WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1990

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ENROLLED

Com. Sub. for
HOUSE BILL No. 2219

(By Delegate sullivan)

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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 rule that it proposes to promulgate, adopt, amend or repeal under the authority of the constitution or of this code with the legislative oversight commission on education accountability pursuant to article three-b, chapter twenty-nine-a of this code. “Rule,” as used herein, means a regulation, standard, statement of policy, or interpretation of general application and future effect.

CHAPTER 29A. STATE ADMINISTRATIVE PROCEDURES.

ARTICLE 1. DEFINITIONS AND APPLICATION OF CHAPTER.

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

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

(b) Except as to requirements for filing in the state register, and with the Legislature or its rule-making review committee, provided in this chapter or other law, the provisions of this chapter do not apply in any respect whatever to the West Virginia board of probation and parole, the public service commission, the board of public works sitting as such and the secondary schools
activities commission: Provided, That rules of such agencies shall be filed in the state register in the form prescribed by this chapter and be effective no sooner than sixty consecutive days after being so filed: Provided, however, That the rules promulgated by the state colleges and universities shall only be filed with the higher education governing boards: Provided further, That such agencies may promulgate emergency rules in conformity with section fifteen, article three of this chapter.

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

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

ARTICLE 3A. HIGHER EDUCATION RULE MAKING.


As used in this article:

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

(b) "Board" means the university of West Virginia board of trustees or the board of directors of the state college system as defined in chapter eighteen-b of this code, or both, or any person employed by such boards who is granted rule-making authority under the provisions of said chapter.
§29A-3A-lla. Additional powers and duties; subpoena powers.

(a) In addition to the powers and duties conferred upon the commission pursuant to the provisions of this article, the commission shall make a continuing investigation, study and review of the practices, policies and procedures of the board and of any and all matters related to education in the state and shall make annual reports to the Legislature of the results of such investigation, study and review.

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

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

(2) Other information considered by the commission to be important, including recommendations for statutory, fiscal or other reform and reasons for such recommendations.

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

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

(c) The commission shall conduct a study to determine whether the bureaucracies of the state board of education and each county board of education are of such size and complexity that they do not best serve the educational needs of the children of the state. The commission may request assistance from the legislative auditor to
conduct this study.

(d) For purposes of carrying out its duties, the commission is hereby empowered and authorized to examine witnesses and to subpoena such persons and books, records, documents, papers or any other tangible things as it believes should be examined to make a complete investigation. All witnesses appearing before the commission shall testify under oath or affirmation, and any member of the commission may administer oaths or affirmations to such witnesses. To compel the attendance of witnesses at such hearings or the production of any books, records, documents, papers or any other tangible thing, the commission is hereby empowered and authorized to issue subpoenas, signed by one of the cochairmen, in accordance with section five, article one, chapter four of this code. Such subpoenas shall be served by any person authorized by law to serve and execute legal process and service shall be made without charge. Witnesses subpoenaed to attend hearings shall be allowed the same mileage and per diem as is allowed witnesses before any petit jury in this state.

If any person subpoenaed to appear at any hearing shall refuse to appear or to answer inquiries there propounded, or shall fail or refuse to produce books, records, documents, papers or any other tangible thing within his control when the same are demanded, the commission shall report the facts to the circuit court of Kanawha County or any other court of competent jurisdiction and such court may compel obedience to the subpoena as though such subpoena had been issued by 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 commission on education accountability created in section eleven, article three-a of this chapter.

3 (b) “Board” means the West Virginia board of education.
§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.

§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.

§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.

§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.

§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.


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.

§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-
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 and the same shall be effective on the date specified in the rule or thirty days after such filing, whichever is later.

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

(a) When the board finally adopts a legislative rule, the board shall submit to the legislative oversight commission on education accountability at its offices or at a regular meeting of such commission ten copies of (1) the full text of the legislative rule as finally approved by the board, 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 house 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.

(b) The commission 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;

(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.

(c) After reviewing the legislative rule, the commission shall recommend to the Legislature any statutory changes needed to clarify the legislative intent of the statute upon which the rule is based or to otherwise modify the activity subject to the rule, or may make such other recommendations to the Legislature or the board, or both, as it deems appropriate.

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

(a) The board 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. Ten copies of the rules and of the required statement shall be filed forthwith with the legislative oversight commission on education accountability.

An emergency rule shall be effective for not more than fifteen 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 sixty 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 one hundred eighty days of the date the proposed rule was filed as an emergency rule; in which case the emergency rule expires on the one hundred eighty-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.

(b) 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 (a) of this section.

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

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

(f) The legislative oversight commission on education accountability may 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.


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.


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

Frederick E. Bark
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Russell E. Antonio
Clerk of the Senate

Donald L. Herron
Clerk of the House of Delegates

Paul M. Pallas
President of the Senate

George C. Cole
Speaker of the House of Delegates

The within is approved this the thirtieth day of March, 1900.

Milton C. Casper
Governor