WEST VIRGINIA CODE CHAPTER 29a ARTICLE 3B

WV Legislature

§29A-3B-1. Findings; definitions.

(a) The Legislature finds:

(1) That section one, article twelve of the West Virginia Constitution, titled “Education”, states in relevant part “The Legislature shall provide”, which language gives the Legislature primacy of authority over education in the State;

(2) That section one, article twelve of the West Virginia Constitution remains identical today as it was when the constitution was adopted in 1872, where the Legislature exercising its authority under section one, article twelve of “Education”, created the four-member West Virginia Board of Examiners in 1905. This was followed by the West Virginia Board of Education in 1908, and then the Legislature abolished that board and created a new State Board of Education in 1919;

(3) That the constitutional amendment of 1958 transferred the already established authority from the elected state superintendent to the West Virginia Board of Education with the same responsibilities for “general supervision” of free schools, and “performing such duties as may be prescribed by law”. The amendment kept the same authoritative language of responsibilities as had previously existed for the elected state superintendent under section two, article twelve of the West Virginia Constitution, without adding additional authoritative responsibility in the amendment;

(4) That section one, article twelve of the West Virginia Constitution does not entail the exclusive delegation of rule-making functions to the Legislature, but it does establish the Legislature as the ultimate authority to approve, amend, or reject rules promulgated by the West Virginia Board of Education under section two, article twelve of the West Virginia Constitution;

(5) That pursuant to section one, article five of the West Virginia Constitution, there are only three branches of government; and

(6) That the Legislature exercises authority over the West Virginia Board of Education pursuant to §18-2-5 of this code.

(b) As used in this article,

"board" means the West Virginia Board of Education.

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§29A-3B-2. Rules to be promulgated in accordance with this article.

In addition to other rule-making requirements imposed by law and except to the extent specifically exempted by the provisions of this chapter or other applicable law, every rule and regulation (including any amendment of or rule to repeal any other rule) shall be promulgated by the board in accordance with this article and shall be and remain effective only to the extent that it has been or is promulgated in accordance with this article.

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§29A-3B-3. Rules of procedure required.

In addition to other rule-making requirements imposed by law:

(a) The board shall adopt procedural rules governing the formal and informal procedures prescribed or authorized by this chapter. Procedural rules shall include rules of practice before the board, together with forms and instructions.

(b) To assist interested persons dealing with it, the board shall, so far as deemed practicable, supplement its rules or regulations with descriptive statements of its procedures.

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§29A-3B-4. Filing of proposed rules.

(a) When the board proposes a procedural, interpretive or legislative rule, the agency shall file in the state register a notice of its action, including the text of the rule as proposed.

(b) All proposed rules filed under subsection (a) of this section shall have a fiscal note attached itemizing the cost of implementing the rules as they relate to this state and to persons affected by the rules and regulations. Such fiscal note shall include all information included in a fiscal note for either house of the Legislature and a statement of the economic impact of the rule on the state or its residents. The objectives of the rules shall be clearly and separately stated in the fiscal note by the agency issuing the proposed rules. No procedural or interpretive rule shall be void or voidable by virtue of noncompliance with this subsection.

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§29A-3B-5. Notice of proposed rule making.

When the board proposes to promulgate a rule other than an emergency rule, it shall file in the state register a notice of its action, including a text of the rule proposed, a fiscal note as defined in subsection (b) of section four, and any request for the submission of evidence to be presented on any factual determinations or inquiries required by law to promulgate such rule. If the board is considering alternative draft proposals, it may include the text thereof.

The notice shall fix a date, time and place for the taking of evidence for any findings and determinations which are a condition precedent to promulgation of the proposed rule and contain a general description of the issues to be decided. If no findings and determinations are required as a condition precedent to promulgation, the notice shall fix a date, time and place for receipt of public comment on such proposed rule.

If findings and determinations are a condition precedent to the promulgation of such rule, then an opportunity for public comment on the merits of the rule shall be afforded after such findings and determinations are made. In such event, notice of the hearing, or of the period for receiving public comment on the proposed rule, shall be attached to and filed as a part of the findings and determinations of the board when filed in the state register.

In any hearing for public comment on the merits of the rule, the board may limit presentations to written material. The time, date and place fixed in the notice shall constitute the last opportunity to submit any written material relevant to any hearing, all of which may be earlier submitted by filing with the board.

The board may also, at its expense, cause to be published as a Class I legal publication in every county of the state, any notice required by this section.

Any citizen or other interested party may appear and be heard at such hearings as are required by this section.

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§29A-3B-6. Filing findings and determinations for rules in state register; evidence deemed public record.

(a) Incident to fixing a date for public comment on a proposed rule, the board shall promulgate the findings and determinations required as a condition precedent thereto, and state fully and succinctly the reasons therefor and file such findings and determinations in the state register. If the board amends the proposed rule as a result of the evidence or comment presented pursuant to section five, such amendment shall be filed with a description of any changes and statement listed for the amendment.

(b) The statement of reasons and a transcript of all evidence and public comment received pursuant to notice are public records and shall be carefully preserved by the board and be open for public inspection and copying for a period of not less than five years from the date of the hearing.

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§29A-3B-7. Notice of hearings.

Notices of hearings required by section five of this article shall be filed in the state register not less than thirty nor more than sixty days before the date of such hearing or the last day specified therein for receiving written material. Any hearing may be continued from time to time and place to place by the board which shall have the effect of extending the last day for receipt of evidence or public comment. Notice of such continuance shall be promptly filed thereafter in the state register.

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§29A-3B-8. Adoption of rules.

A rule shall be considered by the board for adoption not later than six months after the close of public comment and a notice of withdrawal or adoption shall be filed in the State Register within that period. Failure to file such notice shall constitute withdrawal and the Secretary of State shall note such failure in the State Register immediately upon the expiration of the six-month period.

A rule may be amended by the board prior to final adoption without further hearing or public comment. No such amendment may change the main purpose of the rule. If the fiscal implications have changed since the rule was proposed, a new fiscal note shall be attached to the notice of filing. Upon adoption of the rule (including any such amendment), the board shall file the text of the adopted rule with its notice of adoption in the State Register..

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§29A-3B-9. State Board of Education to promulgate rules; submission of legislative rules to the Legislative Oversight Commission on Education Accountabillity; submission of legislative rules, findings, and recommendations to the Legislature.

(a) Under its supervisory duties, the West Virginia Board of Education may promulgate rules or policies, and any new rule so promulgated shall be submitted to the Legislature for its review and approval, amendment, or rejection, in whole or in part, in the manner prescribed by general law, and pursuant to this section.

(b) If, within 15 months, the Legislature does not review and approve, or reject, in whole or in part, the rule as promulgated or amended in the manner prescribed by general law, and pursuant to this section, the rule shall become effective as initially promulgated by the West Virginia Board of Education.

(c) When the board proposes a legislative rule it has adopted, the board shall submit the following to the Legislative Oversight Commission on Education Accountability: (1) The full text of the legislative rule as proposed by the board and filed with the office of the Secretary of State, with new language underlined and with language to be deleted from any existing rule stricken through but clearly legible; (2) a brief summary of the content of the legislative rule and a description and a copy of any existing rule which the agency proposes to amend or repeal; (3) a statement of the circumstances which require the rule; (4) a fiscal note containing all information included in a fiscal note for either chamber of the Legislature and a statement of the economic impact of the rule on the state or its residents; and (5) any other information which the commission may request or which may be required by law.

(d) At its discretion, the board may meet the filing requirement of subsection (c) of this section using either of the following methods:

(1) By submitting 20 copies of the proposed rule to the Legislative Oversight Commission on Education Accountability at its offices or at a regular meeting of the commission; or

(2) By submitting the proposed rule electronically to Legislative Oversight Commission on Education Accountability. Proposed rules submitted electronically shall be transmitted in a timely manner, shall contain all required information, and shall be compatible with computer applications in use by the Legislative Oversight Commission on Education Accountability.

(e) The Legislative Oversight Commission on Education Accountability shall review each proposed legislative rule and, in its discretion, may hold public hearings thereon. Such review shall include, but not be limited to, a determination of:

(1) Whether the board has exceeded the scope of its statutory authority in approving the proposed legislative rule;

(2) Whether the proposed legislative rule is in conformity with the legislative intent of the statute which the rule is intended to implement, extend, apply, interpret, or make specific;

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(3) Whether the proposed legislative rule conflicts with any other provision of this code or with any other rule adopted by the same or a different agency;

(4) Whether the proposed legislative rule is necessary to fully accomplish the objectives of the statute under which the proposed rule was promulgated;

(5) Whether the proposed legislative rule is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it;

(6) Whether the proposed legislative rule could be made less complex or more readily understandable by the general public; and

(7) Whether the proposed legislative rule was promulgated in compliance with the requirements of this article and with any requirements imposed by any other provision of this code.

(f) After reviewing the legislative rule, the Legislative Oversight Commission on Education Accountability shall recommend that the Legislature:

Authorize the promulgation of the legislative rule;

Authorize the promulgation of part of the legislative rule;

Authorize the promulgation of the legislative rule with certain amendments;

Recommend that the proposed rule be withdrawn; or

Reject the proposed rule.

(g) The Legislative Oversight Commission on Education Accountability's submission of legislative rules submitted to them by the West Virginia Board of Education, alongside their findings and recommendations, shall be done in accordance with the procedures, but not the underlying delegating authority of §29A-3-1 *et seq*. of this code.

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§29A-3B-10. Emergency legislative rules; procedure for promulgation; definition.

(a) The West Virginia Board of Education may, without hearing, find that an emergency exists requiring that emergency rules be promulgated and promulgate the same in accordance with this section. Such emergency rules, together with a statement of the facts and circumstances constituting the emergency, shall be filed in the State Register and shall become effective immediately upon such filing. Such emergency rules may adopt, amend, or repeal any legislative rule, but the circumstances constituting the emergency requiring such adoption, amendment, or repeal shall be stated with particularity and be subject to de novo review by any court having original jurisdiction of an action challenging their validity.

(b) The board shall file ten copies of the rules and of the required statement with the Legislative Oversight Commission on Education Accountability. At its discretion, the board may meet the filing requirement contained in this subsection by submitting the emergency rule electronically to the Legislative Oversight Commission on Education Accountability. Proposed rules submitted electronically shall be transmitted in a timely manner, shall contain all required information and shall be compatible with computer applications in use by the Legislative Oversight Commission on Education Accountability.

(c) An emergency rule shall be effective for not more than 15 months and shall expire earlier if any of the following occurs:

(1) The board has not previously filed and fails to file a notice of public hearing on the proposed rule within 60 days of the date the proposed rule was filed as an emergency rule; in which case the emergency rule expires on the sixty-first day.

(2) The board has not previously filed and fails to file the proposed rule with the Legislative Oversight Commission on Education Accountability within 30 days of the date the proposed rule was filed as an emergency rule; in which case the emergency rule expires on the thirty-first day.

(3) The board adopts a legislative rule dealing with substantially the same subject matter since such emergency rule was first promulgated and in which case the emergency rule expires on the date the authorized rule is made effective.

(d) Any amendment to an emergency rule made by the board shall be filed in the State Register and does not constitute a new emergency rule for the purpose of acquiring additional time or avoiding the expiration dates in subdivision (1), (2), or (3), subsection (c) of this section.

(e) Once an emergency rule expires due to the conclusion of 15 months or due to the effect of subdivision (1), (2), or (3), subsection (c) of this section, the board may not refile the same or similar rule as an emergency rule.

(f) Emergency legislative rules currently in effect under the prior provisions of this section

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may be refiled under the provisions of this section.

(g) The provision of this section shall not be used to avoid or evade any provision of this article or any other provisions of this code, including any provisions for legislative review of proposed rules. Any emergency rule promulgated for any such purpose may be contested in a judicial proceeding before a court of competent jurisdiction.

(h) Within 15 months, the Legislative Oversight Commission on Education Accountability shall review any emergency rule to determine: (1) Whether the board has exceeded the scope of its statutory authority in promulgating the emergency rule; (2) whether there exists an emergency justifying the promulgation of such rule; and (3) whether the rule was promulgated in compliance with the requirements and prohibitions contained in this section. The commission may recommend to the board, the Legislature, or the Secretary of State such action as it may deem proper.

WV Legislature

§29A-3B-11. Legislative review of procedural rules, interpretive rules, and existing legislative rules.

The Legislative Oversight Commission on Education Accountability may review any procedural rules, interpretive rules, or existing legislative rules and may make recommendations concerning such rules to the Legislature, or to the board, or to both the Legislature and the board.

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§29A-3B-12. Prior rules.

Any rule lawfully promulgated prior to the effective date of this chapter shall remain in full force and effect until:

(1) Such rule is expressly made ineffective by the provisions of this chapter; or

(2) Such rule should expire by reason of failure to refile the same as provided in section five of article two, or expires pursuant to its own terms and provisions lawfully made before the effective date of this section; or

(3) Such rule is repealed by the lawful act of the board, in conformity with this chapter; or

(4) Such rule is invalidated by an act of the Legislature or the force and effect of another law.

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