

The North Carolina State Board of Education: Its Constitutional Authority and Rule-Making Procedures

by Ann McColl

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Introduction

The State Board of Education (hereinafter the State Board or the board) is the only state agency that derives its powers directly from the North Carolina Constitution. It also receives numerous directives from the General Assembly, including notably in the past few years, legislation authorizing the School-Based Management and Accountability Program (known more generally as the ABCs Plan)^[1] and the Excellent Schools Act.^[2] With the State Board at the center of key educational reform efforts for North Carolina's public schools, now is an opportune time to examine the board's constitutional powers and duties and the processes by which it issues binding decisions for local school administrative units. That is what this article attempts to do. (Please see the sidebar article, "[Who Is the State Board?](#)", below.

Constitutional Powers and Limitations

The North Carolina Constitution establishes the broad authority of the State Board to make rules. As previously noted, no other state agency has such a grant of constitutional authority; all other agencies are totally dependent on a delegation of authority from the General Assembly. Article IX, Section 5 of the state constitution (Powers and Duties of Board) reads:

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in

Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

Although the wording of the State Board's constitutional authority has been modified over time, two key elements have remained constant: the State Board's authority to make needed rules and regulations and the General Assembly's authority to intercede.^[3] The relationship between these two elements has been addressed through the years in case law. Most fundamentally, explained the North Carolina Supreme Court in one case, if the General Assembly does not enlarge or restrict the power of the State Board to make rules, then the parameters of the board's power are defined by the grant of authority in the state constitution.^[4]

General Assembly Powers

The State Board's constitutional authority has been subject to several types of laws enacted by the General Assembly. In some cases the General Assembly has limited the State Board's authority by granting a specific type of authority to another entity. For example, the North Carolina Court of Appeals held that the State Board's constitutional authority to regulate speech and language pathologists employed by public school systems was restricted by the Licensure Act for Speech and Language Pathologists and Audiologists. Enacted by the General Assembly, the act created explicit requirements for valid credentials for certification and put verification of credentials in the hands of another state agency.^[5] In another case, the North Carolina Supreme Court found that the General Assembly limited the State Board's constitutional authority when it enacted a law explicitly granting local school boards control over supplementary materials.^[6] In yet another example, one not addressed in case law, the General Assembly shifted the State Board's constitutional authority by granting to local boards the general control and supervision of all matters pertaining to public schools in their respective administrative units.^[7]

The State Board's constitutional authority is subject also to laws establishing criteria or standards that the State Board must meet. For example, while the regulation of teacher certificates is within the State Board's constitutional authority,^[8] and while the State Board is identified by statute as having the "entire control of certifying all applicants for teaching positions in all public elementary and high schools in North Carolina,"^[9] this authority is not without limitations: the statute conferring control goes on to require that the State Board set standards for initial certification exams that are "sufficiently rigorous" and that it establish minimum scores for standard examinations. Thus the State Board's constitutional authority is subject to specific statutory standards. The Excellent Schools Act is itself replete with examples of the General Assembly setting certain standards or criteria that affect the exercise of the State Board's constitutional authority.^[10]

Occasionally the General Assembly establishes processes that the State Board must follow in exercising its constitutional authority. For example, the General Assembly has required the State Board to consult with others before taking certain actions, as in Chapter 115C, Section 296 of the North Carolina General Statutes (hereinafter G.S.): "The State Board of Education, in consultation with the Board of Governors of The University of North Carolina, shall evaluate and develop enhanced requirements for continuing certification." The legislature has also required the State Board to establish advisory commissions for use in conducting its business, such as the Professional Practices Board for making recommendations to the State Board for a code of teachers' ethics.^[11]

Also, the General Assembly has required the State Board to adopt procedures for the handling of particular subjects. For example, G.S. 115C-12(9)c4 requires the State Board to “develop guidelines, procedures, and rules to establish, implement, and enforce the [ABCs Plan] . . . in order to improve student performance, increase local flexibility and control, and promote economy and efficiency.”

Constitutional Authority and the Right to a Sound Basic Education

Two other key constitutional provisions, while not specifically identifying the State Board, address the educational responsibilities of the state and the General Assembly:

The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.[\[12\]](#)

The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.[\[13\]](#)

These provisions have taken on new meaning with the 1997 North Carolina Supreme Court holding in *Leandro v.State*,[\[14\]](#) wherein the court found that these constitutional requirements could be described as the right to a “sound basic education.” Quoting the court:

The principal question presented by this argument is whether the people’s constitutional right to education has any qualitative content, that is, whether the state is required to provide children with an education that meets some minimum standard of quality. We answer that question in the affirmative and conclude that the right to education provided in the state constitution is a right to a sound basic education. An education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate.[\[15\]](#)

The court went on to provide a detailed definition of the right to a sound basic education:

We conclude that Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools. For purposes of our Constitution, a “sound basic education” is one that will provide the student with at least: (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student’s community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.[\[16\]](#)

With these points of constitutional law settled, the supreme court remanded the case to the trial court for determination of whether the state has met the standard of providing a sound basic education. The

State Board is a defendant in the lawsuit. The eventual outcome of the litigation and the development of future case law on the right to a sound basic education likely will help clarify the relationship between the State Board's constitutional authority to administer and supervise the free public school system and the constitutional requirements it must follow in ensuring a sound basic education.

Powers Delegated by the General Assembly

The State Board derives its fundamental powers from the constitution, but the General Assembly has the authority to delegate to it additional duties. The North Carolina Supreme Court has noted the existence of these two sources of State Board authority.^[17] and they are further set out in G.S. 143A-44.1: "The State Board of Education shall have all powers and duties conferred on the Board by this Article, delegated to the Board by the Governor, and conferred by the Constitution and laws of this State."

When the General Assembly delegates authority to a government agency, it must do so within certain bounds: It is not unfettered in its power to delegate. The supreme court has stated that it generally agrees with the following standards for judging the propriety of a delegation of legislative authority:

Power should be delegated [to an administrative body] where there is agreement that a task must be performed and it cannot be effectively performed by the legislature without the assistance of a delegate or without an expenditure of time so great as to lead to the neglect of equally important business. Delegation is most commonly indicated where the relations to be regulated are highly technical or where their regulation requires a course of continuous decision . . . Where not only technical skill but continuous judgment is demanded the legislature is helpless.^[18]

The General Assembly may delegate its constitutional authority only by meeting appropriate standards,^[19] and occasionally the courts will overturn a delegation. In addressing the General Assembly's delegation to the State Board of the responsibility to regulate the licenses of solicitors for private schools, for example, the North Carolina Supreme Court found that the police power of the state did not provide a sufficient basis for the delegation.^[20] The legislature may delegate authority under the police power, the court said, provided that: "(1) there is a manifest present need which affects the health, morals, or safety of the public generally, (2) the regulations are not arbitrary, discriminatory, oppressive or otherwise unreasonable, and (3) adequate legislative standards are established."^[21] In this case the delegation failed to meet these standards.

Sometimes in its delegations the General Assembly in essence restates the State Board's constitutional authority. North Carolina appellate opinions hold, for example, that the State Board has the authority under *both* the constitution and by General Assembly delegation to certify teachers^[22] and to extend school days and the school year in certain counties.^[23] However, no case has identified an instance in which the General Assembly has by delegation expanded the State Board's powers and duties to supervise and administer the system of free public schools *beyond* the outlines of its constitutional authority.

As regards the State Board's authority to make binding decisions for local school administrative units, it is difficult to find any law enacted by the General Assembly that has delegated additional authority

to the State Board. Rather, the General Assembly’s normal course of action is to limit the State Board’s constitutional authority by establishing standards or processes it must follow or by shifting some of its authority to another governmental entity or official.

Rule Making and Policy Making

The State Board exercises its constitutional authority to make “all needed rules and regulations” through various means, including the passage of resolutions and the endorsement of guidelines. For decisions that are to be binding on local school administrative units, however, the State Board is most likely to adopt formal rules or formulate State Board policies. State Board rules (which are codified in the North Carolina Administrative Code) must go through a rigorous review process prescribed by statute and must be approved by the State Rules Review Commission. By contrast, State Board policies (which are codified in the State Board Policy Manual) are effective as soon as they are adopted by the State Board. In practice all State Board rules codified in the Administrative Code are also codified as policies in the Policy Manual; conversely, many policies are not included in the Administrative Code.

Applying the Administrative Procedure Act to the State Board

The Administrative Procedure Act (APA) establishes a rule-making process for state agencies in order to make sure that proposed rules are within an agency’s authority^[24] and to provide for consistency in rule making and opportunities for public input. The following is the APA’s statement of policy and scope:

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.^[25]

The APA provides numerous opportunities for public notice and input concerning proposed state agency rules. For example, an agency is required to publish both a notice of the rule-making proceeding and the proposed rule in the North Carolina Register; maintain a mailing list of persons who have requested notice of rule making; hold a public hearing and accept comments; and keep a record of the rule-making proceeding, including all written comments received.^[26]

Attempting to meet the requirements of the APA rule-making process—intended to provide an objective, consistent process that is open to the public—can amount to a lengthy and cumbersome journey for a state agency trying to adopt rules. Recent statutory revisions to the process have extended the time period required to complete the rule-making process by preserving a thirty-day period in which the legislature can reject the rule before it is effective.^[27] This becomes a particularly extensive delay if the General Assembly is not in session at the time the rule is being considered. Harry Wilson, an attorney for the State Board, advises the board and the Department of Public Instruction to bring policy issues subject to the APA rule-making process to the State Board at least one year before a rule’s planned implementation date.^[28] APA-related delays can especially impede State Board efforts in educational reform areas that are being quickly shaped and refined, such as charter schools and issues addressed in the Excellent Schools Act. So when the State Board sets out

to address an educational policy through the adoption of a formal rule or policy, a crucial question arises: Does the Administrative Procedure Act apply? If not, the State Board can issue its decision by simply adopting the policy, a process that is considerably less formalized. The following questions provide a framework for considering whether and when the State Board must utilize the APA rule-making process.

Is the State Board an “Agency” as Defined by the APA?

This is a necessary opening question, as the APA rule-making requirements apply only to *agencies*. The term, as defined by the APA, refers to “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.”^[29] The Department of Public Instruction clearly is an agency by this definition because by statute it is defined as a “principal department.”^[30] The State Board, however, is not defined by statute as an agency, yet it is treated as such in statutory requirements for rule making to implement the ABCs Plan and likely meets the broad criteria established in the APA definition of agency.^[31]

Is the State Board Specifically Exempted from the APA?

The General Assembly may exempt an otherwise covered agency from complying with the APA, but if it does, it must do so carefully. The North Carolina Supreme Court has held that the “General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act’s requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly.”^[32]

Thus the APA applies to every agency except for those specifically identified. Agencies fully exempted include the Department of Revenue, the Department of Correction, and the Department of Transportation, except as provided in G.S. 136-29.^[33] The State Board is not listed among those agencies fully exempted from the APA by statute. In fact, a provision in G.S. Ch. 115C suggests an intent that the APA *cover* educational decisions: “All action of agencies taken pursuant to this Chapter [115C—Elementary and Secondary Education], as agency is defined in G.S. 150B-2, is subject to the requirements of the Administrative Procedure Act.”^[34] Chapter 115C does, however, contain one particularized provision exempting the State Board from the APA process: the State Board is not subject to APA rule-making requirements in establishing minimum scores for standard examinations and other measures necessary to assess the qualifications of professional personnel as required by G.S. 115C-296(a).^[35] And the APA process is specifically modified in order to reduce the time frame required for enacting rules bearing a “rational relationship” with the ABCs.^[36]

Does State Board Action Constitute a “Rule” by APA Standards?

Not all agency decisions are rules within the meaning of the APA. A rule is specifically defined as “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.”^[37] One commentator has referred to these as legislative rules. “Legislative rules fill the interstices of statutes. They go beyond mere interpretation of statutory language or application of such language and within statutory limits set

down additional substantive requirements.”[\[38\]](#)

The APA is explicit also about what is *not* a rule. Procedural rules for internal management are not considered rules under the APA, nor are budgets and budget policies and procedures; nonbinding interpretative statements; criteria used by an agency to perform audits, investigations or inspections; or scientific, architectural, or engineering standards.[\[39\]](#)

In determining whether an action is a rule, little weight is given to how an agency characterizes its action—whether, for example, it refers to its action as a rule or a guideline. The supreme court has stated:

[We] are not limited to the label placed on a rule by an agency, but must look instead to the substance of the rule in question. [citations omitted.] As Professor Daye stated in his helpful article analyzing the NCAPA: “It should be emphasized that careful scrutiny of the substance of the rule in question is critical, since the interpretative rule exclusion, if not confined to proper boundaries, could well subsume the rulemaking provisions.”[\[40\]](#)

Is a Rule Created Pursuant to the State Board’s Constitutional Authority Subject to the APA?

Even if the State Board is deemed an “agency” that is not exempt from rule-making procedures, and even if the substance of a proposed action meets the APA definition of a rule, one question remains to be resolved: Does the APA apply when the State Board acts under its constitutional authority to create rules and regulations? North Carolina’s appellate courts have not determined whether APA requirements apply only to rules created pursuant to statutory authority or whether they apply as well to rules adopted under constitutional authority. In *State v. Whittle Communications*, the State Board contended that APA rule-making requirements apply only to rules implementing statutes. The issue, however, was not addressed by the court.[\[41\]](#) It remains a critical issue for the State Board, which arguably exercises its constitutional authority each time it makes a decision about public schools. Consider the following, four different circumstances in which the State Board could establish binding rules and regulations for local school administrative units within its constitutional authority to supervise and administer the free public school system:

1. The issue has not been addressed by the General Assembly;
2. The issue has been addressed by the General Assembly but without changing the scope of the State Board’s constitutional authority;
3. The General Assembly has made the State Board’s constitutional authority subject to laws setting certain standards or criteria;
4. The General Assembly has made the State Board’s constitutional authority subject to laws requiring that the board adopt rules on the issue.

Must the State Board utilize the APA process in any or all of these circumstances? Without judicial guidance on the issue, several legal arguments can be made as to when the State Board must follow APA rule-making procedures. One such argument, or theory, is that the APA is to be applied in precisely the same manner for the State Board as for all other agencies because the State Board’s constitutional authority to create rules and regulations is subject to the laws established in the APA. Under this theory, the State Board’s actions in each of the four circumstances listed above would be subject to APA rule-making requirements. There is some indication that this interpretation reflects the

intent of the General Assembly, as G.S. 115C-2 provides that all actions of agencies taken pursuant to Chapter 115C are subject to the APA. Yet even though this may be the intent of the General Assembly, the APA does not establish standards for reviewing rules created pursuant to constitutional authority. This issue will be explored further in the discussion of other possible legal theories about the applicability of the APA process to State Board actions.

A second possible theory is that the State Board must follow the APA only when the General Assembly specifically directs the State Board to establish “rules.” Under this theory, only circumstance four above would be subject to the APA. Since the State Board’s constitutional authority is subject to the laws of the General Assembly, this theory argues that the General Assembly, by requiring the establishment of rules, has specifically required the State Board to follow the APA process. For this theory to work, however, the General Assembly must use the term *rule* as a term of art; that is, it must refer to a rule as defined by the APA rather than as the word is generally understood. In Chapter 115C there are numerous references to State Board rules, regulations, and policies. These terms—with rare exception—are not defined with reference to the APA. Thus it is difficult to tell how these terms are being used and whether they are being consistently applied. This theory is weak also because it seems inconsistent with the state supreme court’s reasoning that the determination of a rule is made by the substance of the action rather than by its label and that exceptions to the APA must be explicit.^[42] Case law suggests that more is needed than a reference to rules, regulations, and policies in order to declare the State Board exempt from APA rule making. The final problem for this legal theory echoes the flaw of the first theory: Even presuming that the General Assembly wanted to make the State Board’s constitutional authority subject to the APA, the APA simply does not address how to review rules established through constitutional authority. This issue is the heart of the next theory.

The third theory argues that the APA applies only to agency rules established under a delegation of authority by the General Assembly. This theory is supported by the APA’s definition of a rule: “[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”^[43] is a rule. This definition does not address the issue of constitutional authority and so does not appear to apply to circumstances in which the General Assembly has not acted.^[44] Thus under circumstance one, the APA process would not apply. It is arguable, however, that where the General Assembly also has addressed an issue, either merely to repeat the State Board’s constitutional authority (circumstance two) or to make it subject to certain laws (circumstances three and four), the definition of a rule (and the APA process) would apply. Yet the standard of review for rules is not consistent with any circumstance in which the State Board exercises constitutional authority. The Rules Review Commission^[45] must determine whether a rule meets all of the following criteria:

- It is within the *authority delegated to the agency by the General Assembly*.
- It is clear and unambiguous.
- 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*.^[46]

Thus the standard for reviewing whether rules should be adopted as a part of the North Carolina Administrative Code does not in any way address rules promulgated through constitutional authority, regardless of whether this authority has been subject to any laws enacted by the General Assembly. The APA likely was developed without consideration for constitutional authority, as the State Board is the only agency with such authority. Although this third theory is the one most consistent with the express language of the APA, it is not consistent with the intent of the General Assembly as expressed in several sections of Chapter 115C, mentioned earlier in this article: G.S. 115C-2 , providing general requirements for compliance with the APA; G.S. 115C-17, providing a modified process for rules related to the ABCs; and G.S. 115C-296(a1), providing a specific APA exemption for the establishment of measures to assess the qualifications of professional personnel.

These three legal theories have very different implications. Under the first theory, where all “rules” must be adopted through the APA, the vast majority of the State Board’s binding decisions would have to go through the APA’s rule-making process.^[47] Given the amount of time required for a proposed rule to go through this process, the State Board would have difficulty acting expediently on issues unless the General Assembly granted it specific exemptions.

Under the third theory, where only rules promulgated under delegations of the General Assembly’s authority must go through the APA, very few—if any—binding State Board rules applicable to public schools would be subject to APA requirements. As a practical matter, given the State Board’s broad constitutional authority to supervise and administer the public schools, a delegation granting additional powers is feasible only for non-public school issues, such as accreditation of private schools. The State Board policy process—not the more burdensome APA processes—would be used to establish almost all binding decisions under this theory.

The second theory, where the APA process is used only if the General Assembly has specifically required or authorized the State Board to adopt “rules,” is somewhat of a middle ground, both in making some but not all State Board actions subject to the APA and in deferring to the fairly explicit intent of the General Assembly that the State Board use the APA process in certain circumstances. This theory of applying labels to determine whether the APA process is required also results in a system in which some of the State Board’s binding decisions are codified in the Administrative Code and others are found in the board’s policy manual. For example, G.S. 115C-238.29F(c) requires the State Board to adopt “rules” to establish reasonable amounts and types of liability insurance for charter school boards of directors. The State Board’s rule on this subject has gone through APA rule making and is codified within the Administrative Code.^[48] By contrast, the State Board is required to establish “policies” (not “rules”) related to testing programs, and local boards are required to follow these policies.^[49] State Board actions on these testing issues are codified in the State Board Policy Manual.^[50]

The State Board has not adopted a formal procedure for determining when its decisions are to be submitted to the APA rule-making process. As a matter of practice, the State Board appears to consider the definition of a rule and all the statutory exemptions to this definition found in the statutes covering the APA, such as internal procedures or interpretative guidelines; any specific exemptions or modifications to rule making, such as establishing measures of personnel qualifications or making ABCs Plan–related decisions; and whether the General Assembly has specifically required the State Board to adopt a rule.

In summary, it is not clear when the APA must be applied, but for the State Board and its constituents the decision is important. The State Board and/or some of its constituents may find the additional level of review and the formalized mechanisms for public notice and input found in the APA process to be unnecessarily bureaucratic. On the other hand, certain constituents may welcome the APA's guarantees of input and oversight to ensure that an agency is not overreaching its authority. These issues lead to the next issue of how the State Board adopts policies that do not go through the APA rule-making process.

State Board Policies Outside the APA

State Board policies record a wide variety of decisions made by the State Board. The State Board defines its "policy" as "a broad course of action, a general statement of principle, or any resulting rules and regulations implementing these actions or principles."^[51] The State Board also asserts that "[i]t is the responsibility of the State Board of Education to set policy in all areas governing the public schools in North Carolina."^[52]

There are very few legal requirements for the manner in which the State Board is to develop or adopt policies. Of course some general laws apply, such as the open meetings law, but as in the case of local boards of education, there are no specific legal requirements applicable to the State Board regarding other issues of the process of developing or adopting policy.^[53] There is no legal obligation to seek public input, no requisite number of readings for a proposed policy, and no set requirement for the opportunity for debate among the members. Any processes are established within the discretion of the board and may be formalized in State Board policy or may exist simply in routine practices.

The State Board Policy Manual establishes minimal requirements for policy development and adoption. By board policy, "[a]ll State Board actions shall be designated in the official State Board of Education minutes as policy, non-policy and/or Administrative Procedure Act policies."^[54] Other provisions establish the processes for disseminating the board agenda and attachments and voting on late agenda items^[55] and for nominating members to advisory committees.^[56] State Board policies do not address other key elements of policy making, such as the approval process; opportunities for public input; the process for proposing new or revised policies; the effective date of adopted policies; or the delegation of authority for making technical/conforming changes. As stated previously, there is no statutory requirement for written policies on these subjects. Rather, the State Board itself decides when to adopt policies and what policies to adopt in achieving its objectives. The less that is in written form, the more flexibility the board has in exercising its authority and the less vulnerable it becomes to legal attacks for failing to follow its own policies. On the other hand, written policies may give to the State Board's constituents some assurances of a fair process and may provide some consistency in leadership. As stated by John Carver in *Boards That Make a Difference*, "[O]ne way in which the board participates in good process is by placing explicit policies concerning the topic into the Board Process category. . . . Process explicitly designed can produce a discipline controlled more by the will of the board than by individual inclinations or exigencies of the immediate dynamics."^[57]

Although there are few formal policies governing its development and the adoption of policies, the State Board does adhere to some established practices in these areas. Attendance at State Board meetings throughout the first nine months of 1998 and a review of the minutes reveal the following practices routinely observed:

- Proposed policies and other agenda items are categorized as relating to one of the four strategic priorities of the board: high student performance; safe and orderly schools; quality teachers, administrators, and staff; and effective and efficient operation.
- Proposed policies are almost always provided for information at one meeting with action taken at a subsequent meeting.
- Staff of the Department of Public Instruction often present explanations of a policy to the State Board, sometimes providing policy alternatives. The board sometimes spends considerable time gaining background information before making policy decisions, such as in the area of student promotion standards.[\[58\]](#)
- The board often engages in lively discussions and sometimes will defer action for more information or hear more options. For example, issues regarding drop out rates were discussed over the course of several board meetings,[\[59\]](#) and the implementation date of the earth/environmental science graduation requirement in the Standard Course of Study was reconsidered after the department had received adverse comment from school districts.[\[60\]](#)

Some other practices of the board are less consistent. The minutes and agenda and board packets do not routinely identify the sources of legal authority or the duties under which the board is acting. This information would be helpful for understanding the broader context of individual board decisions and for understanding the bases of State Board actions.

The board is also not consistent in noting whether opportunities for public input were given by the Department of Public Instruction or the board or whether input was received. Given the lack of formal procedures for public input or for compiling records of input, the only means of determining the type of public input obtained prior to board decisions is to review the minutes, agenda, and board packets. The type and extent of public input noted in those sources vary among the policy issues addressed. This is in contrast to the highly formalized mechanisms for public input provided for in the APA, which requires that the same process be used for all proposed rules.[\[61\]](#) In board minutes from February to July 1998, the most commonly noted source of input was advisory committees. The State Board has created a number of committees, many with significant voices. For example, the Charter School Advisory Committee, authorized by G.S. 238.29F(f)(3), provided input on charter school matters during the February-to-July time period. No other public input was noted on charter school issues.[\[62\]](#) The State Board has also established the Compliance Commission, a twenty-member group that routinely advises the board on matters related to the ABCs Plan.[\[63\]](#) The State Board also has created and been advised by various ad hoc committees, such as the Ad Hoc Lateral Entry Advisory Commission.[\[64\]](#)

Occasionally in 1998 extensive public input was noted on issues before the board. This input was received through public hearings, a television call-in broadcast, surveys, and focus groups. Such practices were identified in board documents related to the earth/environmental science requirement,[\[65\]](#) the driver's license/drop out guidelines,[\[66\]](#) the N.C. standard course in mathematics,[\[67\]](#) and the standard course in computer/technical skills.[\[68\]](#)

On some issues affecting local school administrative units, no input was noted at all. Since there is no formal requirement to note such input, however, the question of whether there was input prior to a board decision cannot be determined from a review of board documents. One of the issues on which no public input was documented was the cut score for the new Praxis II test. This policy was adopted

pursuant to G.S. 115C-296(a1), a statutory provision that specifically exempts the State Board from the APA rule-making process. The statute also requires thirty days' written notice to all North Carolina schools of education and to all local boards of education before the policy can be changed. Board records (minutes, agenda, board packet) do not note whether this requirement was met.^[69] Other issues addressed by the board in 1998 in which board records do not note public input before a board decision include the ABCs Plan and Safe School Bonuses for School Administrators (on policy issues, such as how long a principal has to be at a school to be eligible for the bonus or how to handle principals of alternative schools),^[70] school closings due to inclement weather,^[71] and the test for certified staff in low-performing schools.^[72]

The State Board does not provide for general public input during its regular meetings. Various individuals may be invited to speak to the board, but there is not an opportunity to speak on agenda items or to raise other issues. The board typically has a full agenda. And while additional input may be useful, at least one commentator has criticized public input at business meetings, noting, "The problem is, perhaps more often than not, the press and many in attendance remember the complaints and criticisms better than anything else. The sound, constructive accomplishments being advanced seem often to be completely overshadowed."^[73]

In summary, the State Board policy-making process has been established primarily through its practices rather than through formal policies. The State Board has developed many consistent practices, including relating agenda items to its strategic priorities and the organization of the agenda. It is less consistent in identifying legal authorities or documenting public input—issues that are required to be addressed when the APA process is followed.

Conclusion

The State Board has broad constitutional authority—but not unbridled discretion—in the way it supervises and administers the system of free public schools and establishes rules and regulations. The General Assembly's directives often serve to limit the authority of the State Board by requiring certain standards and processes, or even by shifting authority to another entity or official. Further case law on the constitutional standard of a "sound basic education" likely will provide greater guidance on the relationship between this standard and the State Board's constitutional powers and duties.

Very little guidance has been given by the courts on whether and in what instances the State Board must use the APA rule-making process for establishing rules pursuant to its constitutional authority. This is a critical issue, given that arguably all rules and regulations affecting public schools are within the State Board's constitutional authority. Stark contrasts are evident between the rule-making and policy-making processes: the APA demands a formalized process with extensive notice and input requirements and oversight by the Rules Review Commission; the State Board's policy-making process is established largely through the board's practices, which preserve flexibility by establishing some consistent routines but do not assure notice, input, or that a particular process will be followed on a particular policy issue. Given the amount of time required to adopt APA rules, there is great incentive for the State Board to utilize its own policy-making process whenever possible.

As long as different processes are used to create binding decisions, educators, board members, and school attorneys need to be familiar with both the North Carolina Administrative Code and the State

Board Policy Manual. The Administrative Code is not a comprehensive source of State Board binding decisions: one must look also to the State Board Policy Manual. To provide input, it also is necessary to understand the formal APA process as well as whatever methods of input the State Board chooses to employ on a particular subject.

Who Is the State Board?

The composition of the State Board is established by the North Carolina Constitution. The board comprises thirteen members, two of whom hold elected positions in state government. The other eleven positions are appointed by the governor for terms of eight years. Article IX, Section 4 states as follows:

The State Board of Education shall consist of the Lieutenant Governor, the Treasurer, and eleven members appointed by the Governor, subject to confirmation by the General Assembly in joint session. The General Assembly shall divide the State into eight educational districts. Of the appointive members of the Board, one shall be appointed from each of the eight educational districts and three shall be appointed from the State at large. Appointments shall be for overlapping terms of eight years. Appointments to fill vacancies shall be made by the Governor for the unexpired terms and shall not be subject to confirmation.

The State Board was established by the North Carolina Constitution of 1868, and the composition of the board, the length of the terms of service, and the role of the superintendent of public instruction have been modified in a series of amendments to the constitution. As originally devised, the State Board was composed of seven members: the governor, lieutenant-governor, secretary of state, state treasurer, state auditor, superintendent of public instruction, and attorney general.^[74] The governor served as president, the superintendent of public instruction as secretary.^[75] An amendment to the constitution passed in 1942 modified the board's composition, keeping only the lieutenant-governor, the state treasurer, and the superintendent of public instruction from the original composition and adding one member from each congressional district to be appointed by the governor to serve four-year terms.^[76] The same constitutional amendment also specified that the state superintendent was to exercise general supervision of the public schools. The composition of the State Board was again modified by a 1944 amendment specifying that the governor appoint ten members, each subject to confirmation by the General Assembly, with two at-large appointments and the remainder to come from eight educational districts for terms of eight years. The amendment also provided that the chair and vice-chair were to be elected by board members. The duties of the superintendent of public instruction were modified to serving as the administrative head of the public school system and as secretary of the board.^[77] The current language of the constitution, adopted as part of amendments submitted to North Carolina voters by the 1969 General Assembly, constituted a revision of the entire constitution, resulting in what is referred to as the Constitution of North Carolina (1971).

Notes

- 1.** Chapter 115C, Sections 105.20 to 105.40 of the North Carolina General Statutes (hereinafter G.S.).
- 2.** SL 1997-221.
- 3.** The constitution of 1868 provided that the State Board “shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed they shall not be re-enacted by the Board.” N.C. CONST. of 1868, art. 9, §10.

An amendment to the constitution in 1942 provided that the State Board had the authority, in part, “generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.” 1941 N.C. Pub. Laws, ch. 151 (ratified 1942).
- 4.** *Guthrie v. Taylor*, 279 N.C. 703, 712, 185 S.E.2d 193, 200 (1971).
- 5.** *Board of Exam’rs v. State Board*, 122 N.C. App. 15, 468 S.E.2d 826 (1996).
- 6.** *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991).
- 7.** G.S. 115C-36, -47.
- 8.** *Guthrie*, 279 N.C. 703, 185 S.E.2d 193.
- 9.** G.S. 115C-296.
- 10.** SL 1997-221 § 3 [amending G.S. 115C-105.38A (requirements for general knowledge test for teachers in low-performing schools)], § 5 [amending G.S. 115C-296(a) (requiring the State Board to make the standard initial certification exam “sufficiently rigorous”)], §7 [amending G.S. 115C-296(b) (setting time frames for initial and continuing certification)], and § 10 [amending G.S. 115C326-(a) (requiring the State Board to revise performance standards to address student achievement)].
- 11.** G.S. 115C-295.3.
- 12.** N.C. CONST. art. I, § 15.
- 13.** N.C. CONST. art. IX, § 2(1).
- 14.** 346 N.C. 336, 488 S.E.2d 249 (1997).
- 15.** *Id.* at 345, 488 S.E.2d at 254.
- 16.** *Id.* at 347, 488 S.E.2d at 255 (citations omitted).
- 17.** *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971).

18. Commissioner of Ins. v. Rate Bureau, 300 N.C. 381, 421–22, 269 S.E.2d 547, 573–74 (1980), quoting Jaffe, *Judicial Control of Administrative Action* (1965), 35, 37.

19. *Guthrie*, 279 N.C. at 713, 185 S.E.2d at 200; North Carolina Turnpike Auth. v. Pine Island, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965).

20. *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960). The court rejected the argument put forward in this case that the constitutional powers of the State Board supported the board’s regulation of the solicitors, saying that “the State Board’s constitutional authority is confined to public schools and activities substantially affecting public schools and the public school system. It may have and exert only such authority in the supervision and control of private schools and their agents and representatives as is conferred by the General Assembly in the proper exercise of the police power of the State.” *Id.* at 341, 117 S.E.2d at 447.

21. *Id.* at 345, 117 S.E.2d at 450.

22. *Guthrie*, 279 N.C. 703, 185 S.E.2d 193.

23. *Morgan v. Polk County Bd. of Educ.*, 74 N.C. App. 169, 328 S.E.2d 320 (1985).

24. See G.S. 150B-21.9(a).

25. *Id.* § 150B-1(a).

26. *Id.* § 150B-21.2.

27. *Id.* § 150B-21.3.

28. The APA—Questions and Answers about the Administrative Procedure Act (unpublished internal document with no author or date noted. The document was shared with this author by Harry Wilson).

29. G.S. 150B-2(1a).

30. G.S. 143A-11.

31. G.S. 115C-17.

32. *North Buncombe Ass’n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 28, 394 S.E.2d 462, 465 (1990) [citing *Vass v. Board of Trustees of State Employees’ Med. Plan*, 324 N.C. 402, 407, 379 S.E.2d 26, 29 (1989)].

33. G.S. 150B-2(c).

34. G.S. 115C-2.

35. *Id.* § 115C-296(a1).

36. *Id.* § 115C-17.

37. G.S. 150B-2(8a).

38. Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. REV. 833, 852–53 (1975), *cited in* Commissioner of Ins. v. Rate Bureau, 300 N.C. 381, 411, 269 S.E.2d 547, 568 (1980).

39. G.S. 150B-2(8a).

40. *Rate Bureau*, 300 N.C. at 412, 269 S.E.2d at 568 (citation omitted).

41. *State v. Whittle Communications*, 328 N.C. 456, 402 S.E.2d 556 (1991).

42. *Rate Bureau*, 300 N.C. at 412, 269 S.E.2d at 568; *North Buncombe Ass'n of Concerned Citizens v. Rhodes*, 100 N.C. App. 24, 28, 394 S.E.2d 462, 465 (1990) [citing *Vass v. Board of Trustees of State Employees' Med. Plan*, 324 N.C. 402, 407, 379 S.E.2d 26, 29 (1989)].

43. G.S. 150B-2(8a).

44. Federal laws and regulations referenced in the definition also are not germane to a discussion of the State Board's constitutional authority. The applicability of the procedure or practice requirements provision is less clear, although the standard of review suggests that it also is related to authority delegated by the General Assembly.

45. The North Carolina Rules Review Commission consists of ten members appointed by the General Assembly, five upon the recommendation of the president pro tempore of the senate and five upon the recommendation of the Speaker of the house of representatives. The commission operates as an independent agency pursuant to Article III, Section 2 of the North Carolina Constitution.

46. G.S. 150B-21.9(a).

47. Note that the APA exempts certain binding decisions, such as scientific standards, from its definition of rules, so all binding decisions are not necessarily rules.

48. 16 NCAC 6G .0501.

49. G.S. 115C-171.12.

50. STATE OF NORTH CAROLINA, STATE BD. OF EDUC. POL'Y MANUAL (codified as State Board of Education policy 01A121).

51. *Id.* (State Board of Education policy 02H103).

52. *Id.* (State Board of Education policy 02H100).

53. A specific exemption to this is found in G.S. 115C-296, which requires a thirty-day notice before revision of policies on subject matters addressed by the statute.

54. STATE BD. OF EDUC. POL'Y MANUAL (State Board of Education policy 02H100).

55. *Id.* (State Board of Education policy O2H105. “The complete agenda and all accompanying attachments shall be received by members one week ahead of the scheduled Board meeting. If the State superintendent, or his staff propose a late agenda item or attachment, the full Board shall vote on whether the item, or attachment, may be added to the regular agenda.”) *Id.*

56. *Id.* (State Board of Education policy 02B100).

57. John Carver, *Boards That Make a Difference: A New Design for Leadership in Nonprofit and Public Organization* (Jossey-Bass, 1997), 30.

58. See the discussion, “Plan for Developing Rigorous State Academic Performance Standards,” in the minutes from the March, May, and July 1998 board meetings.

59. STATE BD. OF EDUC. POL’Y MANUAL (State Board of Education policy 01H102); see also the minutes from the July and August 1998 board meetings.

60. *Id.* (State Board of Education policy 07D101); see also the minutes from the February and March 1998 board meetings.

61. G.S. 150B-21.2.

62. See the following board packets and meeting minutes for the dates listed: Charter School Racial and Ethnical Balance Policy, Policy 12A103, June and July, 1998; Charter School Enrollment Increases for Second Year, May 1998; Plan for Monitoring Charter Schools, June 1998; Plan for Evaluating Charter Schools, June 1998.

63. See, for example, ABCs Recommendations of the Compliance Commission (minutes and board packets for March, April, and June 1998); ABCs Issues Regarding High Schools (minutes and board packet for March 1998); High School Accountability Model—Drop Out Rates, Policy 01H102 (minutes and board packets for June and July 1998).

64. Alternative Licensure Policy, Policy 03B113 (minutes and board packets for April, June, and July 1998).

65. See minutes and board packets for February and March 1998 on State Board of Education policy 07D101.

66. See minutes and board packets for April and May 1998.

67. *Id.* (regarding State Board of Education policies 04H103, 04H108).

68. *Id.* (regarding State Board of Education policy 04H107).

69. See minutes and board packets for February and March 1998 (regarding State Board of Education policy 03A102).

70. See minutes and board packets for June and July 1998 (regarding State Board of Education policy 06G100).

[71.](#) See minutes and board packets for April and May 1998 (regarding State Board of Education policy 08I100); May and June 1998 (regarding State Board of Education policy 06I100).

[72.](#) See minutes and board packet for March 1998 (regarding State Board of Education policy 08B115).

[73.](#) James E. Seitz, *Effective Board Participation* (University Press of America, 1994), 32.

[74.](#) N.C. CONST. of 1868, art.IX, § 8.

[75.](#) N.C. CONST. of 1868, art. IX § 9.

[76.](#) 1941 N.C. Pub. Laws, ch. 151 (ratified 1942).

[77.](#) 1943 N.C. Sess. Laws ch. 468 (ratified 1944.)

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