally.

If you have any questions regarding there qualifications please feel free to contact me.

Cordially,



R. Patrick Yeatts, M.D.

jpg

c: Carolina Prosthetics, Inc.
102 E. Pine Street
Graham, NC 27253

The Compliance Team, Inc.

Exemplary Provider™ Accreditation Program

www.exemplaryprovider.com

Mr. Patrick Boyd
President
Carolina Eye Prosthetics, Inc.
15 Southeast Court Square
Graham, North Carolina 27253

July 19, 2005

LETTER OF ACCREDITATION

Dear Mr. Boyd:

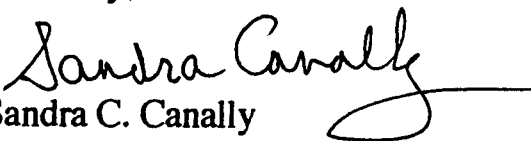
This Accreditation report reflects the results of the on-site evaluation conducted on July 22, 2004 at **Carolina Eye Prosthetics, Inc., 15 Southeast Court Square, Graham, North Carolina 27253**. The evaluation score for your Eye Prosthetic company was **100 %**; thus I am delighted to report that your organization meets the criteria for The Compliance Team's **Exemplary Provider™ Award** for Ocularist's.

Please note that this designation is valid for a one-year period from the date of issuance. Therefore, recognition of this Award and Carolina Eye Prosthetics Exemplary Provider™ status will expire on August 31, 2006 unless a successful follow-up on-site evaluation takes place prior to that date.

Also, Carolina Eye Prosthetics outcomes data will be tracked, reviewed and evaluated on a quarterly basis. This is done as a basic element of our program in order to monitor Carolina Eye's continued compliance with the Exemplary Provider™ standards prior to your program renewal.

Once again, congratulations on your outstanding achievement and demonstrated commitment to health-care delivery excellence.

Sincerely,


Sandra C. Canally
President

Scoring Grid

Client: Carolina Eye Prosthetics, Inc. Date: 7/19/05

Standards	Score
Corporate Compliance 6	6
Administration 6	6
Billing/Collection 3	3
Human Resources 4	4
Quality Improvement 6	6
Risk Management 9	9
Universal Standards Total	34 out of 34
Manufacturing the Prosthetic 22	22
Patient Services 29	29
Infection Control 4	4
Clinical Respiratory	n/a
Regulatory 11	11
Specialty Standards Total	65 Out of 65
Exemplary Provider Award Final Score	100 %



The Compliance Team's
EXEMPLARY PROVIDER™
 Accreditation Programs

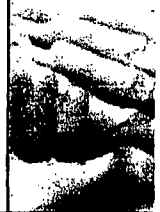
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MEDICARE MODERNIZATION ACT



MEDICARE MODERNIZATION ACT ACCREDITATION UPDATE



MEDICARE MODERNIZATION ACT ACCREDITATION UPDATE



In its run up to full implementation of the Medicare Modernization Act (MMA) 2003 which requires that all Durable Medical Equipment, Prosthetic and Orthotic Suppliers (DMEPOS) successfully participate in an approved nationally recognized healthcare accreditation program, the Centers for Medicare and Medicaid Services (CMS) in Fall 2004 formally identified the Compliance Team as one of the four DMEPOS industry accrediting bodies. The Compliance Team, Inc. shares this distinction with ACHC (Accreditation Commission for Health Care), CHC (Community Health Accreditation Program), and JCAHO (Joint Commission Accreditation of Healthcare Organizations).

- Click here to view the MMA Accreditation Update

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CMS DEVELOPING PRODUCT-LINE/SERVICE SPECIFIC QUALITY STANDARDS



AGENDA

JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE

*Senator Martin Nesbitt,
Co-Chair*

*Representative Melanie Wade Goodwin,
Co-Chair*

**Thursday, March 9, 2006
10:00 am.
Room 544 LOB**

- 1. Welcome and Introductions**
- 2. Approval of February 9, 2006 Minutes**
- 3. Discussion of Proposed Dental Board Rules Regarding Examination of Dental Hygienists**
Bobby White, Chief Operating Officer NC Board of Dental Examiners
Susan Spears Ellis, Dental Hygiene Program Coordinator, Fayetteville Tech. Community College
Martha Taylor, NC Dental Hygienists Association
- 4. Discussion of the Proposal to Allow Accredited Ocular Prosthetists to be Eligible for Medicaid Reimbursement**
Mr. Patrick L. Boyd, President, Carolina Eye Prosthetics, Inc.
- 5. Set Date for Next Meeting**
- 6. Adjourn**

Date _____

FIRM OR AGENCY AND ADDRESS[illegible]

**JOINT LEGISLATIVE
ADMINISTRATIVE PROCEDURE
OVERSIGHT COMMITTEE**

April 20, 2006
10:00 a.m. – Room 544

MINUTES

The Joint Legislative Administrative Procedure Oversight Committee met on Thursday, April 20, 2006 in Room 544 of the Legislative Office Building. Members present included: Co-Chairs, Rep. Goodwin and Senator Nesbitt, Senators Dorsett, Hartsell, Purcell, Stevens, and Webster, and Representatives Bell, Eddins, Gibson, Jones, and Ross. Rep. Melanie Wade Goodwin presided.

Rep. Goodwin called the meeting to order, welcomed members, visitors, and introduced staff. She then asked for a motion for approval of the Minutes from the March 9, 2006 meeting. Rep. Bell moved for approval, seconded by Rep. Jones, and the motion carried.

Agenda Item 5, "Discussion of Draft Proposal Regarding to Allow Accredited Ocular Prosthetists to be Eligible for Medicaid Reimbursement," was before the Committee. Committee Co-Counsel Jeff Hudson was recognized to explain the issue.

Mr. Hudson said that Senator Webster brought this issue before the Committee at its last meeting. The issue is that, the way the Medicaid language is currently written, it would only cover "certified" practitioners and that creates a problem for some of the Ocular Prosthetists that are accredited, rather than certified. The proposal before the Committee would add, "*in case of ocular prosthetists Board certified or accredited.*" Mr. Hudson said staff has contacted the Department of Health and Human Services, Division of Medical Assistance, about this change and they are fine with the language. A copy of the Bill Draft is attached to these Minutes as *Attachment I*.

Discussion followed. Senator Webster explained the purpose and necessity of the ocular prosthetic and encouraged the Committee to endorse the proposed legislation. He also said he would introduce the bill.

Senator Nesbitt said that dealing with this issue was a little out of the ordinary because the Committee wasn't actually reacting to a rule, but it does fit in the Committee's purview because it is something that can't be corrected by a rule. He said the Committee would have to make a statutory change for this to be allowed. It was done in the Clean-up bill last year, but that bill was not ratified so by taking this action, the Committee is making this legislation eligible for introduction during the upcoming session.

Rep. Ross moved to adopt the proposal, Rep. Bell seconded, and the motion was carried.

Agenda Item 3, "Discussion of SB 664," was before the Committee and former Representative Connie Wilson was recognized to comment on the bill. A copy of SB 664, as well as an explanation and a list of endorsements are attached to these Minutes as *Attachments II, III, and IV* respectively.

Ms. Wilson was there on behalf of the Employers' Coalition. She said the bill passed the Senate Commerce Committee during the 2005 Session and is now in the Senate Appropriations Committee. She said this bill is good bill for small businesses, because they don't have the money, or the time to hire a lobbyist or staff to follow rules as they are adopted and this bill addresses that issue.

The Key Components of the Bill:

- **Small Business Definition** – NC regulatory flexibility legislation defines small businesses as entities having 250 or less employees.
- **Economic Impact Analysis** – This provision of the regulatory flexibility legislation requires state agencies to prepare an economic impact statement for rules that would have an adverse economic impact on small businesses. (Ms. Wilson said the reason this is important is that currently the Administrative Procedure Act (APA) requires that a fiscal note be done by an agency if the cost threshold is \$2 million or more. Even though the threshold has been lowered, and a fiscal note is required, she felt that there are no "teeth" in the statute, so if the agency doesn't do the fiscal note, it doesn't really matter.)
- **Examining Alternative Rules** – Under this provision, agencies are required to be proactive in looking for, and considering, regulatory solutions that do not unduly burden small business. A Small Business Regulatory Review Committee is established in the Department of Commerce to advise, and to make recommendations to agencies on the adverse impact that a proposed regulation may have on small businesses.
- **Judicial Review** – This legislation allows small businesses to seek judicial review if an agency does not comply with the rulemaking process provided in the regulatory flexibility legislation. (Ms. Wilson said this is the "teeth" they are putting in this process.)
- **Periodic Review of Rules** – The purpose of the review, among other things, is to determine whether the rules should be continued without change and whether there is a continued need for the rule. (In this bill, Ms. Wilson said they are requiring that agencies periodically to review old rules. They are given up to nine years to do this.)
- **Flexibility in waiver of penalties** – Under certain conditions provided in the bill, agencies may waive or reduce the administrative fine or penalty for violation of a rule by a small business.

Ms. Wilson referred to *Attachment IV* which lists SB 664's endorsers and included a from Lou Wilson.

Rep. Ross had a question about why the definition of small business is one with 250 or fewer employees when there are other definitions for small business that usually has a smaller number of employees.

Ms. Wilson said that with health insurance the definition of small business is less than a hundred. At the federal level they have different sales amounts or different employee amounts, depending on the industry. She believes that this bill will change the "mind-set" and will help all businesses.

Rep. Ross was very concerned about the definition of a small business being one with 250 employees or fewer, and said that would encompass almost all of our work force. She wanted to look at the ranges for the definition of small business throughout our statutes for other purposes and then make a decision as to what the total number of employees should be.

Senator Webster said larger businesses already have to evaluate the impact of rule changes and, typically, the evaluation of those impacts cover the impact on the larger businesses. He agreed that 250 employees may not be the right number, but said it is the cumulative impact on smaller businesses, that is not being evaluated.

Rep. Ross was not unsympathetic to that situation, but felt that a business with 250 employees would demand greater attention than the "mom and pop" businesses. She has a lot of small businesses in her district and wants to pay attention to those businesses with fewer employees who haven't been able to advocate for themselves.

Senator Hartsell said it is true that there are various definitions of a small business, but that is actually what causes the problem. Whether the number is 5, 50 or 250 employees, the analysis that should be taken in adopting a rule should be similar. Its impact may be different and it is important to put it in the context of health insurance requirements (100 employees), part of the point of this analysis is to try to streamline the process so that we all understand how different rules and regulations impact in different ways.

Pat Garland from the US Small Business Administration, Office of Advocacy, was recognized to address the Committee. He explained that the Office of Advocacy is housed with Small Business Administration, but it is an independent agency, with the job of "going after the federal government on behalf of small business." They work off of a regulation called "The Regulation Flexibility Act." He said that South Carolina passed this initiative a year and a half ago and used no fiscal note. It's all taken in within the Commerce Department where an independent committee is established small business people which chosen by the Speaker of the House, the Senate President Pro Tem, and the Governor. An SBA Office of Advocacy handout is attached to these Minutes as *Attachment V*.

Rep. Eddins asked what number of employees neighboring states use as a definition of a small business. Mr. Garland thought the number was between 100 to 250, but wasn't certain.

Rep. Jones asked if they had done comparative analyses from surrounding states. Mr. Garland said each state is different.

Rep. Ross called the Committee's attention to page 4 of Handout V which said that in 2002, 96 percent of businesses had fewer than 100 employees. Most other states have lower percentages, but still in the 90s.

Committee Co-Counsel Jeff Hudson was recognized to discuss Agenda Item #4, Occupational Licensing Board Reports. A copy of this proposal is attached to these Minutes as *Attachment VI*.

Mr. Hudson said staff has observed, over the last few years, that there are an increasing number of issues coming before the Committee that are related to occupational licensing boards. Often, the staff and Committee members are not made aware of these issues until some crisis erupts as did with the Dental Hygienists. He believed this is because, once created by the General Assembly, many of them have little oversight. Under the law there is a requirement that occupational licensing boards produce two reports annually that go to the Secretary of State and the Attorney General's Office.

Requirements for the reports are listed on the draft proposal (*Attachment VI*). This legislative proposal would amend the reporting requirement statute to include the APO Committee as a recipient of these reports. These would include a financial report and a general annual report.

Rep. Goodwin asked for a motion to adopt the proposal and Senator Dorsett so moved. The motion was seconded by Rep. Ross.

Mr. William Potter, representing the NC Dental Board, asked if the proposal was designed to change the existing statute that prohibits a licensing board from spending any funds on lobbying for or against any legislation.

Mr. Hudson said that it was not, that it is more of an informational item than an advocacy item from the occupational licensing boards.

The motion to adopt the proposal was again before the Committee and passed.

Ms. Cochrane Brown was recognized to explain Agenda Item #6 regarding technical changes to agency fee consultation requirement. A copy of this proposal is attached to these Minutes as *Attachment VII*.

She said that under current law, before an agency increases a fee, it is required to consult with the Committee on Governmental Operations. That provision has been in the law since 2000. In 2004 the Joint Legislative Administrative Procedure Oversight Committee

made a recommendation to amend that provision to create an alternative in the event that Gov/Ops did not meet. So in the 2005 Session, this law was amended to provide that alternative. In further review of this law, Ms. Cochran-Brown realized that the definitions contained in (a1) (b) and (c) were inconsistent with the definition contained in the Administrative Procedure Act, Chapter 150B. The definitions should correspond. Ms. Cochran explained that this is purely a technical correction, intended to make GS 12-3.1 consistent with 150B. This proposal references Article 2A of Chapter 150B and deletes the language currently in Subsection b and c, which contain inaccurate definitions.

Rep. Jones moved for adoption of the proposal, Senator Dorsett seconded, and the proposal was adopted.

Karen Cochran-Brown was recognized to explain two draft proposals regarding increased funds for the Office of Administrative Hearings (OAH) and facilities for hearings. The bills are legislative recommendations made by the Chief Administrative Judge, Julian Mann. Copies of these proposals are attached to these Minutes as *Attachment VIII* and *Attachment IX*, respectively.

The first proposal, "OAH Hearing Facilities," would amend the APA to authorize senior resident Superior Court judges to provide facilities for hearings conducted by the Office of Administrative Hearing in counties where they hear cases. The language in this bill is taken from similar language contained in the Industrial Commission Statute. In that statute, however, the provision is mandatory. This proposal would just give the authority to the judge to do so to the extent that facilities are available. The proposal would also allow the judge to provide security arrangements.

The second bill is an appropriation request for funds for the Office of Administrative Hearing to restore some positions that have been eliminated during the past few years. Judge Mann advises that this appropriation would restore the number of position to what these were in 1989.

Senator Stevens asked if a lot of these hearings would take place in Wake County. Ms. Cochran-Brown said not necessarily, and that she had included Chapter 15B-24 **Venue of Hearing** in the proposal to show that under the APA the petitioner can request that the venue be held in the county in which they reside. These cases are heard all over the state.

Senator Stevens was concerned that this would negatively impact Wake County which is already having trouble with space in the Court house.

Senator Nesbitt observed that the language in the proposal said that the resident superior court judge "may" provide suitable facilities, rather than "shall."

Judge Mann said that about 40 percent of OAH's cases are heard in Wake County and currently hearing space is available in their office on Blount Street. That property will eventually be sold and the AOC will be displaced. They have not called upon Wake

County Court System to provide space, but are instead looking for space that can be used outside of that facility because they are aware of the demand placed on courthouse facilities at this time. AOC has calendars which are set up on a monthly basis in Asheville, Charlotte, Highpoint, Fayetteville, New Bern, Wilmington, Elizabeth City, and Halifax. In New Bern and a number of locations the Trial Court Administrator, the Clerk of Court, and sometimes with the intervention of the chief resident superior court judge, the courthouses have been very accommodating with providing space. That is becoming more and more difficult with the simultaneous effect of not having security in these locations.

Senator Nesbitt observed that legislators who lived the greatest distance from Raleigh are the ones that pursued having the Administrative Office of the Court go to the people instead of having the people come to Raleigh. If these judges are going to continue to serve the people, then they will have to have a place to hold their hearings. He said that the language in the proposal was permissive, but it is also a directive that tells people that the General Assembly expects the court system to make space available when they can.

Senator Dorsett asked about the positions being restored and wondered if there would be adequate space to accommodate them. Judge Mann said that his office is in the process of trying to put administrative law judges out into the state, as Judge Sammie Chess in Highpoint. That would take some pressure of their present facilities.

Rep. Gibson shared Senator Steven's concern about courthouse space, but was encouraged with the news that there is a possibility that more judges will be out in the state hearing cases.

Rep. Ross was also concerned that if the state wasn't going to provide space for the OAC, that Wake County might become responsible for providing facilities. She wanted assurances that the state was going to provide adequate facilities.

Judge Mann understood her concerns and said they were looking for their own hearing space with two new courtrooms that are of adequate size.

Senator Nesbitt encouraged the Committee to support the proposals.

Senator Webster made a motion to adopt the proposals, and Rep. Bell seconded.

Senator Stevens said County Commissioners provide the courthouses and wondered if there was a facility fee that goes back to the county to help provide that space.

Judge Mann said to his knowledge there is no fee, that space is provided as an accommodation when space is available.

The motion to adopt the proposals was before the committee and passed.

Ms. Cochrane-Brown was recognized to explain Agenda Item 8, a proposal regarding examination of dental hygienists.

She explained that at the last meeting there was a discussion about this issue and the Chair requested that the Dental Board and other interested parties get together and come to some agreement. Staff was also directed to prepare legislation to do a number of things. At that time, it was suggested that it be in the alternative, but as it has worked out, all the items discussed at the last meeting have been combined in one bill.

Ms. Cochrane-Brown referred to the draft proposal "Dental Hygiene Law Changes," which is a part of these Minutes as *Attachment XII*. This proposal would give the Dental Board clear authority to contract with regional or national testing agencies, but it also gives guidance as to how it would select such a testing agency. She referred to **Section I (5)** of the proposal which gives that authority and asks the Board to consider the number of states that recognize the results of the testing agency's examination, and the cost to the applicant. It also asked the Board to consider how long the testing agency has been conducting examinations, and whether the examination includes procedures performed on human subjects as part of the assessment.

Section 2 authorizes the Board to grant licenses to applicants who are found to have passed examinations given by a Board-approved regional or national exam. Ms. Cochrane-Brown said this cleared up the initial issue, which was whether or not the Dental Board has that authority to require applicants to take a third-party administered exam.

Section 3 adds language which would authorize the Board to require applicants to pay the actual cost of the testing agency in addition to the Board's other fees.

Section 4 of the bill reflects the compromise the parties came to which says that the Board shall continue to conduct the State-administered clinical examinations through September 30, 2007.

Section 5 authorizes the Board to accept applications which were received on or before March 31, 2006.

Senator Dorsett wondered whether all concerns had been addressed.

Dr. Stanley Allen, Chair of the NC Board of Dental Examiners was recognized and thanked the Committee for the opportunity to appear. He wanted to clarify the Board's reasons for entering into a regional examination process, and to announce the consensus agreement in the proposal before the Committee. The primary issue, he acknowledged, had to do with the fact that there was not enough notice given to the students. The Board recognizes that, and has compromised in that it will continue to administer the NC Exam until September 30, 2007. The Board also recognized that, in electing to join the Council of Interstate Testing Agencies (CITA), that there may be some misunderstandings as to the Board's intentions. The Committee has been made aware of the fact that there are

other regionals and other agencies with more states involved. These, however, are not all equal in terms of the ethics which they bring to the exam process. At the present time there is a lot of chaos among all the regionals. The Board selected CITA because it felt that was the best opportunity to maintain the standards that we have grown to expect in North Carolina and, at the same time, to respond to the national pressure of portability in some concerns about provider-patient ratios in various areas. The Board would not have joined CITA if it expected that there would only be two states involved. This is an early process in which North Carolina has a leading role and the opportunity to be on the ground-floor in developing a regional exam that represents what we have become accustomed to having in our State. He assured the Committee that there would be many other states joining CITA in the future and that the Board was only interested in the quality of its licensees.

Dr. Delma Kinlaw, President of CITA, was recognized and thanked the Committee for the opportunity to appear. He talked about his background, and that he had been involved in licensure and testing for a number of years. He served on the NC Board of Dental Examiners for six years, and during that time worked for the Institute of Medicine Task Force on access to care issues. The Institute of Medicine produced twenty-three recommendations, one of which was to investigate the possibility of North Carolina joining a regional examining body. The Board was to report back to the Legislature shortly thereafter. It was the Board's decision to postpone joining a regional exam.. Dr. Kinlaw became involved at the national level in licensure and testing in 1997 when he serving on the ADA's National Invitational Conference on Licensure Examinations. One of the primary recommendations was for all independent states to join a regional testing agency, and for the regional testing agencies to come together and develop one national licensure examination that was common in content and scoring. From 1997 to 2005 Dr. Kinlaw served on numerous committees involved in licensure and test structure development and administration. In 2004 he served as third vice president of the American Board of Dental Examiners which began an initiative to bring all the licensing agencies together to form one national common content examination, a scored licensure examination that would be recognized throughout the United States. The ultimate authority to recognize the results of a licensure examination resides in the individual state. In January 2005, a process was begun to form a corporation that would develop this uniform exam construct. That corporation was the American Board of Dental Examiners. Shortly thereafter it became evident that ADEX would not be a test administrator, it would not be out giving tests in states, it would just be overseeing exam development.. In July of 2005, at the request of a number of independent states throughout the Southeast, a process was begun to organize a regional testing agency called the Council of Interstate Testing Agencies (CITA). CITA would be able to administer this nationally constructed examination. That exam would be administered through a number of southern states as part of the ADEX process and would be recognized in a greater number of states. Unfortunately, in October 2005, because of political and philosophical differences, CITA and three of the original five testing agencies withdrew from ADEX.

Dr. Kinlaw recognized that concerns of the Committee have been fees and mobility. Currently North Carolina and Mississippi are the two test-administering agencies in CITA, but next year he expects Puerto Rico, Alabama and Louisiana to join. He also understands that New Hampshire and Missouri will accept the results of the CITA exam. He is currently in discussion with the two other testing agencies as to how recognition of the CITA results can be opened up. Dr. Kinlaw said CITA is growing, recognition is growing and acceptance is growing. He said that CITA is asking states coming into this process to accept the results exam retro-actively. Dr. Kinlaw understood that the fee increase is considerable. Serving as treasurer of ADEX, he said that the original number established to be a member of ADEX required that all agencies charge \$1400 for the dental exam and \$700 for the hygiene exam. Over the past few months the ADEX fee has increased to \$1800 for dental and \$850 for the hygiene exam. CITA has no intention of raising its fees at this moment.

Dr. Kinlaw asked the Committee to allow the Board's current rules to go forward and he supported the proposed legislation.

Rep. Jones asked if there was a method to certify the reliability of the CITA exam.

Dr. Kinlaw said that the examination that CITA is giving has been validated by two of the nation's top test measurement specialists, Dr. Chad Buckendahl with the Burroughs Institute at the University of Nebraska and Dr. Steven Cline who is also well. The concept of fidelity is one that develops longitudinally as the exam is given at multiple test sites. Test results from those sites are measured to see if there is fidelity from site to site. Dr. Kinlaw said a quality assurance committee has been formed to make certain the exam is uniformly developed and uniformly administered from site to site.

Rep. Goodwin recognized Colleen Kochanek who represents the North Carolina Hygienists Association. She said there had been a lot of confusion surrounding this issue and she felt that was a result of the Association's not having been involved in the initial discussions.

Ms. Kochanek said that Mr. White had sent out a listing after a meeting that was held among all the stake-holders about how they felt the meeting went and what issues were agreed upon. They let Mr. White know, at that time, that they did not agree on his listing. The draft proposal that Ms. Cochrane Brown prepared contained some of the issues of concern to the Association. The main concern was that there needed to be some criteria for the CITA exam. CITA has been talked out as a forgone conclusion and the Association is concerned that maybe CITA is not the best choice. The thing that concerned the Association the most is that they are talking about what might happen in the future. The Board is hoping other states will join CITA and that more regions will get involved, but no one can say that for sure. The Association believes that the Board is asking the Committee to make a decision on what they think will happen in the future and the Association is very concerned about that. Some of these concerns have been addressed in the draft bill by listing criteria, but they have a couple of suggestions as how to tighten that more. The concern that they have is they were not involved in initial

discussions about what regional exam to use, so they are a little hesitant about being included later. The NC Exam will not be given after September 2007. What if, at that time, CITA's membership hasn't increased? Will the Dental Hygiene Association be included in discussions about what to do? One of the criteria listed on the first page, is "the number of states." They believe that is important, but areas of the states are as well, they would like to have neighboring states to be apart of any kind of regional exam. If a national exam is created, the draft bill does allow for a national exam. That would be a better choice. The only other suggestion relates to Section 4 of the Bill draft. The date of September 30, 2007 might need to be pushed out farther.

Rep. Goodwin asked Ms. Kochanek if the Association was requesting that the Committee to amend the bill draft?

Ms. Kochanek said they did not have an issue with the adoption of the proposal, because the profession was very supportive of the regional exam concept, but they would like for the Committee to consider an amendment to the bill draft to make certain that a "regional" exam is offered that includes neighboring states. They also would like time frame for the NC Exam to be pushed beyond 2007.

Rep. Ross asked if the Association was asking the Committee to adopt the proposal and amend it in the future to address concerns about which and how many states would join CITA and whether the time-line could be extended. If the draft is approved the Association could work with the Board to come up with a committee substitute that could be introduced in the short session. Secondly, even if the time-line is not extended from September 2007, there will be an opportunity during the 2007 session whether or not the Board has done what it says it will do. Ms. Kochanek agreed.

Rep. Jones said that it was his understanding that there is a growing movement for reciprocity and asked if that issue has ever come from the discussions.

Martha Taylor, Governmental Affairs Chair with the NC Dental Hygiene Association, was recognized. She said the issue of reciprocity in North Carolina has been addressed by "licensure by credentials."

Rep. Jones wanted assurances that, if the proposal was adopted, the Board and the Association would come together for a compromise.

Dr. Allen said that there would be a serious logistical problem with respect to examining candidates if this proposal is held up any further. It was always agreed and in answer to one of Ms. Kochanek's concerns about the re-evaluation process, the Board is not "married" to any specific entity and the Board thinks that it is very important, in this national climate, with respect to testing and licensure Boards, that the Board always maintained its independence with respect to being able to decide what is and is not appropriate. A lot of the traditional organizations they depended upon to uphold the integrity of the profession have different agendas now. So while they agreed to look at

the Association's issues, and to tweak and turn as best can be, they would not do so to the extent that the integrity of the process is compromised.

Senator Stevens moved that the draft proposal be adopted.

Rep. Goodwin said that Ms. Cochrane-Brown has an amendment that will address some concerns from the members. Ms. Cochrane-Brown said that on p. 3, line 10, the phrase "the Board may require applicants to pay the actual cost of the testing agency in lieu of the fee authorized by Subdivision (a.1) of this section" and the language "in addition to the Board's other fees" would be deleted.

Senator Purcell moved that the amendment be adopted and the motion was seconded by Rep. Bell.

Dr. Kinlaw told the Committee that in the regional or national construct, if NC were to join other regional agencies, these agencies have their own fees for administering the exam, but the schools where the exams are administered also have a site facility fee. He just wanted to Committee to know that there may be an additional site fee.

Rep. Ross wanted to go forward with the proposal and suggested that Dr. Kinlaw's concern was a completely unrelated different issue.

The adoption of the amendment was before the Committee and passed.

Senator Purcell wanted to make certain what the concerns of the Association would be addressed.

Deborah Lefevers from a Hickory Dental Hygiene School was concerned about the language in SECTION I, (a) (5) d. regarding human testing. She wanted something in the bill about the standard of testing, and that it not necessarily require that the exam be performed on a human subject.

Rep. Goodwin did not feel that was an issue and said that the language "whether human subjects are used as part of the assessment is an issue to be considered," is not exclusive or inclusive or required in any way.

Senator Purcell asked Dr. Allen if the Board had concerns about the Association's requests to extend the time that the State exam would be given and that the exam is truly a regional exam, not one with twenty states in the West and one in the East.

Dr. Allen said that the Board couldn't really solve those problems and that they had to look at the integrity of the process. While they are sensitive to those issues, if everybody in the state wanted to do something the Board felt was wrong, they would not necessarily subscribe to that. Their first concern has to be the integrity of the process. They also cannot dictate to other states what to do, but must instead decide whether they agree with

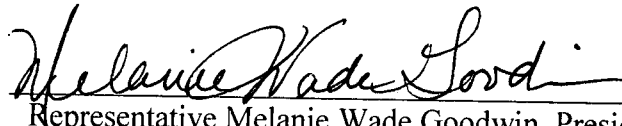
them or not. The Board also would not agree to an extension of the time for the NC exam to be given.

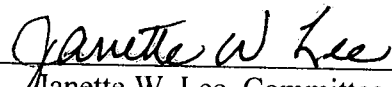
Rep. Goodwin said that individuals graduating in September of 2007 are enrolled at the present time and Dr. Allen said that is correct.

Rep. Jones moved for adoption of the proposal as amended and the motion carried.

There was discussion about the Committee meeting one more time to adopt the Final Report, but no date was decided upon

The meeting adjourned at 12:20 p.m.


Representative Melanie Wade Goodwin, Presiding


Janette W. Lee, Committee Assistant

DRAFT
FOR REVIEW ONLY
D

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

S

BILL DRAFT 2005-SB-25 [v.2] (04/19)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
4/20/2006 8:34:32 AM

Short Title: Medicaid Reimburse. for Ocular Prosthetists. (Public)

Sponsors: Senator Webster.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO CLARIFY MEDICAID REIMBURSEMENTS FOR OCULAR
PROSTHETISTS.

The General Assembly of North Carolina enacts:

SECTION 1. Section 10.11(a)(23) of S.L. 2005-276 reads as rewritten:

"(23) Medically necessary prosthetics or orthotics. – Reimbursement in accordance with the State Plan approved by the Department of Health and Human Services, except that in order to be eligible for reimbursement, providers must be Board ~~certified~~-certified, or in the case of ocular prosthetists Board certified or accredited, not later than July 1, 2005. Medically necessary prosthetics and orthotics are subject to prior approval and utilization review."

SECTION 2. This act becomes effective July 1, 2006.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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2

SENATE BILL 664*
Commerce Committee Substitute Adopted 4/27/05

Short Title: Small Business Regulatory Improvement Act.

(Public)

Sponsors:

Referred to:

March 17, 2005

A BILL TO BE ENTITLED

AN ACT TO REQUIRE STATE AGENCIES PROPOSING PERMANENT RULES TO CONSIDER THE ADVERSE ECONOMIC IMPACT OF THE PROPOSED RULE ON SMALL BUSINESS; TO REQUIRE STATE AGENCY REVIEW OF EXISTING RULES PRIOR TO AMENDMENT TO DETERMINE THE IMPACT ON SMALL BUSINESS; TO ESTABLISH THE SMALL BUSINESS REGULATORY REVIEW COMMITTEE IN THE DEPARTMENT OF COMMERCE TO REVIEW PROPOSED PERMANENT RULES THAT MAY HAVE AN ADVERSE IMPACT ON SMALL BUSINESS AND MAKE RECOMMENDATIONS TO THE AGENCY AND GENERAL ASSEMBLY; TO AUTHORIZE PETITION BY A SMALL BUSINESS OBJECTING TO A PERMANENT RULE ON SPECIFIED GROUNDS; PROVIDING FOR SMALL BUSINESS REGULATORY REVIEW COMMITTEE REVIEW OF THE AGENCY'S RESPONSE TO THE PETITION; AUTHORIZING JUDICIAL REVIEW OF THE PETITION; AUTHORIZING AGENCY WAIVER OF ADMINISTRATIVE FINES OR PENALTIES FOR VIOLATIONS BY SMALL BUSINESS; AND APPROPRIATING FUNDS TO THE DEPARTMENT OF COMMERCE TO SUPPORT THE SMALL BUSINESS REGULATORY REVIEW COMMITTEE.

The General Assembly of North Carolina enacts:

SECTION 1. Article 2A of Chapter 150B of the General Statutes is amended by adding the following new Part to read:

"Part 2A. Small Business Regulatory Improvement Act.

"§ 150B-21.7A. Findings; definitions.

(a) The General Assembly finds the following:

(1) A uniform system for administrative rule making and adjudicatory process is necessary to ensure that rules to protect the health, safety, and economic welfare of the State are adopted and enforced in an open, fair, and equitable manner.

(2) In adopting and enforcing administrative rules, State agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on employers.

(3) The failure to recognize differences in the scale and resources of regulated businesses can adversely affect competition in the marketplace, discourage innovation, and restrict improvements in productivity.

(4) The practice of treating all regulated businesses as equal may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, actions inconsistent with the legislative intent of health, safety, environmental, and economic welfare legislation.

(b) As used in this Part, the term:

(1) 'Adverse economic impact' means any financial impact on small businesses affected by the rule.

(2) 'Committee' means the Small Business Regulatory Review Committee established under G.S. 143B-472.99.

(3) 'Small business' means a business entity, including its affiliates, that is both independently owned and operated and has not more than 250 employees.

"§ 150B-21.7B. Rules affecting small businesses; economic impact statement by agency.

(a) Before an agency publishes in the North Carolina Register the proposed text of a permanent rule that would have an adverse economic impact on small businesses, the agency shall prepare an economic impact statement that includes the following:

(1) An identification and estimate of the number of small businesses subject to the proposed rule.

(2) The projected reporting, record keeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

(3) A statement of the probable effect on impacted small businesses.

(4) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule.

(b) The agency shall include the adverse economic impact statement in the notice of text in accordance with G.S. 150B-21.2(c).

"§ 150B-21.7C. Agency review of existing rules.

In order to minimize the adverse economic impact on small businesses, prior to amending a permanent rule, the agency shall consider the following:

(1) The continued need for the rule.

(2) The nature of complaints or comments received from the public concerning the rule.

(3) The complexity of the rule.

(4) The extent to which the rule overlaps, duplicates, or conflicts with other federal or State rules or local government ordinances.

(5) The length of time since the rule has been evaluated and an estimate on the length of time the rule will continue to be necessary.

(6) The degree to which technology, economic conditions, or other factors have changed or no longer exist in the area affected by the rule.

"§ 150B-21.7D. Periodic agency review of rules.

(a) Within four years of the enactment of this act, each agency shall review all agency rules existing at the time of enactment to determine whether the rules should be continued without change, or should be amended or repealed, consistent with the stated objectives of the underlying statutes, to minimize economic impact of the rules on small businesses in a manner consistent with the stated objectives of applicable statutes. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, the agency shall publish a statement certifying that determination. The agency may extend the completion date by one year at a time for a total of not more than five years.

(b) Rules adopted after the enactment of this act shall be reviewed within five years of the publication of the final rule and every five years thereafter to ensure that they minimize economic impact on small businesses in a manner consistent with the stated objectives of the underlying statutes.

(c) In reviewing rules to minimize economic impact on small businesses, the agency shall consider all of the following factors:

(1) The continued need for the rule.

(2) The nature of complaints or comments received concerning the rule from members of the public.

(3) The complexity of the rule.

(4) The extent to which the rule overlaps, duplicates, or conflicts with other federal, State, or local government rules.

(5) The length of time since the rule has been evaluated or the degree to which economic conditions or other factors have changed or no longer exist in the area affected by the rule.

"§ 150B-21.7E. Proposed permanent rules; agency determination of impact on small business; notice to Small Business Regulatory Review Committee.

If the economic impact statement prepared as required under G.S. 150B-21.7B indicates the proposed permanent rule may have an adverse economic impact on small business, the agency proposing the permanent rule shall provide a copy of the notice of text including the impact statement to the Small Business Regulatory Review Committee established under G.S. 143B-472.99 for its timely review, comment, and recommendations. The agency shall submit the documents to the Committee when it submits the notice of text to the Register for publication. If the Committee determines that the proposed permanent rule may have an adverse economic impact on small business, the Committee shall request that the agency consider the following:

(1) The availability and practicability of less restrictive alternatives that could be implemented; and

(2) Creative, innovative, or flexible methods of compliance by small business.

"§ 150B-21.7F. Permanent rules; petition objecting to adverse economic impact on small business; judicial review.

(a) If a permanent rule has an adverse economic impact on a small business, that small business may file a written petition with the State agency that adopted the rule objecting to all or part of the rule on any of the following grounds:

- (1) The agency's failure to comply with the requirements of G.S. 150B-21.7B.
- (2) The actual effect on small business significantly exceeded or was not reflected in the small business impact statement formulated by the agency in accordance with this Part.
- (3) The actual or estimated adverse economic impact was either not considered in public hearings on the rule, or there were no public hearings conducted on the rule.
- (4) The technology, economic conditions, or other relevant factors underlying the purpose of the rule have changed or no longer exist.

(b) Upon receipt of the petition, the agency shall forward a copy of the petition to the Small Business Regulatory Review Committee as notification of a petition filed under this Part. The agency shall promptly consider the petition and may seek advice and counsel regarding the petition. Within 60 days after the receipt of the petition, the agency shall determine whether the impact statement or the public hearing addressed the actual and significant impact of the rule on small business, or if conditions underlying the purpose of the rule have changed or no longer exist. The agency shall provide a copy of its determination to the Committee.

(c) If the agency determines that the petition merits amendment to or repeal of a rule, it shall initiate rule making in accordance with the applicable requirements of this Chapter. If the agency determines that the petition does not merit the amendment or repeal of a rule, any small business adversely affected by the agency's determination may seek review of the agency's determination by the Committee. Upon request for review, the Committee shall convene a meeting for the purpose of determining whether to recommend that the agency initiate proceedings to amend or repeal a rule. The Committee's review shall not be de novo but shall be based on the actual record presented to the agency. The Committee may base its recommendation on any of the following:

- (1) The failure of the agency to comply with the requirements of G.S. 150B-21.7B.
- (2) The actual effect on small business significantly exceeded or was not reflected in the small business impact statement formulated by the agency pursuant to G.S. 150B-21.7B.
- (3) The actual economic impact was not previously considered by the agency.
- (4) The technology, economic conditions, or other relevant factors underlying the purpose for the rule have changed or no longer exist.

(d) If the Committee recommends that the agency initiate rule making for any reason stated in subsection (c) of this section, then the small business that is adversely

1 affected or aggrieved by the adoption of a permanent rule may seek judicial review of
2 the petition under this section. The small business may seek judicial review under this
3 subsection during the period commencing on the date the permanent rule becomes
4 effective and end one year from that date. If the court finds in favor of the petitioner, it
5 may direct the agency to initiate rule making or provide other appropriate relief.

6 (e) The Committee shall submit to the Joint Administrative Procedure Oversight
7 Committee ("Oversight Committee") an evaluation report and the agency's
8 determination of the petition's merits. The Oversight Committee shall review the
9 Committee's report and agency determination and shall make recommendations to the
10 General Assembly for legislative action, if necessary.

11 **"§ 150B-21.7G. Waiver of administrative penalties.**

12 (a) Notwithstanding any other law to the contrary, a State agency that is
13 authorized to assess administrative fines or penalties upon a business may waive or
14 reduce the administrative fine or penalty for a violation of a statute or rule by a small
15 business only under the following conditions:

16 (1) The small business corrects the violation within 30 days after receipt
17 of notice of the violation.

18 (2) The violation was the result of an excusable misunderstanding of the
19 agency's interpretation of the rule.

20 (b) An agency may not waive an administrative fine or penalty when:

21 (1) A small business has been notified of the violation and has been given
22 a prior opportunity to correct the violation on a prior occasion.

23 (2) A small business fails to exercise good faith in complying with the
24 statute or rule.

25 (3) The violation involves willful or criminal misconduct by the small
26 business or its agents or employees.

27 (4) The violation results in or poses a threat of serious health, safety, or
28 environmental impact.

29 (5) The penalty or fine is assessed pursuant to a federal law or regulation
30 and for which no waiver or reduction is authorized by the federal law
31 or regulation.

32 (c) An agency shall adopt rules providing for the waiver of administrative fines
33 or penalties in accordance with this section."

34 **SECTION 2.** Article 10 of Chapter 143B of the General Statutes is amended
35 by adding the following new Part to read:

36 "Part 20. Small Business Regulatory Review Committee.

37 **"§ 143B-472.99. Small Business Regulatory Review Committee established;
38 members; chairman; selection; removal; compensation; quorum;
39 services.**

40 (a) There is established the Small Business Regulatory Review Committee
41 ("Committee"). The Committee shall be located in the Department of Commerce for
42 budgetary purposes only. The Committee shall consist of 15 members, each of whom
43 shall be appointed by the Governor. In making appointments, the Governor shall ensure

1 that members represent the geographic regions of the State and are employed by or own
2 a small business, as defined in G.S. 150B-21.7B.

3 (b) The Governor shall designate one member of the Committee to serve as
4 Chairman at the pleasure of the Governor.

5 (c) Members shall be appointed for a term of four years, except that one-third of
6 the initial members appointed by the Governor shall be appointed to serve for a term of
7 two years. Members shall serve until their successors are appointed and qualify. Any
8 appointment to fill a vacancy on the Committee created by the resignation, dismissal,
9 death, or disability of a member shall be for the balance of the unexpired term. A
10 member shall not be appointed for more than two consecutive terms.

11 (d) The Governor shall have the power to remove any member of the Committee
12 from office in accordance with the provisions of G.S. 143B-16 of the Executive
13 Organization Act of 1973.

14 (e) Members of the Committee shall receive per diem and necessary travel and
15 subsistence expenses in accordance with the provisions of G.S. 138-5.

16 (f) A majority of the Committee shall constitute a quorum for the transaction of
17 business.

18 (g) The Secretary of Commerce shall provide clerical and other services required
19 for the Committee to carry out its duties, including the designation of a Small Business
20 Advocate. The Advocate shall review all proposed rules submitted to the Committee
21 and make recommendations on less intrusive and less costly alternative methods of
22 achieving the purpose of the proposed rule.

23 (h) The Committee shall meet at least semiannually, or more often if necessary as
24 determined by the Chair.

25 **"§ 143B-472.100. Duties of the Small Business Regulatory Review Committee.**

26 The duties of the Small Business Regulatory Review Committee are as follows:

27 (1) Provide State agencies with input regarding proposed permanent rules
28 which may have an adverse economic impact, as defined in
29 G.S. 150B-21.7B, upon small business and for which notice has been
30 published in the North Carolina Register in accordance with
31 G.S. 150B-21.2. The Committee shall provide its comment and
32 recommendations to the State agency within 30 days of receipt of the
33 proposed permanent rule and impact statement from the State agency
34 pursuant to G.S. 150B-21.7E.

35 (2) Review any permanent rule proposed by a State agency for which the
36 agency has notified the Committee that the proposed rule has an
37 adverse economic impact upon small business and make
38 recommendations to the agency and the General Assembly regarding
39 the need for further agency or legislative action."

40 **SECTION 3. G.S. 150B-21.9 reads as rewritten:**

41 **"§ 150B-21.9. Standards and timetable for review by Commission.**

42 (a) Standards. – The Commission must determine whether a rule meets all of the
43 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 fulfill a duty delegated to the agency by the General Assembly, when considered in light of the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed and the legislative intent of the General Assembly in delegating the duty.

The Commission may determine if a rule submitted to it was adopted in accordance with Part 2 and Part 2A of this Article. 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.

The Commission must notify the agency that adopted the rule if it determines that a rule was not adopted in accordance with Part 2 or Part 2A of this Article and must return the rule to the agency. Entry of a rule in the North Carolina Administrative Code after review by the Commission is conclusive evidence that the rule was adopted in accordance with Part 2 and Part 2A of this Article.

(b) Timetable. – The Commission must review a 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."

SECTION 4. G.S. 150B-21.2(c) reads as rewritten:

"(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.
- (2) A short explanation of the reason for the proposed rule.
- (3) A citation to the law that gives the agency the authority to adopt the rule.
- (4) The proposed effective date of the rule.
- (4a) An adverse economic impact statement on small business as required by G.S. 150B-21.7B.
- (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 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.

1 (9) The procedure by which a person can object to a proposed rule and the
2 requirements for subjecting a proposed rule to the legislative review
3 process."

4 **SECTION 5.** There is appropriated to the Department of Commerce the sum
5 of sixty thousand dollars (\$60,000) for the 2005-2006 fiscal year to be used for the
6 support of the Small Business Regulatory Review Committee.

7 **SECTION 6.** This act becomes effective October 1, 2005, and applies to
8 notices of text for proposed permanent rules published in the North Carolina Register on
9 and after that date.

Small Business Regulatory Improvement Act – HB757 and SB664

A vibrant and growing small business sector is critical to creating jobs in a dynamic economy. More than 93% of businesses in every state are small businesses and in North Carolina the number is even higher at 98%. Therefore, small businesses should be protected from state regulations that require them to bear disproportionate costs and burdens. Small employers can help fix problems if they have a voice in the process.

Background of Model Legislation – In a survey of state laws, the SBA Office of Advocacy found that many states lack flexible regulatory approaches for small businesses. Of the states that do have some form of regulatory flexibility, many are missing key legislative components that give regulatory flexibility its effectiveness. As a result, Advocacy drafted a model legislation to help state legislators create a structure in which small businesses can have meaningful input in the development of state policies and rules. In fiscal year 2002 the cost savings to small businesses from federal regulatory flexibility was more than \$21.1 billion. The Office of Advocacy urges state policymakers to enact regulatory flexibility legislation or amend current laws in order to pass on similar cost savings to state economies.

Developing flexible regulatory approaches for small businesses has become a key economic incentive program for policy makers and small businesses in many states. As of March 2005 one state has enacted the legislation by executive order, ten states have active regulatory flexibility statutes and sixteen have introduced legislation

Key Components of the Bill

- **Small Business Definition** – The North Carolina regulatory flexibility legislation defines small businesses as entities having 250 or less employees.
- **Economic Impact Analysis** – This provision of the regulatory flexibility legislation requires state agencies to prepare an economic impact statement for rules that would have an adverse economic impact on small businesses.
- **Examining Alternative Rules** – Under this provision, agencies are required to be proactive in looking for, and considering, regulatory solutions that do not unduly burden small business. A Small Business Regulatory Review Committee is established in the Department of Commerce to advise, and to make recommendations, to agencies on the adverse impact that a proposed regulation may have on small businesses
- **Judicial Review** – This legislation allows small businesses to seek judicial review if an agency does not comply with the rulemaking process provided in the regulatory flexibility legislation.
- **Periodic Review of Rules** – The purpose of the review, among other things, is to determine whether the rules should be continued without change and whether there is a continued need for the rule.
- **Flexibility in waiver of penalties** – Under certain conditions provided in the bill, agencies may waive or reduce the administrative fine or penalty for violation of a rule by a small business.

SB664 Small Business Regulatory Improvement Act Sen. Hartsell and Sen. Hoyle

Endorsed By:

Employers Coalition of North Carolina

North Carolina Citizens for Business and Industry

National Federation of Independent Businesses

Manufacturers & Chemical Industry Council

NC Retail Merchants Association

The Rural Center

NC Home Builders Association

NC Association of Realtors

Carolinas Associated General Contractors

NC Petroleum Marketers Association

NC Association Long Term Care Facilities

NC Forestry Association

NC Restaurant Association

Small Business Administration

Carolina Asphalt Pavement

NC Healthcare Facilities



Kelly S. King
Chairman

Billy Ray Hall
President

11 January 2006

Senator Fletcher Hartsell
North Carolina General Assembly
518 Legislative Office Building
Raleigh, NC 27603-5925

RE: Senate Bill 664
Small Business Regulatory Improvement Act

Dear Senator Hartsell:

The purpose of this letter is to advise you of action of our Executive Committee concerning Senate Bill 664- Small Business Regulatory Improvement Act. On April 26, 2005, the committee received an update from staff on several critical bills moving through the General Assembly. Included in that discussion, and noted as a bill to be supported by the Rural Center, was S664.

Thank you for your leadership on this bill and for your work in support of small businesses.

Sincerely,


Jean Crews-Klein
Vice President

North Carolina

JCK:hps

Rural Economic

Cc: Billy Ray Hall, President
Leslie Scott, Director, Institute for Rural Entrepreneurship
Connie Wilson

Development Center, Inc.

4021 Carya Drive

Raleigh, NC 27610

Phone: (919) 250-4314

FAX: (919) 250-4325

-----Original Message-----

From: Info [mailto:info@ncaltcf.com]

Sent: Wednesday, April 20, 2005 11:40 AM

To: 'Lou B. Wilson'

Subject: A message from Lou Wilson

Dear Senator Soles,

It is my understanding that SB 664- Small Business Regulatory Act will be heard in the Commerce Committee next Tuesday, April 26, 2005.

I believe the information below is a perfect example of why such legislation is necessary. Over regulation on a small business is not only a burden to the business, in the human service area, it can become dangerous to the very people we are attempting to protect!

Please read the following information and vote yes on the Bill.

- The Department of Health and Human Services (DHHS), Division of Facility Services (DFS) has created rules for Adult Care Homes and a regulatory approach that is almost solely paper driven.
- Documentation requirements in an 80-bed facility now exceed an average of 126,000 entries annually or more than 10,000 a month.
- The regulatory approach to assure compliance depends on if the documentation is complete, thus driving the industry to assure compliance with paper rather than provide care and supervision to residents.
- The reimbursement system allows for one direct care staff for every 20 residents and is insufficient to maintain a reliable, well trained work force.
- The practice of creating such a system leads to enforcement problems, drains the facilities' resources, but more alarming, it creates an atmosphere which places a higher priority on paper than the care, safety and health of the residents.
- Below is a list of actual documentation requirements and an estimate of the numbers required in an 80-bed home.

The Estimates assume:

1 80-bed facility, with an average of 75 residents (25 admissions/discharges annually), with 1 administrator, 6 supervisors, 20 aides and 5 Med Techs, 1 activity coordinator, 1 maintenance, 6 cooks and kitchen helpers, 6 housekeepers and laundry personnel, 2 transportation, 1 records clerk, 1 receptionist – equal 50 total staff – staff turnover 100%.

1. License Application	=	1
2. Documentation to monitor physical plant, House Keeping system (1 time a week)	=	52
3. Monitoring compliance for hot water (1 time a week)	=	52

4.	Documentation for continued education for Administrator, Supervisors and Aides (assumes co-ed obtained in 4 increments annually)	=	48
5.	Plan for Evacuation (12 rehearsals Annually)	=	12
6.	Medication Aides clinical skills competency (6 FTE Med Aides)	=	6
7.	Documentation for staff and residents TB (50 staff and 25 New admissions)	=	100
8.	Documentation – Flu vaccinations for residents	=	50
9.	Documentation – Flu vaccinations for staff	=	50
10.	Documentation – Pneumonia vaccinations for residents (25 new admissions)	=	25
11.	Documentation – Personal Care Aide training	=	50
12.	Documentation – staff orientation	=	50
13.	Documentation – staff reference	=	50
14.	Documentation – staff trained in facility plans and policies	=	50
15.	Documentation – Personal Care staff task demonstration	=	50
16.	Documentation – staff training diabetic residents	=	6
17.	Documentation – staff training physical restraints	=	31
18.	Documentation – staff assessment training (3 unlicensed staff members preparing resident assessments)	=	3
19.	Documentation – staff food services orientation (6 food staff members required to have food service orientation)	=	6
20.	Daily Resident Census reports	=	365
21.	Work schedule – weekly	=	52
22.	Documentation for Admissions requirements (25 new charts annually)	=	25
23.	Documentation – discharge requirements (5 residents discharged annually)	=	5
24.	Documentation – Resident Assessments (Annually, 1 significant change per resident annually)	=	150
25.	Documentation – Resident Care Plans (Annually and when significant change occurs)	=	150
26.	Contracts with Physicians (6 residents weekly)	=	312
27.	Contracts with other Licensed Health Care Professionals (4 residents weekly)	=	208
28.	Accident/Incident Reports (1 accident/2 incidents weekly)	=	156
29.	Documentation – Licensed Health Professional Support (Assumes 1/3 residents require heavy care task)	=	100
30.	Documentation – Appropriate Health professionals are notified Assumes notification to:	=	(below)

Physicians for 6 residents weekly	=	312	
Pharmacy for 5 residents weekly	=	260	
Notification to Home Health or Mental Health for 5 residents weekly	=	<u>260</u>	
		832	832
31. Documentation – Menus – monthly	=		12
32. Documentation – Menu substitutions (2 times a week)	=		104
33. Documentation – Residents food preferences (25 New Admissions)	=		25
34. Documentation – Therapeutic diets (Assume 1/3 residents on Therapeutic Diets)	=		25
35. Documentation to monitor dietary system (1 time a week)	=		52
36. Documentation –Activity calendars (document 12 calendars annually)	=		12
37. Documentation – resident activities and outings	=		12
38. Documentation – transportation to all Health Care facilities and community resources (daily)	=		365
39. Residents' Personal Funds receipts (monthly, 75 x 12 month)	=		900
40. Residents Personal Funds disbursements (Assume facility manages personal funds for ¾ of residents, daily disbursement to 50 residents)	=		18,250
41. Documentation – Health Care Personnel Registry (50 staff)	=		50
42. Documentation – Compliance with Criminal Records checks (50 staff, 100% turnover)	=		50
43. Documentation – Death reports	=		5
44. Documentation – Physical restraint, Physician orders (8 residents annually, 4 prescriptions annually)	=		32
45. Documentation for family or representative notified regarding restraints	=		8
46. Documentation for restraint care planning (8 residents, quarterly)	=		32
47. Documentation for restraint care (8 residents daily)	=		2,920
48. Documentation – Notifications to Physicians regarding Emergency restraints (1 incident per quarter)	=		4
49. Documentation – Notification to family members when residents are ill, injured or wander (6 residents weekly)	=		312
50. Documentation of Physician Medication orders changes (Assumes each resident has 6 medication orders recorded every 6 months)	=		900
51. Documentation Medication orders clarified (2 residents per month)	=		24
52. Documentation residents' Emergency Room visits (1 resident weekly)	=		52
53. Documentation – Physician Treatment orders (1/3 of residents require orders for 1 treatment 8 times annually)	=		50



Advocacy: the voice of small business in government

Small Business Regulatory Flexibility Model Legislation Initiative

September 2005

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Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. Appointed by the President and confirmed by the U.S. Senate, the Chief Counsel for Advocacy directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Economic research, policy analyses, and small business outreach help identify issues of concern. Regional Advocates and an office in Washington, DC, support the Chief Counsel's efforts.

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Foreword

America's small businesses—more than 23 million strong—are the backbone of our nation's economy. They account for over 50 percent of the country's nonfarm domestic product, create 60 to 80 percent of the net new jobs, and produce two and one half times as many innovations per employee as large firms.

Despite their importance to the economy, small businesses are heavily burdened by the costs of government regulation and excessive paperwork. In 1976, the U.S. Congress created the Office of Advocacy within the U.S. Small Business Administration to protect, strengthen, and effectively represent the nation's small businesses within the federal government's legislative and rulemaking processes. Advocacy consistently advances the views, concerns, and interests of small businesses before Congress, the White House, federal agencies, federal courts, and state policymakers.

The Office of Advocacy works to reduce the burdens that federal policies impose on small firms. Advocacy's mission, simply stated, is to encourage policies that support the development and growth of American small businesses.

While the focus of the Office of Advocacy has been mostly at the federal level, our Regional Advocates around the country help to identify the regulatory concerns of small businesses in each state by monitoring the impact of federal and state regulations and policies at the local level. Their goal is to see that programs and policies that encourage fair regulatory treatment of small business are developed and implemented to ensure future growth and prosperity.

Recognizing that state and local governments can also be a source of burdensome regulations on small businesses, in December 2002, the Office of Advocacy presented draft state regulatory flexibility model legislation to the American Legislative Exchange Council (ALEC) for consideration by state legislators. ALEC adopted the legislation as a model bill and numerous small business advocacy organizations and state legislators have pursued its passage in

various states. Advocacy's model legislation is patterned after the federal Regulatory Flexibility Act and its purpose is to improve the regulatory climate for small businesses at the state level.

Since the release of Advocacy's state model legislation report, many states have taken steps to strengthen regulatory flexibility for small businesses. In building on state and federal successes with regulatory flexibility, the Office of Advocacy continues to urge state legislators and policymakers to enact regulatory flexibility legislation or to amend current statutes to include considerations for small businesses.

Giving small employers a voice early in the process is key to reducing the negative impact of regulations on small businesses, increasing the level of regulatory compliance, and passing on cost savings to state economies. Ensuring that the regulatory burden is not excessive and that regulations are straightforward and easy to understand helps entrepreneurs start up businesses, increases competition, and promotes job creation.

Please contact the Regional Advocate who represents your state for further assistance. The Office of Advocacy stands ready to help you level the playing field for small businesses in your state.



Thomas M. Sullivan
Chief Counsel for Advocacy

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Regulatory Flexibility: What It Is And Why It Matters

According to a 2001 study funded by the Office of Advocacy, *The Impact of Regulatory Costs on Small Firms*, by Drs. Mark Crain and Thomas Hopkins, small businesses spend \$6,975 each year per employee just to comply with federal regulations and mandates. That is 60 percent more than large firms.

In September 1980, Congress enacted the Regulatory Flexibility Act (RFA), which mandated that agencies consider the impact of their regulatory proposals on small entities, analyze equally effective alternatives, and make their analyses available for public comment.

The law was not intended to create special treatment for small businesses. Congress intended that agencies consider impacts on small businesses to ensure that, in their efforts to fulfill their public responsibilities, their regulatory proposals did not have unintended anticompetitive impacts and that agencies explored less burdensome alternatives that were equally effective in resolving agency objectives.

In March 1996, Congress was finally persuaded by 16 years of uneven compliance with the RFA, and by the repeated urging of the small business community, to authorize the courts to review agency compliance with the RFA. This amendment to the RFA, in the form of the Small Business Regulatory Enforcement Fairness Act (SBREFA), became law and raised the stakes for regulatory agencies. Judicial review gave the RFA "teeth" and reinforced the RFA requirement that agencies reach out and consider the input of small businesses in the development of regulatory proposals.

One of the clearest examples of how benefits can be derived from efforts to ensure compliance with the RFA comes from the Office of Advocacy's work with the U.S. Department of Transportation (DOT). In 2002, DOT published a proposed rule to revise its Computer Reservations System (CRS) regulations. DOT issued its proposed rule to exam-

ine whether the existing rules governing these systems were necessary and if so, whether they should be modified. Through small business outreach, Advocacy determined that the proposed rule had several provisions that could harm small businesses such as travel agencies. In its March 2003 comment letter, Advocacy encouraged DOT to publish for comment a revised initial regulatory flexibility analysis that identified the affected small entities, analyzed the proposal's economic impact on the small entities, and addressed regulatory alternatives that would minimize the impact on small businesses.

On January 7, 2004, DOT announced that it would deregulate the CRS industry by discontinuing most of its regulations on January 31, 2004. To ensure a smooth transition, rules governing display bias and prohibiting CRSs from imposing certain unreasonably restrictive contract clauses remained in effect until July 31, 2004. The final rule allowed travel agencies to negotiate their own contracts and receive bonuses and other incentives from CRSs. DOT achieved its deregulatory objective while protecting the interests of small businesses in the travel industry. The travel agent industry was very pleased with DOT's decision and estimated that removal of the CRS rules prevented travel agents from losing \$438 million annually in revenue.

Enforcing the RFA is central to the success of tearing down regulatory barriers to entrepreneurial success. By working with federal agencies to implement the RFA, the Office of Advocacy in FY 2004 saved small businesses \$17.1 billion in foregone federal regulatory costs—money that can now be invested by the businesses in other productive uses.

Regulatory Flexibility and the States

While there are federal measures in place to reduce regulatory burdens on small businesses, the need does not stop at the federal level. More than 92 percent of businesses in every state are small businesses, which bear a disproportionate share of regulatory costs and burdens. However, sometimes because of their size, the aggregate importance of small businesses to the economy is overlooked. Because of this, it is very easy to fail to notice the negative impact of regulatory activities on them.

Recognizing that in addition to the federal government, state and local governments can also be a source of burdensome regulations on small business, Advocacy drafted model regulatory flexibility legislation for the states based on the federal RFA.

The intent of Advocacy's model legislation is to foster a climate for entrepreneurial success in the states so that small businesses will continue to create jobs, produce innovative new products and services, bring more Americans into the economic mainstream, and broaden the tax base. Excessive regulation can be reduced and the economy improved without sacrificing important regulatory goals such as higher environmental quality, greater travel safety, better workplace conditions, and increased family financial security.

"This bill recognizes the vital role that small business plays in growing jobs and opportunity within the state. We must work to create an environment that fosters small business growth."—Kentucky Governor Ernie Fletcher

Many states have some form of regulatory flexibility laws on the books. However, many of these laws do not contain all of the five critical elements addressed in Advocacy's model legislation. Recognizing that some laws are missing key components that give regulatory flexibility its effectiveness, legislators continue to introduce legislation to strengthen their current systems.

According to Advocacy's state model legislation, successful state-level regulatory flexibility laws should address the following: 1) a small business definition that is consistent with state practices and permitting authorities; 2) a requirement that state agencies perform an economic impact analysis on the effect of a rule on small businesses before

they regulate; 3) a requirement that state agencies consider alternatives for small businesses that are less burdensome while meeting the agency's regulatory goals; 4) a provision that requires state governments to review existing regulations periodically; and 5) judicial review to give the law "teeth."

Since 2002, 14 state regulatory flexibility laws have been signed into law,¹ 33 state legislatures have considered regulatory flexibility legislation,² and four executive orders have been signed by governors implementing regulatory flexibility.³

"This bill is all about making life easier for our state's small businesses, which is a big step forward in stimulating job creation and economic growth in South Carolina. Ultimately, though, letting those businesses keep more of what they earn so they can reinvest in new people, new equipment and new technologies is going to have the biggest impact on our state's economy."—South Carolina Governor Mark Sanford

In 2005, 18 states introduced regulatory flexibility legislation (Alabama, Alaska, Hawaii, Indiana, Iowa, Mississippi, Missouri, Montana, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington). Alaska Governor Frank Murkowski, Indiana Governor Mitch Daniels, Missouri Governor Matt Blunt, New Mexico Governor Bill Richardson, and Virginia Governor Mark Warner signed regulatory flexibility legislation into law and Arkansas Governor Mike Huckabee implemented regulatory flexibility through an executive order in 2005.

One of the most recent examples on the state level of how benefits can be derived from regulatory flexibility laws comes from the New York

1 These states include: Alaska, Colorado, Connecticut, Indiana, Kentucky, Missouri, New Mexico, North Dakota, Rhode Island, South Carolina, South Dakota, Virginia, and Wisconsin.

2 These states include: Alabama, Alaska, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

3 These states include: Arkansas, Massachusetts, Missouri (whose executive order was later superseded by legislation), and West Virginia.

Department of Health. In October 2004, New York State adopted an emergency regulation to prevent prescription fraud by requiring the use of an official state prescription form for all prescriptions issued in New York. These forms have a security feature used to curtail alterations and forgeries which often divert drugs to the black market and result in the sale to unsuspecting consumers. This type of fraud also costs New York's Medicaid program and private insurers tens of millions of dollars annually in fraudulent claims.

Under New York's Administrative Procedure Act and an Executive Order signed by Governor Pataki, the Department of Health was required to perform a regulatory flexibility analysis for small business. As a result of its analysis, the agency found that the proposed regulation would affect a variety of small businesses such as practitioners, pharmacists, retail pharmacies, hospitals, and nursing homes.

Therefore, in drafting the regulation, the Department of Health met with and considered comments from the affected small businesses. By consulting with small business throughout the rule writing process, the agency was able to craft a regulation that met its goals without unduly burdening small entities.

As a result of this collaborative effort, the Department of Health promulgated a rule that took into account the uniqueness of small businesses by establishing a grant administered by the agency to defray costs for software adjustments faced by small pharmacies; eliminating the official prescription fee for small practitioners and institutions; and allowing small practitioners, pharmacists, retail pharmacies, hospitals, and nursing homes 18 months to transition to the new prescription form system.

Under the Serialized Official New York State Prescription Form regulation, private insurers and the Medicaid program are expected to save millions

of dollars by reducing fraudulent prescription claims while at the same time benefiting the state, its citizens, and private insurers.

A vibrant and growing small business sector is critical to creating jobs in a dynamic economy. Small businesses are 99.7 percent of all businesses, employ half of the work force, produce 52 percent of the private sector output, and provide significant ownership opportunities for women, minorities, and immigrants.

"Small business is the dynamo that powers our economy and every dollar a small business puts towards complying with cumbersome government regulations is a dollar that cannot be spent expanding the business, providing benefits, or hiring new employees. I sponsored HB 33 because I see smarter regulations as an economic development tool and strongly feel that we can add an awareness of the needs of small businesses to the regulatory process without compromising the health, safety, or welfare of the public."

—Alaska Representative Kevin Meyer

Advocacy welcomes the opportunity to work with state leaders on their regulatory issues. In addition to this report, the text of Advocacy's model legislation and frequently updated versions of the state regulatory flexibility legislative activity map can be found on Advocacy's website at http://www.sba.gov/advo/laws/law_modelleg.html.

Table 1. State Employer Firms by Employment Size of Firm, 2002

State	Total	Number of Firms by Employment Size				Percentage of Firms by Employment Size			
		<10	<20	<100	<500	<10	<20	<100	<500
United States	5,697,759	4,476,451	5,090,331	5,598,580	5,680,914	78.6	89.3	98.3	99.7
Alabama	78,710	58,561	67,186	74,768	76,554	74.4	85.4	95.0	97.3
Alaska	15,986	12,489	14,058	15,220	15,485	78.1	87.9	95.2	96.9
Arizona	95,908	71,602	81,828	90,812	93,178	74.7	85.3	94.7	97.2
Arkansas	52,094	39,574	45,069	49,564	50,601	76.0	86.5	95.1	97.1
California	674,635	517,978	591,088	656,371	669,132	76.8	87.6	97.3	99.2
Colorado	119,568	93,475	104,768	114,373	116,761	78.2	87.6	95.7	97.7
Connecticut	77,256	57,468	65,967	73,427	75,201	74.4	85.4	95.0	97.3
Delaware	20,208	14,257	16,290	18,124	18,779	70.6	80.6	89.7	92.9
District of Columbia	16,377	10,504	12,313	14,409	15,288	64.1	75.2	88.0	93.4
Florida	370,789	303,701	335,819	360,928	366,657	81.9	90.6	97.3	98.9
Georgia	164,252	125,411	141,929	156,567	160,442	76.4	86.4	95.3	97.7
Hawaii	24,912	18,501	21,198	23,519	24,120	74.3	85.1	94.4	96.8
Idaho	33,214	25,716	29,010	31,618	32,232	77.4	87.3	95.2	97.0
Illinois	253,720	190,941	218,492	243,366	249,419	75.3	86.1	95.9	98.3
Indiana	116,030	84,694	98,289	110,317	113,234	73.0	84.7	95.1	97.6
Iowa	65,136	49,088	56,049	62,057	63,534	75.4	86.0	95.3	97.5
Kansas	60,949	45,423	51,924	57,611	59,082	74.5	85.2	94.5	96.9
Kentucky	71,874	52,679	60,753	67,968	69,753	73.3	84.5	94.6	97.0
Louisiana	81,684	60,171	69,478	77,870	79,693	73.7	85.1	95.3	97.6
Maine	34,421	26,938	30,311	32,953	33,553	78.3	88.1	95.7	97.5
Maryland	107,995	80,464	92,205	102,822	105,445	74.5	85.4	95.2	97.6
Massachusetts	146,080	110,360	125,755	139,785	143,191	75.5	86.1	95.7	98.0
Michigan	192,284	144,574	166,728	185,278	189,259	75.2	86.7	96.4	98.4
Minnesota	118,667	89,055	101,980	113,602	116,227	75.0	85.9	95.7	97.9
Mississippi	47,979	36,047	41,128	45,404	46,459	75.1	85.7	94.6	96.8
Missouri	119,561	90,010	102,627	114,161	116,855	75.3	85.8	95.5	97.7
Montana	28,812	23,055	25,738	27,770	28,171	80.0	89.3	96.4	97.8
Nebraska	41,487	31,240	35,655	39,310	40,177	75.3	85.9	94.8	96.8
Nevada	42,502	30,897	35,274	39,324	40,671	72.7	83.0	92.5	95.7
New Hampshire	32,279	23,947	27,376	30,494	31,209	74.2	84.8	94.5	96.7
New Jersey	203,467	159,624	179,467	196,447	200,273	78.5	88.2	96.5	98.4
New Mexico	35,597	26,338	30,178	33,406	34,223	74.0	84.8	93.8	96.1
New York	428,425	344,201	383,562	417,244	424,337	80.3	89.5	97.4	99.0
North Carolina	165,020	125,261	143,332	158,426	161,776	75.9	86.9	96.0	98.0
North Dakota	17,151	12,812	14,634	16,158	16,565	74.7	85.3	94.2	96.6
Ohio	211,017	155,169	180,138	202,343	207,337	73.5	85.4	95.9	98.3
Oklahoma	70,334	53,895	61,012	67,132	68,536	76.6	86.7	95.4	97.4
Oregon	85,134	65,466	74,391	81,508	83,154	76.9	87.4	95.7	97.7
Pennsylvania	237,397	178,307	204,842	228,352	233,573	75.1	86.3	96.2	98.4
Rhode Island	25,469	19,154	21,675	23,989	24,584	75.2	85.1	94.2	96.5
South Carolina	78,608	58,984	67,547	74,732	76,473	75.0	85.9	95.1	97.3
South Dakota	20,877	15,782	17,966	19,752	20,212	75.6	86.1	94.6	96.8
Tennessee	100,720	74,195	85,271	95,296	97,856	73.7	84.7	94.6	97.2
Texas	373,059	283,415	324,811	360,246	368,118	76.0	87.1	96.6	98.7
Utah	49,259	37,273	42,307	46,539	47,572	75.7	85.9	94.5	96.6
Vermont	19,039	14,566	16,522	18,059	18,427	76.5	86.8	94.9	96.8
Virginia	142,593	107,173	122,839	136,208	139,513	75.2	86.1	95.5	97.8
Washington	138,256	107,391	121,568	133,039	135,692	77.7	87.9	96.2	98.1
West Virginia	32,669	24,491	28,009	30,887	31,597	75.0	85.7	94.5	96.7
Wisconsin	115,980	84,775	98,777	111,030	113,641	73.1	85.2	95.7	98.0
Wyoming	16,465	12,670	14,325	15,610	15,905	77.0	87.0	94.8	96.6

Note: Includes employer firms that existed at any point during the year and excludes nonemployer firms, which numbered 17.6 million in 2002. Firms can be in more than one state. Data for 2002 are the latest available firm size data.

Source: U.S. Small Business Administration, Office of Advocacy, based on data provided by the U.S. Census Bureau, Statistics of U.S. Businesses.

Model Legislation

A BILL

To improve state rulemaking by creating procedures to analyze the availability of more flexible regulatory approaches for small businesses.

Findings

- (1) A vibrant and growing small business sector is critical to creating jobs in a dynamic economy;
- (2) Small businesses bear a disproportionate share of regulatory costs and burdens;
- (3) Fundamental changes that are needed in the regulatory and enforcement culture of state agencies to make them more responsive to small business can be made without compromising the statutory missions of the agencies;
- (4) When adopting regulations to protect the health, safety, and economic welfare of [State], state agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on small employers;
- (5) Uniform regulatory and reporting requirements can impose unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses with limited resources;
- (6) The failure to recognize differences in the scale and resources of regulated businesses can adversely affect competition in the marketplace, discourage innovation, and restrict improvements in productivity;
- (7) Unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes;
- (8) The practice of treating all regulated businesses as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental, and economic welfare legislation;
- (9) Alternative regulatory approaches which do not conflict with the stated objective of applicable statutes may be available to minimize the significant economic impact of rules on small businesses;
- (10) The process by which state regulations are developed and adopted should be reformed to require agencies to solicit the ideas and comments of small businesses, to examine the impact of proposed and existing rules on such businesses, and to review the continued need for existing rules.

Section 1. Short Title

This act may be cited as the Regulatory Flexibility Act of [2006].

Section 2. Definitions

(a) As used in this section:

(1) "Agency" means each state board, commission, department, or officer authorized by law to make regulations or to determine contested cases;

(2) "Proposed regulation" means a proposal by an agency for a new regulation or for a change in, addition to, or repeal of an existing regulation;

(3) "Regulation" means each agency statement of general applicability, without regard to its designation, that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior regulation, but does not include (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public, (B) declaratory rulings, or (C) intra-agency or interagency memoranda;

(4) "Small business" means a business entity, including its affiliates, that (A) is independently owned and operated and (B) employs fewer than [five hundred] full-time employees or has gross annual sales of less than [six] million dollars.

Section 3. Economic Impact Statements

(a) Prior to the adoption of any proposed regulation that may have an adverse impact on small businesses, each agency shall prepare an economic impact statement that includes the following:

(1) An identification and estimate of the number of the small businesses subject to the proposed regulation;

(2) The projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record;

(3) A statement of the probable effect on impacted small businesses;

(4) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

Section 4. Regulatory Flexibility Analysis

(a) Prior to the adoption of any proposed regulation on and after [January 1, 2007], each agency shall prepare a regulatory flexibility analysis in which the agency shall, where consistent with health, safety, environmental, and economic welfare, consider utilizing regulatory methods that will accomplish the objectives of applicable statutes while minimizing adverse impact on small businesses. The agency shall consider, without limitation, each of the following methods of reducing the impact of the proposed regulation on small businesses:

- (1) The establishment of less stringent compliance or reporting requirements for small businesses;
- (2) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (3) The consolidation or simplification of compliance or reporting requirements for small businesses;
- (4) The establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and
- (5) The exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

(b) Prior to the adoption of any proposed regulation that may have an adverse impact on small businesses, each agency shall notify the [Department of Economic and Community Development or similar state department or council that exists to review regulations] of its intent to adopt the proposed regulation. The [Department of Economic and Community Development or similar state department or council that exists to review regulations] shall advise and assist agencies in complying with the provisions of this section.

Section 5. Judicial Review

(a) For any regulation subject to this section, a small business that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of this section.

(b) A small business may seek such review during the period beginning on the date of final agency action and ending one year later.

Section 6. Periodic Review of Rules

(a) Within four years of the enactment of this law, each agency shall review all agency rules existing at the time of enactment to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of those statutes, to minimize economic impact of the rules on small businesses in a manner consistent with the stated objective of applicable statutes. If the head of the agency determines that completion of the review of existing rules is not feasible by the established date, the agency shall publish a statement certifying that determination. The agency may extend the completion date by one year at a time for a total of not more than five years.

(b) Rules adopted after the enactment of this law should be reviewed every five years of the publication of such rules as the final rule to ensure that they minimize economic impact on small businesses in a manner consistent with the stated objectives of applicable statutes.

(c) In reviewing rules to minimize economic impact of the rule on small businesses, the agency shall consider the following factors:

- (1) The continued need for the rule;
- (2) The nature of complaints or comments received concerning the rule from the public;
- (3) The complexity of the rule;
- (4) The extent to which the rule overlaps, duplicates, or conflicts with other Federal, State, and local governmental rules; and
- (5) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

Key Elements of Advocacy's Model Bill

Every state has some form of administrative procedure law that governs the agency rulemaking process, and many states currently have provisions that pertain to regulations affecting small businesses and provide for regulatory flexibility. However, recognizing that some laws are missing key components that give regulatory flexibility its effectiveness, legislators continue to introduce legislation to strengthen their current systems.

"I think that our passage of a law requiring all South Dakota governmental agencies to complete and file small business impact statements whenever they promulgate new rules is one of the best things we have ever done for small business."

—Jerry Wheeler, Executive Director, South Dakota Retailers Association

Advocacy's model legislation is patterned after the federal regulatory flexibility law and contains the following five key elements: 1) a small business definition; 2) an economic impact analysis; 3) a regulatory flexibility analysis; 4) periodic review of existing regulations; and 5) judicial review.

Small Business Definition

It is important for "small business" to be defined by statute and for the definition to be consistent with how other laws and/or permitting authorities within the state characterize "small." If there is no such definition currently provided by statute, states generally use the number of employees and/or the gross annual sales of the entity to define "small business."

Economic Impact Analysis

Pursuant to most state administrative procedure laws, agencies are already required to prepare some form of economic impact analysis to determine

how the proposed regulation will affect the entities being regulated. Segmenting out the impact on small business is a necessary additional step in the analysis because small businesses bear a disproportionate share of regulatory costs and burdens. By recognizing the cost of a regulation to small businesses and the differences in scale and resources of regulated businesses, agencies are able to craft regulations that consider the uniqueness of small businesses. As a result, small businesses are better able to comply with agency rules and to survive in a competitive marketplace.

"This in turn will mean that agencies specified in the bill will have to consider the adverse impacts to small business before promulgating regulations. I am encouraged by this move to help return common sense to the regulatory process affecting this very important sector of our economy."—Alaska Governor Frank Murkowski

Regulatory Flexibility Analysis

Sometimes, because of their size, the aggregate importance of small businesses in the economy is overlooked. Because of this, it is very easy to fail to notice the negative impact of regulatory activities on them. The intent of Advocacy's model legislation is to require regulatory agencies to consider small businesses when regulations are developed and particularly to consider whether there are alternative regulatory solutions that do not unduly burden small business but still accomplish the agency goal.

Tailoring regulatory proposals to the unique needs of small business saves small employers money that is better used to hire additional employees, provide health care, train existing staff, and upgrade their facilities and equipment. This can be accomplished without sacrificing health, safety, and welfare issues of major importance to state governments.

Judicial Review

The federal regulatory flexibility law had limited success in curbing excess regulatory burdens for 16 years until judicial review was enacted in 1996.

The effect of the 1996 law was to give the RFA some “teeth” and to focus the heightened attention of regulatory officials on small business issues. Approximately 4,000 regulations are finalized in any given year. Only 12 to 13 lawsuits that cite noncompliance with the RFA have been filed per year since federal judicial review was enacted in 1996. Allowing small businesses to challenge state agencies for failure to adequately consider their impact on small business during the regulatory process is critical, as it provides an incentive for agencies to conduct a thorough and well-reasoned economic and regulatory flexibility analysis.

“Adding judicial review is an important step forward for our state’s small businesses. Now the law has some teeth, and that will help small business and state agencies work together to produce good regulations that get the job done without causing serious harm. It means a better business and job-creating climate for Missouri.”—Scott George, President and CEO of Mid American Dental and Hearing Center, Mt. Vernon, MO

Periodic Review

Existing regulations may also unduly burden small businesses because the rule may no longer serve its purpose, may be duplicated by newer federal or state legislation, or may have been promulgated without consideration of the effects on small businesses. Also, given the length of time that may have passed since the rule was promulgated, technology, economic conditions, or other relevant factors may have significantly changed in the area affected by the rule. Therefore, it is critical that agencies review rules periodically to determine whether they should be continued without change, amended, or rescinded to minimize the economic impact of the rule on small businesses.

A clear example of how benefits can be derived from efforts to periodically review existing regulations comes from the Massachusetts Office of Consumer Affairs and Business Regulation

(OCABR). OCABR has implemented a comprehensive 10-month review of every regulation promulgated by OCABR agencies to identify those that have become outdated or irrelevant. After publishing the proposed revisions, OCABR held a series of public hearings that gave affected small entities the opportunity to voice concerns about existing regulations and the proposed changes. OCABR was then able to refine the proposed changes based on this input.

The review is still in progress; however, approximately 50 pages of regulations have already been eliminated. Also as a result of this review process, the remaining rules are more precisely tailored, easier for regulated entities to understand, and less difficult for agency personnel to apply. OCABR also recognized that because the review process is now in place, future analyses should take considerably less time.

Exemptions

Even the strongest regulatory flexibility law has little value if most agencies and/or certain rules are exempt from it. Therefore, legislation should provide exemptions only to agencies or rules when it is absolutely necessary.

Fiscal Notes

During a time of tight state budgets, a common question is how much it will cost a state to implement regulatory flexibility for small businesses. The answer is that implementing a regulatory flexibility system can be accomplished at minimal to no additional cost to the state. In fact, the state saves money by getting input on costly or unnecessary regulation prior to implementation. Requiring small business analysis, input, and consideration of less burdensome alternatives ensures that state agencies make good final decisions. On the other hand, if regulations are poorly written and do not consider small businesses, they may need to be rewritten, which is more costly to state government than doing a thorough analysis the first time.

*Trained in FY 2003

Implementing regulatory flexibility for small businesses also does not require state agencies to incur excessive compliance costs for the preparation of the economic impact and regulatory flexibility analyses. Many states already conduct a general regulatory flexibility analysis. Segmenting out the impact on small business is a necessary additional step in the analysis. Moreover, rules that are finalized without adequate impact analysis run the risk of being more costly to both citizens and state agencies. And it is not in the interest of state agencies to propose and finalize a rule that small businesses cannot comply with and that causes widespread industry burdens resulting in layoffs and business closures.

Regulatory Flexibility Implementation

In states that have passed regulatory flexibility laws, the Office of Advocacy works with the small business community, state legislators, and state government agencies (usually the department of economic development) to assist with implementation and to ensure its effectiveness. Small business owners are the greatest resource that agencies can use to understand how regulations affect small businesses and what alternatives may be less burdensome.

"Our regulatory flexibility laws help to ensure a level playing field for South Carolina's small business."—Monty Felix, Alaglass Pools, Saint Matthews, SC, and chairman of the South Carolina Small Business Regulatory Review Committee

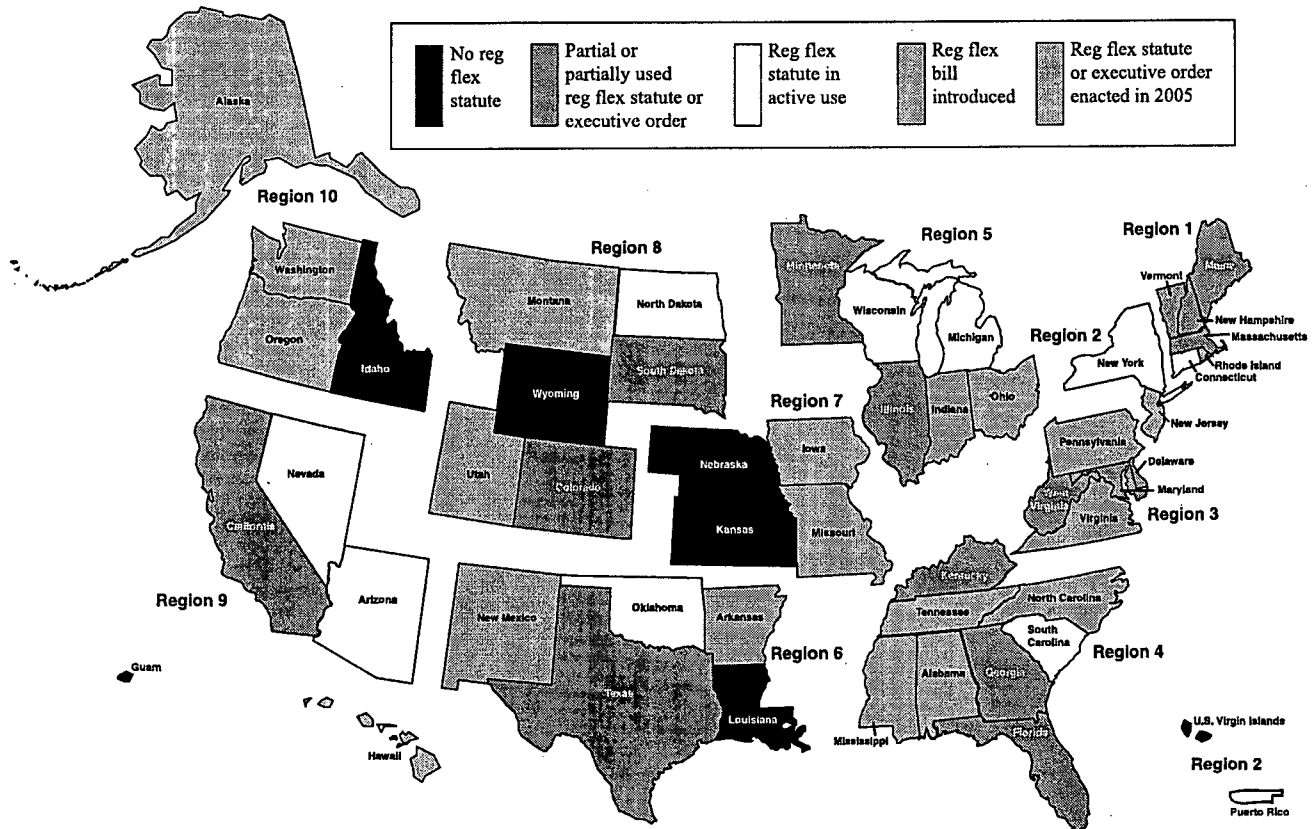
One of the most successful tools in communicating with small businesses and facilitating the implementation of regulatory flexibility legislation has been use of a free email regulatory alert system. A regulatory alert system allows interested parties to sign up and receive automatic regulatory alerts

when agencies file a notice for a proposed rule that may affect their small business. Creating a user-friendly Internet-based tool allows small business owners, trade associations, chambers of commerce and/or other interested parties to stay on top of agency activities that may have an impact on small businesses. It also provides an avenue through which stakeholders can voice their concerns about the adverse impact of a proposed rule and suggest regulatory alternatives that are less burdensome.

Advocacy's state model legislation has been successful because policymakers across the country are realizing that regulatory flexibility is an economic development tool. More than 23.7 million small businesses in the United States create between 60 and 80 percent of the net new jobs in the U.S. economy. There is also no question that small businesses are the driving force of the economy in each state across the country.

"Giving small business owners a seat at the table when regulatory decisions are made allows for their voices to be heard and ensures that better decisions are made. This means more jobs and growth at the state and local levels."—Thomas M. Sullivan, Chief Counsel for Advocacy

State Regulatory Flexibility Model Legislation Activity



August 2005



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Advocacy: the voice of small business in government

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Table 2. State Administrative Procedure and Regulatory Flexibility Statutes, August 2005

State	Citation	Small Business Definition	Economic Impact Analysis	Regulatory Flexibility Analysis	Periodic Review	Judicial Review	Exemptions	Legislation Introduced in 2005
Alabama	Ala. Code T. 41 Ch. 22	None.	41-22-23(f) ¹	42-22-23(g) ¹	None.	41-22-10 ¹	41-22-2(e) 41-22-3(1)	HB 745
Alaska	Ak. Stat. T. 24, Ch. 20 T. 44, Ch. 62	44.62.218 ²	44.62.218(a) 44.62.218(c)	44.62.218(a) 44.62.218(d)	44.62.125 (b)(3)	44.62.218(h) 44.62.300 ¹	44.62.218(g)	HB 33 effective 1/1/06
Arizona	Ariz. Rev. Stat. T. 41, Ch. 6	41-1001(19)	41-1055(B)	41-1035 41-1055(B)	41-1056(A)	41-1034 ¹ 41-1056.01	41-1005 41-1057	N/A ³
Arkansas	Ark. Code T. 25 Ch. 15	EO Sec.1	15-204(d) ¹ EO Sec.3	EO Sec.3	25-15-216	25-15-207 ¹	25-15-202(2)(C)	Executive Order in effect ⁴
California	Cal. Gov. Code T. 2 Div. 3 Ch. 3.5	11342.610	11346.3 ¹ 11346.5(a)(7)	11346.2(b)(3) 11346.5(a)(7) 11346.9(a)(4) 11346.9(a)(5)	11349.1 11349.7	11350 ¹	11340.9 11346.1	None.
Colorado	Col. Rev. Stat. T. 24 Art. 4	24-4-102(18)	24-4-103(2.5)	24-4-103(2.5)	None.	24-4-106 ^{1,5}	24-4-102(3) 24-4-103	None.
Connecticut	Conn. Gen. Stat. T. 4 Ch.54	4-168a	None.	4-168a(b)	None.	4-175 ^{1,5} 4-183	4-166(1) 4-168(a)(d)	N/A ³
Delaware	Del. Code T. 29 Ch. 101	10403(3)	10404	10404	10407	10141 ¹	10102(1) 10161	None.
District of Columbia	DC Code T. 1	None.	None.	None.	None.	Sec.110	None.	None.
Florida	Fla. Stat. T. X Ch. 120	288.703	120.54 120.541(2)(d)	120.54(3)(b)	120.74	120.68 ¹	120.50 120.63 120.80 120.81	None.
Georgia	Ga. Code T. 50 Ch. 13	50-13-4(a)(3)	None.	50-13-4(a)(3) 50-13-4(a)(4)	None.	50-13-10 ¹	50-13-2(1) 50-13-4(b) 15-13-42	None.
Guam	5 GCA Ch. 9	None.	9301(f) ¹	None.	None.	9309 ⁵	9301(i) 9302	None.
Hawaii	Haw. Rev. Stat. Ch. 201M	201M-1	201M-2	201M-2	201M-7	201M-6 91-7 ¹	201M-2(c)	HB 602 SB 422
Idaho	Idaho Code T. 67 Ch. 52	None.	67-5223(2) ¹	None.	None.	67-5271 ^{1,5}	67-5201(2)	None.
Illinois	5 Ill. Comp. Stat. 100	100/1-75	100/5-30(c)	100/5-30(a)	100/5-130	5-150 ^{1,5}	1-5(c)	None.
Indiana	Ind. Code T.4 Art. 22	4-22-2.1-4	4-22-2.1-5	4-22-2.1-5	4-22-2.5-3.1	4-22-2.1-8	4-22-2-13(b)	HB 1822, ⁶ effective

Note: All section numbers in columns 3 through 8 refer to the law cited in column 2, except as noted otherwise.

¹ Not small business specific.

² Alaska passed its regulatory flexibility legislation in the summer of 2005. A small business definition, small business specific economic impact statement, and small business regulatory flexibility analysis were added to current law as a result of this bill.

³ This column is not applicable to this state because it has a regulatory flexibility statute in active use.

⁴ Governor Huckabee implemented regulatory flexibility through Executive Order 05-04 in February of 2005. This executive order provides a small business definition and requires agencies to prepare a small business economic impact statement and to consider alternative means for accomplishing the objectives of the proposed rule that may be less burdensome to small businesses.

⁵ Petitioner must first exhaust administrative remedies.

State	Citation	Small Business Definition	Economic Impact Analysis	Regulatory Flexibility Analysis	Periodic Review	Judicial Review	Exemptions	Legislation Introduced in 2005
Iowa	Iowa Code T. 1, Subt. 6 Ch. 17A	17A.4A	17A.4(3) ¹ 17A.4A(2)(a)	17A.4A(2)(b)	17A.33	17A.19 ^{1,5}	None.	SF 65
Kansas	Kan. Sta. Ch. 77	None.	77-416(b) ¹	77-416(b) ¹	None.	77-607 ^{1,5} 77-612 77-621	None.	None.
Kentucky	Ky. Rev. Stat. T. 3 Ch. 13A	13A.010	13A.240 ¹	13A.210	None.	13A.337 ¹	None.	None.
Louisiana	La. Rev. Stat. T. 49 Ch. 13	49:965.1	49:953 ¹	None.	None.	49:963 ^{1,5} 49:964 49:965.1	49:967	None.
Maine	Me. Rev. Stat. T. 5, Pt. 18 Ch. 375	8052.5-A	8057-A.1(D)	8052.5-A	None.	8058 ¹	8054	None.
Maryland	Md. Code State Govt.	None.	10-124 ¹	10-124 ¹	10-132.1 10-133	10-125 ¹	10-102(b) 10-110(a)	None.
Massachusetts	Mass. Gen. Law T. III Ch. 30A	None.	30A-5 EO (Sec.5) ^{4,7}	30A-5 EO (Sec.5)	None.	30A-7 ¹	None.	None.
Michigan	Mich. Comp. Laws Ch. 24 Act 306	24.207a 24.240(2)	24.240 24.245(3)	24.240	None.	24.264 ^{1,5} 24.301	24.315	N/A ³
Minnesota	Minn. Stat. Ch. 14	None.	14.131 ¹	14.131 ¹ 14.055	14.05 (subd.5)	14.44 ¹	14.03	None.
Mississippi	Miss. Code T. 25 Ch. 43	None.	25.43- 3.105(2)(d)	25.43- 3.105(2)(f) ¹ 3.105(2)(g) ¹	25.43-3.114	25-43- 3.105(3) 25-43-17	25-43-3.108 25-43-6	HB 1472 SB 2795
Missouri	Mo. Rev. Stat. T. 36 Ch. 536	536.010	536.300	536.300.2	536.325	536.328	536.025 536.300(4)	HB 576 ⁸ effective 8/28/05
Montana	Mt. Code T. 2 Ch. 4	None.	2-4-302 ¹ 2-4-405 ¹	2-4-405 ¹	2-4-314	2-4-506 ¹	2-4-102(2)	HB 630
Nebraska	Ne. Rev. St. Ch. 84	None.	84-907 ¹	None.	None.	84-911 ¹	84-901	None.
Nevada	Nev. Rev. Stat. T. 18 Ch. 233B	233B.0382	233B.0608 233B.0609	233B.0608 233B.0609	233B.050 (1)(e)	233B.105 233B.110 ^{1,5}	233B.039	N/A ³
New Hampshire	N.H. Rev. Stat. T. LV Ch. 541A	541-A:5(IV)(e)	541-A:5(IV)(e)	None.	None.	541-A:24 ¹	541-A:21	None.
New Jersey	N.J. Stat. T. 52, Subt. 3 Ch. 14B	52:14B-17	52:14B-19	52:14B-18	None.	None.	None.	A 3973 S 2754
New Mexico	N.M. Stat. Ch. 12 Art. 8	HB 869 Sec.3.E	None.	HB 869 Sec.4.B	HB 869 Sec.6	12-8-8(A) ¹	None.	HB 869 ⁹ SB 842 effective

Note: All section numbers in columns 3 through 8 refer to the law cited in column 2, except as noted otherwise.

⁶ Indiana passed its regulatory flexibility legislation in the 2005 legislative session and it became effective July 1, 2005. HB 1822 added all of the key elements of Advocacy's model legislation to Indiana's current administrative procedure laws.

⁷ Governor Romney implemented regulatory flexibility through Executive Order No. 453 (No. 03-11) in September of 2003. This executive order requires agencies to prepare a small business economic impact statement and regulatory flexibility analysis and creates a Small Business Advocate position.

⁸ HB 576 added periodic review and judicial review provisions to existing Missouri administrative procedure law in the 2005 legislative session.

State	Citation	Small Business Definition	Economic Impact Analysis	Regulatory Flexibility Analysis	Periodic Review	Judicial Review	Exemptions	Legislation Introduced in 2005
New York	NY CLS St. Admin. P Act	102(8)	202-b	202-b	207	205 ^{1,5}	202-b(3)	N/A ³
North Carolina	N.C. Gen. Stat. Ch. 150B	None.	150B-21.4(b1) ¹	None.	None.	150B-43 ^{1,5}	150B-1 150B-21.1A 150B-21.5	HB 757 SB 664 SB 622
North Dakota	N.D. Cent. Code T. 28 Ch. 32	28-32-08.1	28-32-08.1	28-32-08.1	28-32-08.1	28-32-08.1	28-32-08.1	N/A ³
Ohio	Ohio Rev. Code T.1 Ch. 119	121.24	121.24(B) 127.18	None.	119.3.2 121.24(D)	119.12 ^{1,5}	119.01 119.03(H)	SB 15
Oklahoma	Okla. Stat. T. 74	75-502	75-303 75-504	75-303(A)(4) 75-504	75-250.10 75-307.1	75-306 ¹ 75-505	75-250.4 75-250.5	N/A ³
Oregon	Or. Revised Stat. Ch. 183	183.310	183.335(2)(b) HB 3238 Sec.2	183.540	HB 3238 Sec.3	183.400 ¹	183.315	HB 3238 ¹⁰
Pennsylvania	71 Pa. Cons. Stat. Ch. 4A	None.	745.5(a) ¹	745.5(a)	745.8.1	None.	None.	HB 236 SB 842
Puerto Rico	PR St T. 3 Ch. 79	2251(d)	2254	2254	2259	2260	2251(a)	N/A ³
Rhode Island	R.I. Gen. Laws T. 42 Ch. 35	42-35-1	42-35-3.3	42-35-3.3	42-35-3.4	42-35-7 ¹	42-35-1.1 42-35-3.3(d)	None.
South Carolina	S.C. Code T. 1, Ch. 23	1-23-270(B)	1-23-270(C)	1-23-270(D)	1-23-270(F)	1-23-270(E)	1-23-120(G)	N/A ³
South Dakota	S.D. Codified Laws T. 1 Ch. 26	1-26-1(8A)	1-26-2.1	None.	None.	1-26-14 ¹	None.	None.
Tennessee	Tenn. Code T. 4, Ch. 5	None.	4-5-226(i) ¹	None.	4-5-226(e)	4-5-225 ^{1,5}	4-5-106 4-5-208	HB 279 SB 1276
Texas	Tex. Govt. Code T. 10 Ch. 2006	2006.001	2006.002	2006.002	2001.39	2001.038 ^{1,5}	2006.012	None.
Utah	Utah Code T. 63 Ch. 46a	None.	63-46a-4 ¹	63-46a-4 ¹	63-46a-9	63-46a-12.1	63-46a-7	HB 209
Vermont	Vt. Stat. T. 3 Ch. 25	3-801	3-838(c)	3-832a 3-838(c)(3)	834	3-807 ¹	3-816 3-832	None.
Virgin Islands	None.	None.	None.	None.	None.	None.	None.	None.
Virginia	Va. Code T. 2.2 Ch. 40	2.2-4007.1(A)	2.2-4007(H)	2.2-4007.1(B)	2.2-4007.1(D), (E), (F)	2.2-4027	2.2-4002 2.2-4006	HB 1948 ¹¹ SB 1122 effective

Note: All section numbers in columns 3 through 8 refer to the law cited in column 2, except as noted otherwise.

⁹ New Mexico passed its regulatory flexibility legislation, titled the Small Business Regulatory Relief Act, in the 2005 legislative session. This bill added a small business definition, a small business regulatory flexibility analysis, and periodic review of existing regulations to its current administrative procedure laws.

¹⁰ Oregon passed its regulatory flexibility legislation in the 2005 legislative session. HB 3238 enhances Oregon's current regulatory flexibility laws by requiring the small business economic impact statement to include the elements outlined in Advocacy's model legislation and to conduct periodic review of existing regulations.

State	Citation	Small Business Definition	Economic Impact Analysis	Regulatory Flexibility Analysis	Periodic Review	Judicial Review	Exemptions	Legislation Introduced in 2005
Washington	Wash. Rev. Code T. 19, Ch. 85 T. 34, Ch. 5	19.85.020	19.85.030 19.85.040	19.85.030	34.05.630	34.05.570 ¹	19.85.025 34.05.030	HB 1445
West Virginia	W. Va. Code Ch. 29A	None.	EO ¹²	EO	EO	29A-4-2 ¹	29A-1-3	None.
Wisconsin	Wis. Stat. Ch. 27	227.114(1)	227.19(3)(e)	227.114(2) 227.19(3)(e)	227.30	227.40 ¹	227.24	N/A ³
Wyoming	Wyo. Stat. T. 16, Ch. 3	None.	None.	None.	None.	16-3-114 ^{4,5}	16-3-103(b)	None.

Note: All section numbers in columns 3 through 8 refer to the law cited in column 2, except as noted otherwise.

¹¹ Virginia passed its regulatory flexibility bill in the 2005 legislative session. The bill added all of the key components of Advocacy's model legislation to current Virginia administrative procedure laws.

¹² Governor Wise signed Executive Order No. 20-03 in 2003, which included a small business specific economic impact statement, regulatory flexibility analysis, and periodic review of existing regulations.

OSHA Issues New Standard for Occupational Exposure to Hexavalent Chromium

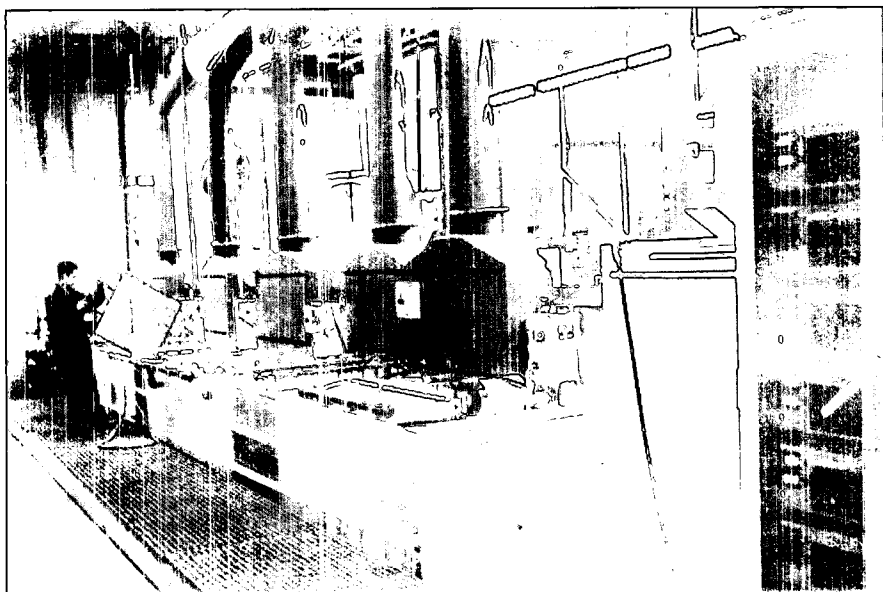
On February 28, 2006, the Occupational Health and Safety Administration (OSHA) issued its new standard for occupational exposure to hexavalent chromium. This new rule lowers the current permissible exposure limit (PEL) for airborne exposure to hexavalent chromium from 52 micrograms per cubic meter of air ($\mu\text{g}/\text{m}^3$) to 5 $\mu\text{g}/\text{m}^3$ —a tenfold reduction. The new standard will apply to some 558,000 workers in general industry, construction, and shipyards and will result in a projected 40-145 avoided lung cancer cases annually among exposed workers. OSHA estimates the rule will cost businesses \$282 million per year.

Hexavalent chromium is a form of chromium metal that is used in many industrial applications, primarily for its anti-corrosive properties. Among its many uses

are electroplating, wood preservatives, catalysts, pigments and dyes, and glass and plastic colorants. Inhalation of hexavalent chromium is suspected to cause lung cancer, nasal septum ulcerations and perforations, and other illnesses. The new rule will require new exposure controls from a variety of industries, including electroplating; welding; aerospace and auto body painting and repair; chromate pigment and chemical production; glass manufacturing; and plastic colorant production.

OSHA's new rule is highly controversial and is the result of prolonged litigation and a truncated rulemaking process. In 1993, the OCA Workers International and Public Citizen's Health Research Group petitioned OSHA for a rulemaking to lower the PEL

Continued on page 2



OSHA's hexavalent chromium rule will require new exposure controls from a variety of industries, including electroplating (shown here); welding; aerospace and auto body painting and repair; chromate pigment and chemical production; glass manufacturing; and plastic colorant production.

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for hexavalent chromium. While OSHA agreed to consider a new standard, several years passed and no action was taken. As a result, the organizations sued OSHA to compel the agency to act. The U.S. Court of Appeals for the Third Circuit eventually agreed that OSHA's delay was unreasonable and ordered the agency to propose a new rule by October 2004 and issue a final rule by January 2006.

The Office of Advocacy was heavily involved in the rulemaking process. OSHA was required by the Small Business Regulatory Enforcement Fairness Act

(SBREFA) to convene a panel to consider the impact of the rule on small businesses. That process allowed small entity representatives to review and comment on a draft version of the rule before it was published. The panel's report is available on Advocacy's website at www.sba.gov/advo/laws/is_oshapanel.html. Advocacy also filed detailed comments with OSHA recommending, among other things, that OSHA establish an interim PEL of 23 $\mu\text{g}/\text{m}^3$ while continuing to assess the risk data.

The SBREFA panel narrowed the cost and scope of the rule in some respects (see box); but few are pleased with the outcome. Both

SBREFA Panel Process Ameliorates Impact

The Small Business Regulatory Enforcement Fairness Act (SBREFA) required OSHA to convene a panel to consider the impact of its hexavalent chromium proposal on small businesses. This process allowed small entity representatives to review and comment on a draft version of the rule before it was published. The final rule differs from OSHA's original proposal in some significant respects. Many of these changes are the result of the SBREFA panel. For example:

- The panel recommended that OSHA re-assess its risk data, as well as the technical and economic feasibility of various permissible exposure limits (PEL). The panel asked the agency to consider a PEL higher than its proposed level of 1 microgram per cubic meter of air ($\mu\text{g}/\text{m}^3$). OSHA considered various PELs (from 0.25 to 20 $\mu\text{g}/\text{m}^3$) and selected 5 $\mu\text{g}/\text{m}^3$ based on its statutory mandate to establish a level that protects workers and is economically and technically feasible.
- The panel recommended that OSHA consider excluding industry sectors with little or no exposures to hexavalent chromium; consequently OSHA allowed industries that can demonstrate very low exposures (i.e., less than 0.5 $\mu\text{g}/\text{m}^3$) to be exempt from the rule. OSHA also excluded Portland cement (since dermal exposures are covered by other OSHA rules) and chromium copper arsenate (a wood preservative) because it is already regulated under an Environmental Protection Agency program.
- Also, based on the panel's recommendation, OSHA determined that businesses with employees who are exposed above the PEL for fewer than 30 days per year can comply by the use of respirators rather than having to install expensive engineering controls. Further, OSHA provided an engineering control limit of 25 $\mu\text{g}/\text{m}^3$ for certain aerospace painting operations (supplemented by respirators), and increased the time for all employers to comply with various provisions of the final standards.

The panel's report is available on Advocacy's website at www.sba.gov/advo/laws/is_oshapanel.html.

The Small Business Advocate

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Public Citizen and industry groups have already filed competing lawsuits against OSHA claiming that the final rule is unjustified. Small business groups, most notably in the electroplating and welding industries, have claimed that OSHA's cost projections are too low and that the new rule could put them out of business or force them to move overseas (where exposure limits tend to be between 20 and 50 $\mu\text{g}/\text{m}^3$). While industry grapples to comply with the new limits, final resolution of these legal issues will likely be decided in federal courts over the next few years. For further information or to discuss this rule, please contact Assistant Chief Counsel for Advocacy Bruce Lundegren at (202) 205-6144 or bruce.lundegren@sba.gov.

Message from the Chief Counsel

Sarbanes-Oxley Act Relief

by Thomas M. Sullivan, Chief Counsel for Advocacy

The existence of readily available capital markets could be off limits to the next generation of small, innovative firms if regulators implement reforms without considering their impact on private firms' decisions to go public.

This is the situation that the U.S. Securities and Exchange Commission (SEC) is confronted with as it considers how to implement section 404 of the Sarbanes-Oxley Act of 2002. Section 404 would require public companies to obtain expensive outside audits for reports on internal controls. The Office of Advocacy strongly recommends that the SEC provide some flexibility for small companies to comply with the Sarbanes-Oxley Act without incurring costs that could inadvertently shut the door to capital markets.

Advocacy has worked on this issue since 2002. Small entrepreneurial companies have consistently warned that these new requirements will effectively close the capital markets to them. Industry surveys on actual compliance costs bear out their concern, with one survey recently finding that for small companies, the first-year compliance costs totaled more than \$1 million.

Thus, if section 404 is applied to small companies, small firms could find themselves with such

expensive regulatory requirements that raising capital no longer makes financial sense. In addition to the cost burden, there is a competitive one: small private firms may face competition from innovative companies from other countries or companies listed on foreign exchanges

"The committee advised the SEC to defer the implementation of the internal control audit requirement for small companies until there is an adequate framework in place to account for differences in size between smaller and larger companies."

to which the new section 404 requirements wouldn't apply.

So far, the SEC has taken an active role in ensuring that its rules under the Sarbanes-Oxley Act do not unduly harm small businesses. The SEC created the Advisory Committee on Smaller Public Companies, and charged it with reviewing the statute's requirements and making recommendations to minimize the law's harmful impact on small business. The committee consisted of more than a dozen diverse members. It met publicly

across the country over the course of the last eleven months, soliciting testimony from members of the public, investors, and a wide range of industry participants.

The committee has completed its assigned task, and it issued a recommendation on February 21. The committee advised the SEC to defer the implementation of the new section 404 internal control audit requirement for small companies until there is an adequate framework in place to account for differences in size between smaller and larger companies.

The Office of Advocacy supports the recommendation to provide small business flexibility, and urges the SEC to defer to the expertise of its Advisory Committee on Smaller Public Companies. I hope that the SEC acts to keep our capital markets competitive and open to small companies.

Small Business Week 2006, April 12-13

In celebration of America's entrepreneurial spirit, the Small Business Administration will host Small Business Week 2006 in Washington, D.C., April 12-13. The conference will focus on small business accomplishments and showcase those businesses recover-

ing from disasters. During Small Business Week 2006, more than 100 outstanding small business owners from around the country will be honored in our nation's capital. Small business honorees reflect the full range of business products, services, and innovations offered by

America's entrepreneurs. To learn more, visit www.sba.gov/sbw.

Small Business Champions for 2006

The Office of Advocacy salutes all the winners, including the champions listed below.

Journalist Champion

Jerry Chautin
Cherokee Scout
Murphy, North Carolina

Home-Based Champion

Rosemin A. Mohammed
Owner, ABC 123 Academy
Dale City, Virginia

Women in Business Champion

Janet Bullard
Program Manager, Vermont
Commission on Women
Montpelier, Vermont

Family Owned Champion

Pedro A. "Tony" Fernandez
President, Albuquerque
Printing Company
Albuquerque, New Mexico

Minority Champion

Elaine K. Bland
General Manager, Lickity Split
Chocolate Studio
Blanding, Utah

Financial Services Champion

Rita Mitchell
Vice President, Wachovia
Small Business Lending
Thousand Oaks, California

Young Entrepreneur

Genevieve Thiers
CEO & Founder, Sittercity.com
Chicago, Illinois

Exporter Champion

John Miller
President, Oxbow Pet Products
Murdock, Nebraska

Veteran Champion

Andrew Douglas Davis
Chairman & Co-Founder
Comfort for Courage
Minneapolis, Minnesota

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Economic News

Small Business Job Creation and the Linkages to Innovation

by Chad Moutray, Chief Economist, Office of Advocacy

Martek Biosciences was founded in 1985. From its early roots in the University of Maryland's Technology Advancement Program, it has evolved into one of the nation's fastest growing technology companies (according to *Forbes* magazine's February 2006 poll). The primary reason for its success is its development and production of two essential nutrients for infant brain and eye development. Although these two nutrients occur naturally in human breast milk, Martek's compounds are derived from naturally occurring algal and fungal sources. Martek has patented processes for producing these compounds, which are now a staple in infant formulas.

Martek's success story is similar to that of many other firms that have capitalized on innovation and technology to grow to new heights. In the process, it has moved from being a small business to a much larger one, with several locations and over 600 employees. And like many others, Martek benefited from an incubator program for early-stage technology companies—the University of Maryland's Technology Advancement Program. This program has been successful in nurturing inventions and companies since its inception in 1986. (See www.tap.umd.edu.)

The Importance of Small Business Innovation. Small business innovation, as illustrated by this example, can lead to greater profits for the firm and more employment for the local community. Many high-growth, innovative new firms, like Martek, get their start as commercialized ventures resulting from research that was conducted at a university. In fact, Advocacy research has shown

a positive relationship between research and development spending at universities and firm births in the surrounding areas.

Economist William Baumol writes about this phenomenon in the most recent edition of the *Small Business Economy*. Large firms tend to be more risk-averse with



(Census Bureau photo.)

Martek Bioscience's success is rooted in innovation—the development and production of two essential nutrients for infant brain and eye development. These compounds are derived from naturally occurring algal and fungal sources.

their research and development spending. Their research and development is geared toward staying ahead of the competition, often by making small, incremental changes to existing products and processes. Small firms, on the other hand, can afford to “go for broke” with a new innovation that might be a breakthrough. If successful, these entrepreneurs will be able to grow their companies, the market, and the overall economy.

Once again, Advocacy research backs up this thinking. In 2003, a research study commissioned by Advocacy found that small patenting firms produce 13 to 14 times more patents per employee than their larger counterparts. In addition, their patents are more likely to be cited in other patent applications, which suggests that these innovations are more technologically and scientifically important.

Innovation and Net Job Creation. Small businesses that produce and patent valuable innovations rarely stay small for long. Martek is a prime example.

Continued on page 6

For More Information

- BJK Associates, *The Influence of R&D Expenditures on New Firm Formation and Economic Growth*, U.S. Small Business Administration, Office of Advocacy, 2002, www.sba.gov/advo/research/rs222tot.pdf.
- *The Small Business Economy: A Report to the President, 2005*, U.S. Small Business Administration, Office of Advocacy, 2005, www.sba.gov/advo/stats/sb_econ2005.pdf.
- CHI Research, *Small Serial Innovators: The Small Firm Contribution to Technical Change*, U.S. Small Business Administration, Office of Advocacy, 2003, www.sba.gov/advo/research/rs225tot.pdf.
- U.S. Department of Labor, Bureau of Labor Statistics, *Business Employment Dynamics*, www.bls.gov/bdm.

Net Job Creation, from page 5

Bringing a useful and innovative product to market generates spiraling demand that forces firms to grow quickly to keep up with it. This means investing resources in new plant and capital, as well as hiring many new employees.

The Bureau of Labor Statistics analyzed employment dynamics between September 2002 and March 2005 and found that 65 percent of the net new jobs created in that window stemmed from firms with fewer than 500 employees. This is consistent with data from the U.S. Census Bureau which has shown 60 to 80 percent of the net new jobs coming from small firms annually over the past decade. Clearly, small businesses are the engines of growth for the economy.

Moreover, research shows that job growth occurs in firms with fewer than 20 employees in the first two years of operation. These startups can have a large impact on employment. For this reason, entrepreneurship is seen by many communities as the catalyst that will “jump-start” their economic base. Many new firms, though, will never grow beyond a certain size. Thus, there are attempts to identify the ones that will, and to nurture them through business incubator

programs and other means. (Such fast-growth firms are often referred to as “gazelles.”)

For America to retain its technological and competitive edge, it must embrace the entrepreneur. Thanks to small business ingenuity, more Americans will be employed and the overall economy will be stronger.

Why “Net” New Jobs?

Job creation is a moving target. As employment grows at some firms, it decreases at others. Economists use the measure of “net” new jobs to show actual increases in the number of jobs, after you subtract the number of jobs lost from the number of new jobs created. The result shows the overall increase, with the losses taken into account.

Small Fast-Growing Private Firms Cluster in Industries Employing Scientists and Engineers

Small fast-growing private firms cluster in industries employing a high percentage of scientists and engineers, according to a report published by the Office of Advocacy in March. Conversely, as industries mature, large fast-growing public firms that have more sales, distribution, and production employees predominate.

“Entrepreneurs play an important role in our economy, and that role clearly differs by industry,” said Chad Moutray, chief economist for the Office of Advocacy. “It has always been a tenet of economic theory that industry conditions can help to determine the role of entrepreneurs. Now, using a unique

data set, the theory has been tested and found to be correct.”

The report, *Innovation and Small Business Performance: Examining the Relationship Between Technological Innovation and the Within-Industry Distributions of Fast-Growth Firms*, written by Peregrine Analytics with funding from the Office of Advocacy, used *Inc.* magazine’s “Inc. 500” as an important source of data for its findings.

Among the report’s findings:

- Distribution of large high-growth established firms and small high-growth private firms is not even across industries.
- Industries that are more

technically oriented (as evidenced by increased employment of scientists and engineers) are more accommodating to new fast-growing private firms.

- Production-oriented industries are more accommodating to large fast-growing public firms.

The complete report is available online at www.sba.gov/advocacy/research/rs272tot.pdf.

Regional Roundup

Economic Development Expert Christine Serrano Glassner Is Regional Advocate for Small Business in Federal Region II

Economic development expert Christine Serrano Glassner has joined the Office of Advocacy as regional advocate for the federal government's Region II, covering New Jersey, New York, Puerto Rico, and the Virgin Islands. She will be the direct link between small business owners, state and local government agencies, state legislators, small business associations, and the Office of Advocacy.

"Christine Serrano Glassner is a great addition to President Bush's small business team," said Thomas M. Sullivan, chief counsel for advocacy. "Her experiences with the Empire State Development Corporation and as a small business owner uniquely qualify her to help small businesses combat overly burdensome government regulations."

Serrano Glassner has extensive experience in economic development with the Empire State Development Corporation. She served in a variety of capacities, most recently as senior vice president of new market development. She also has experience in small

business, as the former owner of a catering firm.

"I am excited to be able to use my economic development experience and small business background to promote policies that strengthen entrepreneurs," said Serrano Glassner. "I look forward to being a part of the Office of Advocacy and to the opportunity to bring the concerns of small business owners in Region II to Washington, D.C."

Regional advocates help identify new issues and concerns of small business owners. They also monitor the impact of federal and state policies on small business at the local level. They work closely with local government officials, state officials, legislators, and the chief counsel for advocacy to develop programs and policies that reduce regulation and promote small business growth.



Region II Advocate Christine Serrano Glassner.

Region II Advocate

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Need An Extension to File Your Federal Return? It's A Little Easier This Year!

The deadline for filing your federal tax return this year is Monday, April 17, 2006. If you need an extension to file your 2005 individual tax return you must file Form 4868 by April 17, 2006. (The form and instructions can be found at www.irs.gov.) No explanation is required. Filing Form 4868 gives you an extra six months to file your individual tax return. However, the tax liability remains due on April 17, 2006.

Form 4868 can be filed electronically or in hard copy. It replaces a two-step process that had included Form 2688.

Small Business: Your issues are our issues at the SBA Office of Advocacy.

Access Advocacy Listservs for the latest regulatory alerts and small business statistics. Email notices will provide a hotlink to the new material, so your in-box won't fill up with large documents. At <http://web.sba.gov/list>, check:

- ☒ Advocacy Newsletter
- ☒ Advocacy Press
- ☒ Advocacy Regulatory News
- ☒ Advocacy Research



Advocacy: the voice of small business in government

U.S. Small Business Administration
Office of Advocacy
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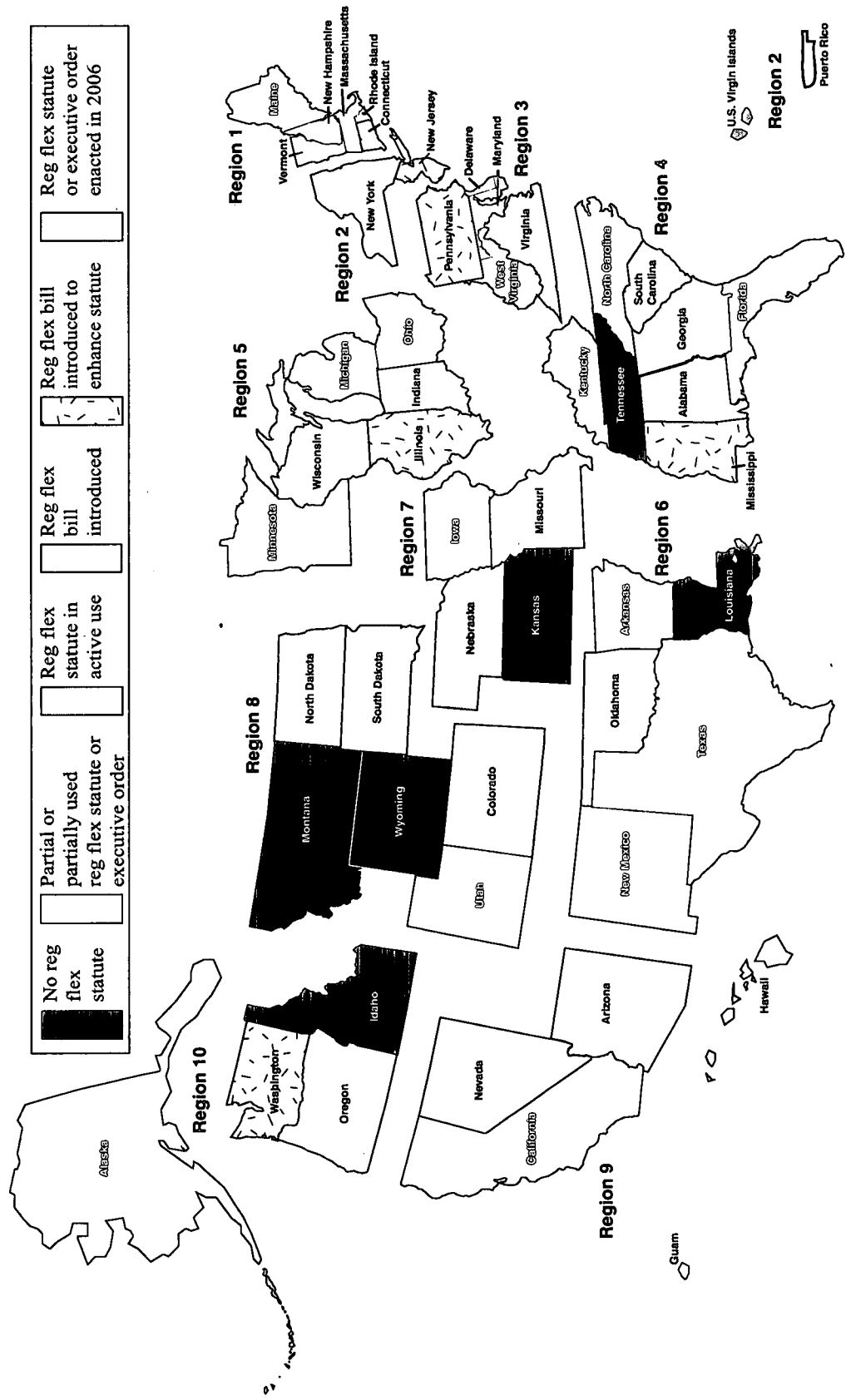
A Voice for Small Business

409 3rd Street, SW λ MC 3114 λ Washington, DC 20416 λ 202/205-6533 ph. λ 202/205-6928 fax λ www.sba.gov/advo

The Facts About State Regulatory Flexibility Model Legislation

- The role of the U.S. Small Business Administration's (SBA) Office of Advocacy is to reduce the excessive regulatory burden placed on small business. While focusing on federal regulations, Advocacy welcomes the opportunity to work with state leaders on their regulatory issues.
- President Bush has an active and aggressive small business plan that includes tearing down regulatory barriers to entrepreneurial success. Enforcing the Regulatory Flexibility Act (RFA) is central to the success of this commitment. By working with federal agencies to implement the RFA, the Office of Advocacy in FY 2004 saved small businesses \$17.1 billion in foregone regulatory costs that now can be used to create jobs, buy equipment, and expand access to health care for millions of Americans.
- The Office of Advocacy has drafted model legislation for consideration by states that mirrors the federal Regulatory Flexibility Act. Its intent is to foster a climate for entrepreneurial success in the states, so that small businesses will continue to create jobs, produce innovative new products and services, bring more Americans into the economic mainstream, and broaden the tax base.
- Successful state-level regulatory flexibility laws, as in the model legislation, should address the following areas: 1) A small business definition that is consistent with state practices and permitting authorities, 2) A requirement that state agencies perform an economic impact analysis before they regulate, 3) A requirement that state agencies consider less burdensome alternatives that still meet the regulatory goals, 4) Judicial review so that the law has teeth, and 5) A provision that forces state governments to periodically review all its regulations.
- Excessive regulation can be reduced, and the economy improved, without sacrificing important regulatory goals such as higher environmental quality, greater travel safety, better workplace conditions, and increased family financial security.
- Many states have some form of regulatory flexibility laws on the books. However, many of these laws do not contain all of the five critical elements addressed in Advocacy's model legislation. Recognizing that some laws are missing key components that give regulatory flexibility its effectiveness, legislators continue to introduce legislation to strengthen their current systems.
- According to a 2005 study funded by the Office of Advocacy, *The Impact of Regulatory Costs on Small Firms*, by Dr. Mark Crain, firms with fewer than 20 employees annually spend \$7,647 per employee to comply with federal regulations, compared with the \$5,282 spent by firms with more than 500 employees. That is a 45 percent greater burden on small entities than their larger business counterparts.
- Small businesses are vital to the health of states' economies. They are 99.7 percent of all businesses, employ half of the workforce, produce 52 percent of the private sector output, and provide significant ownership opportunities for women, minorities, and immigrants. A healthy small business sector also means a growing tax base.
- For text of model legislation and a chart of current state laws visit www.sba.gov/advo.

2006 Legislative Activity



State Regulatory Flexibility Model Legislative Initiative

2006 Legislative Activity

3 States have passed regulatory flexibility legislation or implemented an executive order (EO) in 2006

- Colorado (HB 1041)
- Georgia (EO)
- South Dakota (SB 74, SB 75)

11 States have introduced regulatory flexibility legislation in 2006

- Alabama (HB 320)
- Colorado (HB 1041)
- Illinois (HB 5388)
- Kansas (HB 2821)
- Michigan (HB 5849/HB 5850/ HB 5812)
- Mississippi (HB 1113/SB 2881)
- Nebraska (LB 1170)
- New Jersey (A 2327/ SB 1335)
- Pennsylvania (HB 236/SB 842)[†]
- South Dakota (SB 74, SB 75)
- Washington (HB 1445)

Current Status

13 States and 1 Territory have active regulatory flexibility statutes

- Arizona
- Connecticut
- Hawaii
- Indiana^{*}
- Missouri^{*}
- Nevada
- New York
- North Dakota
- Oklahoma
- Oregon^{*}
- Puerto Rico
- South Carolina
- Virginia^{*}
- Wisconsin

29 States have partial or partially used regulatory flexibility statutes

- Alaska^{*}
- Arkansas (EO)^{*}
- California
- Colorado
- Delaware
- Florida
- Georgia
- Illinois
- Iowa
- Kentucky
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Mississippi
- New Hampshire
- New Jersey
- New Mexico^{*}
- North Carolina
- Ohio
- Pennsylvania
- Rhode Island
- South Dakota
- Texas
- Utah
- Vermont
- Washington
- West Virginia

8 States, 2 Territories and the District of Columbia have no regulatory flexibility statutes

- Alabama
- District of Columbia
- Guam
- Idaho
- Kansas
- Louisiana
- Montana
- Nebraska
- Tennessee
- Virgin Islands
- Wyoming

[†] This bill was introduced in the 2005 legislative session and continues to be active in 2006.

^{*} In 2005, the state enacted regulatory flexibility legislation or an executive order.

DROWNING IN INFORMATION?

WE'LL MAKE SENSE OF SMALL BUSINESS ISSUES FOR YOU.

Use the Office of Advocacy of the U.S. Small Business Administration to Find:

- Small business facts about your state
www.sba.gov/advo/research/profiles
- National Small Business Fact Sheet
www.sba.gov/advo/stats/sbfaq.pdf
- Academic Fact Sheet
www.sba.gov/advo/stats/arsbfaq.pdf
- The latest on hot regulatory issues
www.sba.gov/advo/laws/law_regalerts.html
- Information on women in business
www.sba.gov/advo/stats/wib01.pdf
- Information on minorities in business
www.sba.gov/advo/stats/min01.pdf
- Other questions? Contact Pat Gartland, U.S. Small Business Advocate, Region IV at patrick.gartland@sba.gov
- For up to date information on small business issues sign up for our monthly newsletter at <http://web.sba.gov/list/>. Check the "Advocacy Newsletter" box, then scroll down to add your name.



Find it fast. Find it here. Find it for Free.
www.sba.gov/advo

What is a small business?

The Office of Advocacy defines a small business for research purposes as an independent business having fewer than 500 employees. Firms wishing to be designated small businesses for government programs such as contracting must meet size standards specified by the U.S. Small Business Administration (SBA) Office of Size Standards. These standards vary by industry; see www.sba.gov/size.

How important are small businesses to the U.S. economy?

Small firms

- Represent 99.7 percent of all employer firms.
- Employ half of all private sector employees.
- Pay 45 percent of total U.S. private payroll.
- Have generated 60 to 80 percent of net new jobs annually over the last decade.
- Create more than 50 percent of nonfarm private gross domestic product (GDP).
- Supplied more than 23 percent of the total value of federal prime contracts in FY 2004.
- Produce 13 to 14 times more patents per employee than large patenting firms. These patents are twice as likely as large firm patents to be among the one percent most cited.
- Are employers of 41 percent of high tech workers (such as scientists, engineers, and computer workers).
- Are 53 percent home-based and 3 percent franchises.
- Made up 97 percent of all identified exporters and produced 26 percent of the known export value in FY 2002.

Sources: U.S. Bureau of the Census; Advocacy-funded research by Joel Popkin and Company (Research Summary #211); Federal Procurement Data System; Advocacy-funded research by CHI Research, Inc. (Research Summary #225); Bureau of Labor Statistics, Current Population Survey; U.S. Department of Commerce, International Trade Administration.

How many small businesses are there?

In 2004, there were approximately 24.7 million businesses in the United States, according to Office of Advocacy estimates. The Internal Revenue Service (IRS) estimates there were 29.3 million nonfarm business tax returns in 2004; however, this number may overestimate the number of firms, as one business can operate more than one taxable entity.

Census data show there were 5.7 million firms with employees and 17.6 million without employees in 2002 (and 18.6 million without employees in 2003). Applying the sole proprietorship growth rates to the nonemployer figures and similar Department of Labor growth rates to the employer figures produces the 24.7 million figure. Small firms with fewer than 500 employees represent 99.9 percent of the 24.7 million businesses, as the most recent data show there are 17,000 large businesses.

The SBA's Office of Advocacy was created by an act of Congress in 1976 to protect, strengthen, and effectively represent the nation's small businesses within the federal government. As part of this mandate, the office conducts policy studies and economic research on issues of concern to small business and publishes data on small business characteristics and contributions. For instant access to small business resources, statistics, and research, visit the Office of Advocacy's home page at <http://www.sba.gov/advo/>.

How do regulations affect small firms?

Very small firms with fewer than 20 employees spend 45 percent more per employee than larger firms to comply with federal regulations. These very small firms spend 4½ times as much per employee to comply with environmental regulations and 67 percent more per employee on tax compliance than their larger counterparts. For data broken down by industry, see www.sba.gov/advo/research/rs264tot.pdf.

Cost of Federal Regulations by Firm Size, All Business Sectors (Dollars)

Type of Regulation	Cost per Employee for Firms with: <20 Employees	500+ Employees
All Federal Regulation	\$7,647	\$5,282
Environmental	3,296	710
Economic	2,127	2,952
Workplace	920	841
Tax Compliance	1,304	780

Source: *The Impact of Federal Regulations on Small Firms*, an Advocacy-funded study by W. Mark Crain, September 2005 (Research Summary #264).

How many businesses open and close each year?

Estimates for businesses with employees indicate there were 580,900 new firms and 576,200 closures (both about 10 percent of the total) in 2004.

Starts and Closures of Employer Firms, 2000-2004

Category	2000	2001	2002	2003	2004
New Firms	574,300	585,140	569,750	553,500e	580,900e
Firm Closures	542,831	553,291	586,890	572,300e	576,200e
Bankruptcies	35,472	40,099	38,540	35,037	34,317

e = Estimate. For more information, see "Business Estimates from the Office of Advocacy: A Discussion of Methodology," a working paper by Brian Headd, June 2005 (Research Summary #258).

Sources: U.S. Bureau of the Census; Administrative Office of the U.S. Courts; U.S. Department of Labor, Employment and Training Administration.

How many new jobs do small firms create?

Over the past decade, small business net job creation fluctuated between 60 and 80 percent. For a more complete look at employment dynamics by firm size from 1989 to 2002, see www.sba.gov/advo/research/data.html#us.

Source: U.S. Bureau of the Census.

What is small firms' share of employment?

The small business share of employment remains around 50 percent. Although small firms generally create 60 to 80 percent of the net new jobs, some firms will become large firms as the new jobs are created. Of 112.4 million nonfarm private sector

workers in 2002, small firms with fewer than 500 workers employed 56.4 million and large firms, 56.0 million. Smaller firms with fewer than 100 employees employed 40.5 million.

Source: U.S. Bureau of the Census.

What is the survival rate for new firms?

Two-thirds of new employer establishments survive at least two years, and 44 percent survive at least four years, according to a new study. These results were similar for different industries. Firms that began in the second quarter of 1998 were tracked for the next 16 quarters to determine their survival rate. Despite conventional wisdom that restaurants fail much more frequently than firms in other industries, leisure and hospitality establishments, which would include restaurants, survived at rates only slightly below the average.

Earlier research has explored the reasons for a new business's survivability. Major factors in a firm's remaining open include an ample supply of capital, the fact that a firm is large enough to have employees, the owner's education level, and the owner's reason for starting the firm in the first place, such as freedom for family life or wanting to be one's own boss.

Sources: "Survival and Longevity in the Business Employment Dynamics Database" by Amy E. Knaup, *Monthly Labor Review*, Volume 128, Number 5 (May 2005), pp. 50-6; "Redefining Business Success: Distinguishing Between Closure and Failure" by Brian Headd, *Small Business Economics*, Volume 21, Number 1 (August 2003), pp. 51-61.

How are small businesses financed?

Commercial banks are the most important suppliers of debt capital to small firms, supplying more than 80 percent of lending in the credit line market and more than 50 percent in other markets, such as commercial mortgages and vehicle, equipment, and other loans. In June 2004, small business loans outstanding owed to commercial banks amounted to \$522 billion, but small firms are not just receiving loans from smaller, relationship-driven banks. Very large banks with assets of at least \$10 billion are making a significant percentage of small loans of less than \$100,000.

Shares of the Number and Amount of Small Business Loans by Banks and BHCs by Asset Size, June 2004

	Bank/BHC Asset Size (\$)			All Banks & BHCs
	<500M	500M-10B	>10B	
Number of Banks/BHCs	5,706	645	72	6,423
SBLs <\$100K				
Share of Amount	31.1%	19.2%	49.7%	\$125.3B
Share of Number	11.0%	21.5%	67.5%	13.6M
SBLs \$100K-<\$1M				
Share of Amount	26.8%	28.2%	45.0%	\$397.0B
Share of Number	27.2%	28.2%	44.6%	1.7M
SBLs <\$1M				
Share of Amount	27.8%	26.0%	46.2%	\$522.3B
Share of Number	12.8%	22.3%	65.0%	15.3M

Abbreviations: BHC, Bank Holding Company; SBL, Small Business Loan

Sources: Federal Reserve Board, Survey of Small Business Finances; special tabulations of the June call reports (Consolidated Reports of Condition and Income for U.S. Banks) prepared for the Office of Advocacy by James Kolari, Texas A&M University.

What role do women, minority, and veteran entrepreneurs play in the economy?

• Women owned 6.5 million businesses that generated \$950.6 billion in revenues, employed 7.2 million workers, and

had \$179.6 billion in payroll in 2002. In addition, another 2.7 million firms are owned equally by both women and men; these firms add another \$731.1 billion in revenues and employ another 5.7 million workers.

• Of the 23 million firms in 2002, 6.9 percent were owned by Hispanic Americans, 5.2 percent by African Americans, 4.8 percent by Asian Americans, 0.9 percent by American Indians and Alaskan Natives, and 0.14 percent by Native Hawaiian and other Pacific Islanders. In 2002, minorities owned 4.1 million firms that generated \$694.1 billion in revenues and employed 4.8 million workers.

• Male veterans' self-employment rates were higher than those of nonveterans from 1979 to 2003. The rate was 13.7 percent in 2003.

• According to a study on veteran business ownership, about 22 percent of veterans in the U.S. household population were either purchasing or starting a new business or considering purchasing or starting one, and almost 72 percent of these new veteran entrepreneurs planned to employ at least one person at the outset of their new venture.

Sources: Preliminary data from the 2002 Survey of Business Owners from the U.S. Census Bureau; Advocacy-funded research by Robert Fairlie (Research Summary #243); Advocacy-funded research by Waldman Associates (Research Summary #242).

What research is there on the cost of health insurance?

According to a National Federation of Independent Business membership survey, the number one small business issue is the cost and availability of insurance. Aspects of insurance that may drive small business concern are premium increases and administrative costs. Advocacy research shows that insurers of small health plans have higher administrative expenses than those that insure larger group plans.

Sources: National Federation of Independent Business; Kaiser Family Foundation; Advocacy-funded research by Rose C. Chu and Gordon R. Trapnell (Research Summary #224)

Whom do I contact about regulations?

To submit comments on proposed regulations, send email to advocacy@sba.gov or visit Advocacy's regulatory alerts page at www.sba.gov/advo/laws/law_regalerts.html. To follow up on regulatory enforcement issues, email ombudsman@sba.gov.

How can I get more information?

For more detailed information, visit www.sba.gov/advo/. Sign up at <http://web.sba.gov/list> for email delivery of news releases, *The Small Business Advocate* newsletter, small business research findings and statistics, and regulatory communications.

Office of Advocacy economic research can be found at www.sba.gov/advo/research. Specific points of interest include:

• Firm size data (static/dynamic for the U.S., states and metropolitan statistical areas): www.sba.gov/advo/research/data.html

• Small firm lending studies (1994-present):

www.sba.gov/advo/research/lending

• State economic profiles (1998-present):

www.sba.gov/advo/research/profiles

• *The Small Business Advocate* monthly newsletter (1996-present): www.sba.gov/advo/newsletter.html

Direct questions to (202) 205-6533 or advocacy@sba.gov.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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BILL DRAFT 2005-SB-22 [v.5] (03/08)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
4/18/2006 3:42:32 PM

Short Title: Occupational Licensing Board Reports. (Public)

Sponsors: Unknown.

Referred to:

A BILL TO BE ENTITLED
AN ACT TO REQUIRE OCCUPATIONAL LICENSING BOARDS TO ANNUALLY
REPORT CERTAIN INFORMATION TO THE JOINT LEGISLATIVE
ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 93B-2 reads as rewritten:

"§ 93B-2. Annual reports required; contents; open to inspection.

(a) Each occupational licensing board shall file with the Secretary of State ~~and with the Attorney General an annual financial report, and State, the Attorney General, and the Joint Legislative Administrative Procedure Oversight Committee~~ an annual report containing all of the following information:

- (1) The address of the board, and the names of its members and ~~officers; officers.~~
- (2) The number of persons who applied to the board for ~~examination; examination.~~
- (3) The number who were refused ~~examination; examination.~~
- (4) The number who took the ~~examination; examination.~~
- (5) The number to whom initial licenses were ~~issued; issued.~~
- (6) The number who applied for license by reciprocity or ~~eemity; comity.~~
- (7) The number who were granted licenses by reciprocity or ~~eemity; comity.~~
- (8) The number of licenses suspended or ~~revoked; and revoked.~~
- (9) The number of licenses terminated for any reason other than failure to pay the required renewal fee.
- (10) The substance of any anticipated request by the occupational licensing board to the General Assembly to amend statutes related to the occupational licensing board.

1 (11) The substance of any anticipated change in rules adopted by the
2 occupational licensing board or the substance of any anticipated
3 adoption of new rules by the occupational licensing board.

4 (b) Each occupational licensing board shall file with the Secretary of State, the
5 Attorney General, and the Joint Legislative Administrative Procedure Oversight
6 Committee a financial report that includes the source and amount of all funds credited to
7 the occupational licensing board and the purpose and amount of all funds disbursed by
8 the occupational licensing board during the previous 12-month period.

9 (c) The reports required by this section shall be open to public inspection."

10 **SECTION 2.** This act becomes effective July 1, 2006. The first reports
11 required by G.S. 93B-2, as amended by Section 1 of this act, are due no later than July
12 1, 2007.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

U

D

BILL DRAFT 2005-RO-15 [v.1] (04/09)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
4/11/2006 1:24:03 PM

Short Title: Technical Changes/Agency Fees.

(Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

AN ACT TO MAKE TECHNICAL CHANGES TO THE LAW RELATING TO THE
ESTABLISHMENT OR INCREASE OF FEES OR CHARGES BY STATE
AGENCIES.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 12-3.1 reads as rewritten:**"§ 12-3.1. Fees and charges by agencies.**

(a) Authority. – Only the General Assembly has the power to authorize an agency to establish or increase a fee or charge for the rendering of any service or fulfilling of any duty to the public. In the construction of a statute, unless that construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute, the legislative grant of authority to an agency to adopt rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service. Notwithstanding any other law, a rule adopted by an agency in accordance with Article 2A of Chapter 150B of the General Statutes to establish or increase a fee or charge shall not go into effect until the agency has consulted with the Joint Legislative Commission on Governmental Operations on the amount and purpose of the fee or charge to be established or increased. The agency shall submit a request for consultation to all members of the Commission, the Commission Assistant, and the Fiscal Research Division of the General Assembly on the same date the notice of text of the rule is published. The request for consultation shall consist of a written report stating (i) the amount of the current fee or charge, if applicable, (ii) the amount of the proposed new or increased fee or charge, (iii) the statutory authority for the fee or charge, and (iv) a detailed explanation of the need for the establishment or increase of the fee or charge.

1 (a1) If the Commission does not hold a meeting to hear the consultation required
2 by subsection (a) of this section within 90 days after the notice of text of the rule has
3 been published and the consultation request required by subsection (a) of this section
4 has been submitted, the consultation requirement is satisfied.

5 ~~(b) Definitions. The following definitions apply in this section:~~

6 ~~(1) Agency. Every agency, institution, board, commission, bureau,~~
7 ~~department, division, council, member of the Council of State, or~~
8 ~~officer of the legislative, executive or judicial branches of State~~
9 ~~government. The term does not include counties, cities, towns,~~
10 ~~villages, other municipal corporations or political subdivisions of the~~
11 ~~State or any agencies of these subdivisions, the University of North~~
12 ~~Carolina, community colleges, hospitals, county or city boards of~~
13 ~~education, other local public districts, units, or bodies of any kind, or~~
14 ~~private corporations created by act of the General Assembly.~~

15 ~~(2) Rule. Every rule, regulation, ordinance, standard, and amendment~~
16 ~~thereto adopted by any agency, including rules and regulations~~
17 ~~regarding substantive matters, standards for products, procedural rules~~
18 ~~for complying with statutory or regulatory authority or requirements~~
19 ~~and executive orders of the Governor.~~

20 ~~(c) Exceptions. This section does not apply to any of the following:~~

21 ~~(1) Rules establishing fees or charges to State, federal or local~~
22 ~~governmental units.~~

23 ~~(2) A reasonable fee or charge for copying, transcripts of public hearings,~~
24 ~~State publications, or mailing a document or other item.~~

25 ~~(3) Reasonable registration fees covering the cost of a conference or~~
26 ~~workshop.~~

27 ~~(4) Reasonable user fees covering the cost of providing data processing~~
28 ~~services.~~

29 (d) In lieu of the requirements of subsections (a) and (a1) of this section, the
30 North Carolina State Ports Authority shall report the establishment or increase of any
31 fee to the Joint Legislative Commission on Governmental Operations as provided in
32 G.S. 143B-454(a)(11)."
33

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

U

D

BILL DRAFT 2005-RO-18 [v.1] (04/19)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
4/19/2006 7:09:21 PM

Short Title: OAH Hearing Facilities.

(Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED
AN ACT TO AUTHORIZE SENIOR RESIDENT SUPERIOR COURT JUDGES TO
PROVIDE FACILITIES FOR HEARINGS CONDUCTED BY THE OFFICE OF
ADMINISTRATIVE HEARINGS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 150B-24 reads as rewritten::

"§ 150B-24. Venue of hearing.

(a) The hearing of a contested case shall be conducted:

- (1) In the county in this State in which any person whose property or rights are the subject matter of the hearing maintains his residence;
- (2) In the county where the agency maintains its principal office if the property or rights that are the subject matter of the hearing do not affect any person or if the subject matter of the hearing is the property or rights of residents of more than one county; or
- (3) In any county determined by the administrative law judge in his discretion to promote the ends of justice or better serve the convenience of witnesses.

(b) Any person whose property or rights are the subject matter of the hearing waives his objection to venue by proceeding in the hearing.

(c) To the extent practicable, the senior resident superior court judge may provide suitable facilities for the conduct of hearings under this Article in the county or counties within the judge's district at the time that a hearing is scheduled therein. The senior resident superior court judge may, to the extent the judge determines necessary and practicable, provide or arrange for security at hearings upon the request of an administrative law judge."

SECTION 2. This act becomes effective October 1, 2006.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

U

D

BILL DRAFT 2005-RO-17 [v.1] (04/19)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)
4/19/2006 5:05:59 PM

Short Title: OAH Position Funds.

(Public)

Sponsors:

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO APPROPRIATE FUNDS TO THE OFFICE OF ADMINISTRATIVE
3 HEARINGS TO RESTORE NECESSARY POSITIONS IN THE HEARINGS
4 DIVISION.

5 The General Assembly of North Carolina enacts:

6 SECTION 1. There is appropriated from the General Fund to the Office of
7 Administrative Hearings the sum of four hundred ninety-five thousand fifty nine dollars
8 (\$495,059) for the 2006-2007 fiscal year to restore several positions in the Hearings
9 Division, including:

10 (a) Two Administrative Law Judges.

11 (b) A Trial Court Administrator.

12 (c) An Administrative Assistant.

13 (d) A Clerk Typist.

14 SECTION 2. This act becomes effective July 1, 2006.

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005**

U

D

BILL DRAFT 2005-RO-14 [v.6] (04/07)

(THIS IS A DRAFT AND IS NOT READY FOR INTRODUCTION)

4/19/2006 8:40:59 PM

Short Title: Dental Hygiene Law Changes.

(Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED
AN ACT TO AUTHORIZE THE NORTH CAROLINA STATE BOARD OF DENTAL
EXAMINERS TO ACCEPT, IN ADDITION TO EXAMINATIONS
CONDUCTED BY THE BOARD, THE RESULTS OF OTHER
BOARD-APPROVED REGIONAL OR NATIONAL INDEPENDENT
THIRD-PARTY CLINICAL EXAMINATIONS OF APPLICANTS SEEKING A
LICENSE TO PRACTICE AS A DENTAL HYGIENIST, AND AUTHORIZING
THE BOARD TO CHARGE THE ACTUAL COST OF THE THIRD-PARTY
TESTING SERVICE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 90-223(a) reads as rewritten:

"(a) The Board is authorized and empowered to:

- (1) Conduct examinations for licensure,
- (2) Issue licenses and provisional licenses,
- (3) Issue annual renewal certificates, and
- (4) Renew expired ~~licenses~~ licenses, and
- (5) Contract with a regional or national testing agency to conduct clinical examinations. Prior to entering a contract with a regional or national testing agency, the Board shall evaluate the agency based on the following criteria:
 - a. The number of states that recognize the results of the testing agency's examination.
 - b. The cost to the applicant of the examination.
 - c. How long the testing agency has been conducting examinations.
 - d. Whether the examination includes procedures performed on human subjects as part of the assessment of restorative clinical competencies."

1 **SECTION 2.** G.S. 90-224 reads as rewritten:

2 **"§ 90-224. Examination.**

3 (a) The applicant for licensure must be of good moral character, have graduated
4 from an accredited high school or hold a high school equivalency certificate duly issued
5 by a governmental agency or unit authorized to issue the same, and be a graduate of a
6 program of dental hygiene in a school or college approved by the Board.

7 (b) The Board shall have the authority to establish in its rules and regulations:

8 (1) The form of application;

9 (2) The time and place of examination;

10 (3) The type of examination;

11 (4) The qualifications for passing the examination.

12 (b1) The Board also may grant a license to an applicant who is found to have
13 passed an examination given by a Board-approved regional or national dental hygiene
14 testing agency, provided that the Board deems the regional or national examination to
15 be substantially equivalent to or an improvement upon the examination given by the
16 Board, and the applicant meets the other qualifications set forth in this Article.

17 (c) The Department of Justice may provide a criminal record check to the Board
18 for a person who has applied for a new or renewal license through the Board. The Board
19 shall provide to the Department of Justice, along with the request, the fingerprints of the
20 applicant, any additional information required by the Department of Justice, and a form
21 signed by the applicant consenting to the check of the criminal record and to the use of
22 the fingerprints and other identifying information required by the State or national
23 repositories. The applicant's fingerprints shall be forwarded to the State Bureau of
24 Investigation for a search of the State's criminal history record file, and the State Bureau
25 of Investigation shall forward a set of the fingerprints to the Federal Bureau of
26 Investigation for a national criminal history check. The Board shall keep all information
27 pursuant to this subsection privileged, in accordance with applicable State law and
28 federal guidelines, and the information shall be confidential and shall not be a public
29 record under Chapter 132 of the General Statutes.

30 The Department of Justice may charge each applicant a fee for conducting the
31 checks of criminal history records authorized by this subsection."

32 **SECTION 3.** G.S. 90-232 reads as rewritten:

33 **"§ 90-232. Fees.**

34 (a) In order to provide the means of carrying out and enforcing the provisions of
35 this Article and the duties devolving upon the North Carolina State Board of Dental
36 Examiners, it is authorized to charge and collect fees established by its rules not
37 exceeding the following:

38 (1) Each applicant for examination \$350.00

39 (2) Each renewal certificate, which fee shall be annually
40 fixed by the Board and not later than November 30 of each
41 year it shall give written notice of the amount of the renewal
42 fee to each dental hygienist licensed to practice in this State
43 by mailing such notice to the last address of record with
44 the Board of each such dental hygienist..... 250.00

- 1 (3) Each restoration of license 150.00
2 (4) Each provisional license..... 150.00
3 (5) Each certificate of license to a resident dental hygienist
4 desiring to change to another state or territory 50.00
5 (6) Annual fee to be paid upon license renewal to assist in
6 funding programs for impaired dental hygienists 80.00
7 (7) Each license by credentials 1,500.

8 (b) In all instances where the Board uses the services of a regional or national
9 testing agency for preparation, administration, or grading of examinations, the Board
10 may require applicants to pay the actual cost of the testing agency in addition to the
11 Board's other fees.

12 (c) In no event may the annual fee imposed on dental hygienists to fund the
13 impaired dental hygienists program exceed the annual fee imposed on dentists to fund
14 the impaired dentist program. All fees shall be payable in advance to the Board and
15 shall be disposed of by the Board in the discharge of its duties under this Article."

16 **SECTION 4.** The North Carolina State Board of Dental Examiners shall
17 continue to conduct clinical examinations for applicants seeking a license to practice
18 dental hygiene until at least September 30, 2007. No applicant for a dental hygiene
19 license shall be required to take a Board-approved regional or national independent
20 third-party clinical examination prior to September 30, 2007.

21 **SECTION 5.** Notwithstanding any provision to the contrary, the North
22 Carolina State Board of Dental Examiners may accept any application for the dental
23 hygiene clinical examination to be conducted on June 8, 2006, if the application was
24 received on or before March 31, 2006.

25 **SECTION 6.** This act becomes effective July 1, 2006.

VISITOR REGISTRATION SHEET

JOINT LEGISLATIVE

ADMINISTRATION PROCEDURE OVERSIGHT April 20, 2006

Name of Committee

Date

VISITORS: PLEASE SIGN BELOW AND RETURN TO COMMITTEE CLERK

<u>NAME</u>	<u>FIRM OR AGENCY AND ADDRESS</u>
Martha Sixton Taylor EdD	NC Dental Hygiene Assoc.
Kendall S. Crut	P. Cho & Assoc.
Terry Friddle	NC Dental Board
Casie Smith	NC Dental Board
Stanley L. Allen, DDS	N.C. Dental Board
Elizabeth Brown	DAHS - Facility Services
George Votts	CAT/ECNE
Molly Masich	OAH
Julie Edwards	OAH
Felicia Williams	OAH
SUSANNE STEERS	NC RESTAURANT ASSOC.
Bobby D. White	NC Dental Board
WM H. Potter, Jr.	NC Dental Society
John McBrat	Gov OAG
Melvin B. Grogan	Div. of Med Assistance
Carmelle Houston	OAH
Julian Mann	OAH
BOB LAMMIE	
ELLIE SPRUELL	Gov
PAT GANTHARD	SBA
Lisa Martin	NC Home Builders
Andy Ellen	NCRMA
Elizabeth Rushing	NC Dept of Secretary of State
Debra Sybil PDH	NC State Board
Edna X. Leland	CITA
Susan Speers Ellis	NC Dental Hygiene Educators'
Reborah C. Lefevre	NC Dental Hygiene Ed. and NC Dental Hygienists Assn.
Corrine Decker	NC Dental Hygiene Ed - CUCC, Hickory

JOINT LEGISLATIVE

April 20, 2006

Date _____

NAME

[illegible]

**JOINT LEGISLATIVE
ADMINISTRATIVE PROCEDURE
OVERSIGHT COMMITTEE**

May 10, 2006
9:30 a.m. – Room 544
MINUTES

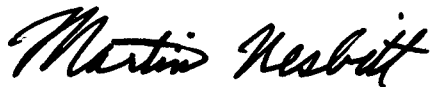
The Joint Legislative Administrative Procedure Oversight Committee met on Wednesday, May 10, 2006 in Room 544 of the Legislative Office Building. Members present included, Co-Chairs Senator Martin Nesbitt and Representative Melanie Wade Goodwin, Senators Hartsell, Kerr, Purcell, Stevens, Webster and Representatives Bell, Gibson, Stiller.

Senator Nesbitt called the meeting to order and welcomed members, visitors, and staff.

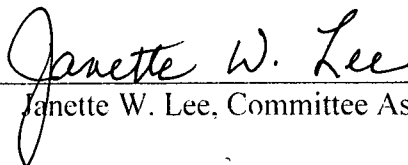
Adoption of the Report to the 2006 Session of the 2005 General Assembly of North Carolina was the issue before the Committee. Ms. Karen Cochrane-Brown was recognized to review proposals contained in the Report, which is a part of these Minutes as Attachment I.

Senator Stevens moved that the Report be adopted. There was further discussion about bill sponsors.

The Meeting adjourned at 10:00 a.m.



Senator Martin L. Nesbitt, President



Janette W. Lee, Committee Assistant