

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990

— ● —

# ENROLLED

Com. Sub. for  
HOUSE BILL No. 2219

(By ~~HB~~ Delegate Jatten )

— ● —

Passed March 10, 1990

In Effect 90 Days from Passage

**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR  
**H. B. 2219**  
(By DELEGATE SATTES)

[Passed March 10, 1990; in effect ninety days from passage.]

AN ACT to amend and reenact section five-a, article two, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section three, article one, chapter twenty-nine-a of said code; to amend and reenact sections one and eleven-a, article three-a, chapter twenty-nine-a of said code; and to further amend said chapter twenty-nine-a by adding thereto a new article, designated article three-b, all relating to providing for adequate public participation in the promulgation of state board of education rules; exempting the secondary schools activities commission from the provisions of this article; redefining "board"; providing for the collection and preservation of state board of education rules in a manner easily accessible to the public; providing a process for clarification of legislative intent of statutes upon which state board of education rules are based; and changing obsolete code language and code references.

*Be it enacted by the Legislature of West Virginia:*

That section five-a, article two, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that section three, article one, chapter twenty-nine-a of said code be amended and

reenacted; that sections one and eleven-a, article three-a, chapter twenty-nine-a be amended and reenacted; and that said chapter twenty-nine-a be further amended by adding thereto a new article, designated article three-b, all to read as follows:

## **CHAPTER 18. EDUCATION.**

### **ARTICLE 2. STATE BOARD OF EDUCATION.**

#### **§18-2-5a. Board rules to be filed with Legislature.**

1 The state board of education shall file a copy of any  
2 rule that it proposes to promulgate, adopt, amend or  
3 repeal under the authority of the constitution or of this  
4 code with the legislative oversight commission on  
5 education accountability pursuant to article three-b,  
6 chapter twenty-nine-a of this code. "Rule," as used  
7 herein, means a regulation, standard, statement of  
8 policy, or interpretation of general application and  
9 future effect.

## **CHAPTER 29A. STATE ADMINISTRATIVE PROCEDURES.**

### **ARTICLE 1. DEFINITIONS AND APPLICATION OF CHAPTER.**

#### **§29A-1-3. Application of chapter; limitations.**

1 (a) The provisions of this chapter do not apply in any  
2 respect whatever to executive orders of the governor,  
3 which orders to the extent otherwise lawful shall be  
4 effective according to their terms: *Provided*, That the  
5 executive orders shall be admitted to record in the state  
6 register when and to the extent the governor deems  
7 suitable and shall be included therein by the secretary  
8 of state when tendered by the governor.

9 (b) Except as to requirements for filing in the state  
10 register, and with the Legislature or its rule-making  
11 review committee, provided in this chapter or other law,  
12 the provisions of this chapter do not apply in any respect  
13 whatever to the West Virginia board of probation and  
14 parole, the public service commission, the board of  
15 public works sitting as such and the secondary schools

16 activities commission: *Provided*, That rules of such  
 17 agencies shall be filed in the state register in the form  
 18 prescribed by this chapter and be effective no sooner  
 19 than sixty consecutive days after being so filed:  
 20 *Provided, however*, That the rules promulgated by the  
 21 state colleges and universities shall only be filed with  
 22 the higher education governing boards: *Provided*  
 23 *further*, That such agencies may promulgate emergency  
 24 rules in conformity with section fifteen, article three of  
 25 this chapter.

26 (c) The provisions of this chapter do not apply to rules  
 27 relating to or contested cases involving the conduct of  
 28 inmates or other persons admitted to public institutions,  
 29 the open seasons and the bag, creel, size, age, weight and  
 30 sex limits with respect to the wildlife in this state, the  
 31 conduct of persons in military service or the receipt of  
 32 public assistance. Such rules shall be filed in the state  
 33 register in the form prescribed by this chapter and be  
 34 effective upon filing.

35 (d) Nothing herein shall be construed to affect, limit  
 36 or expand any express and specific exemption from this  
 37 chapter contained in any other statute relating to a  
 38 specific agency, but such exemptions shall be construed  
 39 and applied in accordance with the provisions of this  
 40 chapter to effectuate any limitations on such exemptions  
 41 contained in any such other statute.

#### ARTICLE 3A. HIGHER EDUCATION RULE MAKING.

##### §29A-3A-1. Definitions.

1 As used in this article:

2 (a) "Commission" means the legislative oversight  
 3 commission on education accountability;

4 (b) "Board" means the university of West Virginia  
 5 board of trustees or the board of directors of the state  
 6 college system as defined in chapter eighteen-b of this  
 7 code, or both, or any person employed by such boards  
 8 who is granted rule-making authority under the  
 9 provisions of said chapter.

**§29A-3A-11a. Additional powers and duties; subpoena powers.**

1 (a) In addition to the powers and duties conferred  
2 upon the commission pursuant to the provisions of this  
3 article, the commission shall make a continuing inves-  
4 tigation, study and review of the practices, policies and  
5 procedures of the board and of any and all matters  
6 related to education in the state and shall make annual  
7 reports to the Legislature of the results of such  
8 investigation, study and review.

9 (b) These reports shall describe and evaluate in a  
10 concise manner:

11 (1) The major activities of the board for the fiscal year  
12 immediately past, including important policy decisions  
13 reached on initiatives undertaken during that year,  
14 especially as such activities, decisions and initiatives  
15 relate to the implementation of (1) the constitutional  
16 requirement of providing a thorough and efficient  
17 education to the children of this state and (2) the  
18 objective of improving the quality of education at all  
19 levels in this state.

20 (2) Other information considered by the commission  
21 to be important, including recommendations for statu-  
22 tory, fiscal or other reform and reasons for such  
23 recommendations.

24 Further, these reports may specify in what manner  
25 said practices, policies and procedures may or should be  
26 modified to satisfy said constitutional requirement and  
27 to improve the quality of education at all levels in this  
28 state.

29 The commission may meet as often as may be  
30 necessary and employ such professional, clerical and  
31 technical personnel as it considers necessary to perform  
32 effectively the duties herein prescribed.

33 (c) The commission shall conduct a study to determine  
34 whether the bureaucracies of the state board of educa-  
35 tion and each county board of education are of such size  
36 and complexity that they do not best serve the educa-  
37 tional needs of the children of the state. The commission  
38 may request assistance from the legislative auditor to

39 conduct this study.

40 (d) For purposes of carrying out its duties, the  
 41 commission is hereby empowered and authorized to  
 42 examine witnesses and to subpoena such persons and  
 43 books, records, documents, papers or any other tangible  
 44 things as it believes should be examined to make a  
 45 complete investigation. All witnesses appearing before  
 46 the commission shall testify under oath or affirmation,  
 47 and any member of the commission may administer  
 48 oaths or affirmations to such witnesses. To compel the  
 49 attendance of witnesses at such hearings or the produc-  
 50 tion of any books, records, documents, papers or any  
 51 other tangible thing, the commission is hereby empow-  
 52 ered and authorized to issue subpoenas, signed by one  
 53 of the cochairmen, in accordance with section five,  
 54 article one, chapter four of this code. Such subpoenas  
 55 shall be served by any person authorized by law to serve  
 56 and execute legal process and service shall be made  
 57 without charge. Witnesses subpoenaed to attend hear-  
 58 ings shall be allowed the same mileage and per diem  
 59 as is allowed witnesses before any petit jury in this state.

60 If any person subpoenaed to appear at any hearing  
 61 shall refuse to appear or to answer inquiries there  
 62 propounded, or shall fail or refuse to produce books,  
 63 records, documents, papers or any other tangible thing  
 64 within his control when the same are demanded, the  
 65 commission shall report the facts to the circuit court of  
 66 Kanawha County or any other court of competent  
 67 jurisdiction and such court may compel obedience to the  
 68 subpoena as though such subpoena had been issued by  
 69 such court in the first instance.

#### ARTICLE 3B. STATE BOARD OF EDUCATION RULE MAKING.

##### §29A-3B-1. Definitions.

1 As used in this article:

2 (a) "Commission" means the legislative oversight  
 3 commission on education accountability created in  
 4 section eleven, article three-a of this chapter.

5 (b) "Board" means the West Virginia board of  
 6 education.

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

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

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

1 In addition to other rule-making requirements im-  
2 posed by law:

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

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

**§29A-3B-4. Filing of proposed rules.**

1 (a) When the board proposes a procedural, interpre-  
2 tive or legislative rule, the agency shall file in the state  
3 register a notice of its action, including the text of the  
4 rule as proposed.

5 (b) All proposed rules filed under subsection (a) of this  
6 section shall have a fiscal note attached itemizing the  
7 cost of implementing the rules as they relate to this state  
8 and to persons affected by the rules and regulations.  
9 Such fiscal note shall include all information included  
10 in a fiscal note for either house of the Legislature and  
11 a statement of the economic impact of the rule on the  
12 state or its residents. The objectives of the rules shall  
13 be clearly and separately stated in the fiscal note by the  
14 agency issuing the proposed rules. No procedural or

15 interpretive rule shall be void or voidable by virtue of  
16 noncompliance with this subsection.

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

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

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

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

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

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

36 Any citizen or other interested party may appear and



37 be heard at such hearings as are required by this  
38 section.

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

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

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

**§29A-3B-7. Notice of hearings.**

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

**§29A-3B-8. Adoption of rules.**

1 A rule, shall be considered by the board for adoption  
2 not later than six months after the close of public  
3 comment and a notice of withdrawal or adoption shall  
4 be filed in the state register within that period. Failure  
5 to file such notice shall constitute withdrawal and the  
6 secretary of state shall note such failure in the state  
7 register immediately upon the expiration of the six-

8 month period.

9 A rule may be amended by the board prior to final  
10 adoption without further hearing or public comment. No  
11 such amendment may change the main purpose of the  
12 rule. If the fiscal implications have changed since the  
13 rule was proposed, a new fiscal note shall be attached  
14 to the notice of filing. Upon adoption of the rule  
15 (including any such amendment) the board shall file the  
16 text of the adopted rule with its notice of adoption in  
17 the state register and the same shall be effective on the  
18 date specified in the rule or thirty days after such filing,  
19 whichever is later.

**§29A-3B-9. Submission of legislative rules to the legisla-  
tive oversight commission on education  
accountability.**

1 (a) When the board finally adopts a legislative rule,  
2 the board shall submit to the legislative oversight  
3 commission on education accountability at its offices or  
4 at a regular meeting of such commission ten copies of  
5 (1) the full text of the legislative rule as finally approved  
6 by the board, with new language underlined and with  
7 language to be deleted from any existing rule stricken-  
8 through but clearly legible; (2) a brief summary of the  
9 content of the legislative rule and a description and a  
10 copy of any existing rule which the agency proposes to  
11 amend or repeal; (3) a statement of the circumstances  
12 which require the rule; (4) a fiscal note containing all  
13 information included in a fiscal note for either house of  
14 the Legislature and a statement of the economic impact  
15 of the rule on the state or its residents; and (5) any other  
16 information which the commission may request or  
17 which may be required by law.

18 (b) The commission shall review each proposed  
19 legislative rule and, in its discretion, may hold public  
20 hearings thereon. Such review shall include, but not be  
21 limited to, a determination of:

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

25 (2) Whether the proposed legislative rule is in confor-  
26 mity with the legislative intent of the statute which the  
27 rule is intended to implement, extend, apply, interpret  
28 or make specific;

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

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

35 (5) Whether the proposed legislative rule is reason-  
36 able, especially as it affects the convenience of the  
37 general public or of persons particularly affected by it;

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

41 (7) Whether the proposed legislative rule was promul-  
42 gated in compliance with the requirements of this  
43 article and with any requirements imposed by any other  
44 provision of this code.

45 (c) After reviewing the legislative rule, the commis-  
46 sion shall recommend to the Legislature any statutory  
47 changes needed to clarify the legislative intent of the  
48 statute upon which the rule is based or to otherwise  
49 modify the activity subject to the rule, or may make  
50 such other recommendations to the Legislature or the  
51 board, or both, as it deems appropriate.

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

1 (a) The board may, without hearing, find that an  
2 emergency exists requiring that emergency rules be  
3 promulgated and promulgate the same in accordance  
4 with this section. Such emergency rules, together with  
5 a statement of the facts and circumstances constituting  
6 the emergency, shall be filed in the state register and  
7 shall become effective immediately upon such filing.  
8 Such emergency rules may adopt, amend or repeal any  
9 legislative rule, but the circumstances constituting the

10 emergency requiring such adoption, amendment or  
 11 repeal shall be stated with particularity and be subject  
 12 to de novo review by any court having original jurisdic-  
 13 tion of an action challenging their validity. Ten copies  
 14 of the rules and of the required statement shall be filed  
 15 forthwith with the legislative oversight commission on  
 16 education accountability.

17 An emergency rule shall be effective for not more  
 18 than fifteen months and shall expire earlier if any of the  
 19 following occurs:

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

25 (2) The board has not previously filed and fails to file  
 26 the proposed rule with the legislative oversight commis-  
 27 sion on education accountability within one hundred  
 28 eighty days of the date the proposed rule was filed as  
 29 an emergency rule; in which case the emergency rule  
 30 expires on the one hundred eighty-first day.

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

36 (b) Any amendment to an emergency rule made by  
 37 the board shall be filed in the state register and does  
 38 not constitute a new emergency rule for the purpose of  
 39 acquiring additional time or avoiding the expiration  
 40 dates in subdivision (1), (2), or (3), subsection (a) of this  
 41 section.

42 (c) Once an emergency rule expires due to the  
 43 conclusion of fifteen months or due to the effect of  
 44 subdivision (1), (2), or (3), subsection (a) of this section,  
 45 the board may not refile the same or similar rule as an  
 46 emergency rule.

47 (d) Emergency legislative rules currently in effect  
 48 under the prior provisions of this section may be refiled

49 under the provisions of this section.

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

57 (f) The legislative oversight commission on education  
58 accountability may review any emergency rule to  
59 determine (1) whether the board has exceeded the scope  
60 of its statutory authority in promulgating the emer-  
61 gency rule; (2) whether there exists an emergency  
62 justifying the promulgation of such rule; and (3)  
63 whether the rule was promulgated in compliance with  
64 the requirements and prohibitions contained in this  
65 section. The commission may recommend to the board,  
66 the Legislature, or the secretary of state such action as  
67 it may deem proper.

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

1 The legislative oversight commission on education  
2 accountability may review any procedural rules, inter-  
3 pretive rules or existing legislative rules and may make  
4 recommendations concerning such rules to the Legisla-  
5 ture, or to the board, or to both the Legislature and the  
6 board.

**§29A-3B-12. Prior rules.**

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

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

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

10 or

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

13 (4) Such rule is invalidated by an act of the Legisla-  
14 ture or the force and effect of another law.

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The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Frederic J. Perky*  
Chairman Senate Committee

*Bernard V. Kelly*  
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

*Samuel E. Holmes*  
Clerk of the Senate

*Donald L. Hoagg*  
Clerk of the House of Delegates

*Walter B. Austin*  
President of the Senate

*Ed St. Cole*  
Speaker of the House of Delegates

The within is approved this the 16<sup>th</sup>  
day of March, 1900.

*Walter B. Austin*  
Governor

PRESENTED TO THE

GOVERNOR

Date 3/22/90

Time 4:05 pm



