WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1994

- • -

ENROLLED

Com. Jule. for
HOUSE BILL No. 4066...

(By Delegate Gallagher)

- • -

Passed February 21, 1994

In Effect Passage
AN ACT to amend article one, chapter twenty-nine-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section four; to amend and reenact section six, article two of said chapter; to amend and reenact sections five, nine, eleven, twelve, thirteen, fifteen, fifteen-a and fifteen-b, article three of said chapter, and to amend and reenact section six, ten, sixteen and sixteen-a, article three-a of said chapter, all relating to the filing of rules in the state register and the promulgation of legislative rules; providing for the application of the open governmental proceedings law; requiring the secretary of state to promulgate a procedural rule requiring the use of a uniform system of electronic transmission for the filing of rules with the secretary of state; authorizing the secretary of state to grant exceptions to such requirement; providing for notice of proposed rule-making; prohibiting ex parte communications with an agency after close of public comment and before final agency approval of a proposed rule; requiring notice of a proposal of legislative rules and describing when a proposed rule shall have force and effect; authorizing the secretary of the executive department administering an agency to submit proposed rules to the legislative rule-making review
committee unless an agency, board or commission proposing a rule is not administered by an executive department; allowing the Legislature to combine and group bills authorizing legislative rules by executive departments, by agencies and by bills having a unity of subject matter; providing that the single object of a bill of authorization is to authorize the promulgation of legislative rules; authorizing the secretary of the executive department administering an agency to promulgate legislatively authorized rules unless an agency, board or commission promulgating the rule is not administered by an executive department; redefining the authority of the secretary of state and the attorney general to disapprove the filing of an emergency rule or an amendment to an emergency rule; making certain technical changes throughout article three; providing for notice of proposed rule-making by the university of West Virginia board of trustees or the board of directors of the state college system; prohibiting ex parte communications with a board after close of public comment and before final board approval of a proposed rule; requiring notice of a proposal of legislative rules and describing when a proposed rule shall have force and effect; redefining the authority of the secretary of state to disapprove the filing of an emergency rule or an amendment to an emergency rule; and making certain technical changes throughout article three-a.

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

That article one, chapter twenty-nine-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section four, that section six, article two of said chapter be amended and reenacted; that sections five, nine, eleven, twelve, thirteen, fifteen, fifteen-a and fifteen-b, article three of said chapter be amended and reenacted, and that sections six, ten, sixteen and sixteen-a, article three-a of said chapter be amended and reenacted, all to read as follows:

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

(a) All meetings of an agency, board or commission of the executive branch of government or of the legislative rule-making review committee which may only be convened upon the presence of a required quorum, and which are convened for the purpose of making a decision or deliberating toward a decision as to the form and substance of a rule, as defined in subsection (i), section two of this article, are subject to the open governmental proceedings law as set forth in article nine-a, chapter six of this code, except as may otherwise be provided for in this section.

(b) When an agency, board or commission is considering the form and substance of a rule or proposed rule, the informal occurrence of (1) consultations between the governing members of the agency, board or commission and its staff members, (2) deliberations by the governing members, or (3) the engagement of a governing member or members in the process of making a decision, does not constitute a meeting within the meaning of article nine-a, chapter six of this code when, during such stages, neither a quorum nor the convening of the governing members of the agency, board or commission is required.

(c) When the legislative rule-making review committee is considering the form and substance of a rule or proposed rule, the informal occurrence of (1) consultations between the members of the committee and its staff members, (2) deliberations by the governing members, or (3) the engagement of a governing member or members in the process of making a decision, does not constitute a meeting within the meaning of article nine-a, chapter six of this code when, during such stages, neither a quorum nor the convening of the members of the committee is required.

(d) After public hearing or the close of the public comment period, during which hearing or period an agency, board or commission has received statements concerning the form and substance of a rule or proposed
rule, the agency, board or commission shall not permit
the filing or receipt of, nor shall it consider, any
attempted ex parte communications directed to it in the
form of additional comment, prior to the submission of
its final agency-approved rule to the legislative rule-
making review committee pursuant to the provisions of
section eleven, article three of this chapter. Nothing
contained herein shall prohibit the agency, board or
commission from soliciting or receiving information
relating to the rule or proposed rule from the federal
government, from the Legislature or its members, or
from another agency, board or commission of the
executive branch of the government of this state.

(e) After a proposed rule is approved for submission
and is submitted to the legislative rule-making review
committee pursuant to the provisions of section eleven,
article three of this chapter, the right of the people to
assemble, to petition government, to consult for the
common good, to instruct their representatives, and to
apply for redress of grievances, in accordance with the
provisions of section sixteen, article III of the Constitu-
tion, shall reserve to a person the right to freely
communicate, ex parte or otherwise, with the agency,
board or commission or the legislative rule-making
review committee in attempts to influence deliberations
or decision-making regarding the form and substance of
the proposed rule prior to authorization being granted
for promulgation of the rule.

ARTICLE 2. STATE REGISTER.

§29A-2-6. Format and numbering of agency rules filed in
state register.

(a) Each proposed rule filed by an agency requiring
a notice to be published in the state register in
accordance with the provisions of section five, article
three of this chapter shall include as its initial provi-
sions: (1) A statement identifying such rule as a
legislative rule, an interpretive rule or a procedural
rule, as the case may be; (2) a statement of such section,
article and chapter of this code to which such rule or
any part thereof relates; and (3) a statement of the
section, article and chapter of this code or any other
provision of law which provides authority for the
promulgation of such rule. The agency shall be estopped
from relying on any authority for the promulgation of
such rule which is not stated therein in accordance with
the requirements of this subdivision.

(b) Each rule when filed, to be finally effective, shall
have attached thereto an abstract of its promulgation
history prepared by the agency showing the date of the
filing in the state register of the content of, or notice of
any procedure relating to, action necessary under this
chapter to cause such rules to be finally effective:
Provided, That any error or omission in such abstract
shall not affect the validity of any rule or action in
respect thereto.

(c) The secretary of state shall prescribe by legislative
rule a standard size, format numbering and indexing
for rules to be filed in the state register and he may
prescribe such procedural or interpretive rules as he
deems advisable to clarify and interpret the provisions
in this section. The secretary of state shall refuse to
accept for filing any rules which do not comply with the
specific provisions of this section, and he may refuse to
accept for filing any rules which do not comply with the
procedural rules issued by him pursuant to this section
until the rules sought to be filed are brought into
conformity with the secretary of state's procedural rules.

(d) Unless and until the secretary of state prescribes
otherwise by rule issued and made effective under the
provisions of subsection (c) of this section, each rule filed
in this state register shall be on white paper measuring
eight and one-half inches by eleven inches, typewritten
and single-spaced, with a one inch margin at the top,
bottom and each side of each page, and shall be
reproduced photographically, or by xerography or other
duplication process. The secretary of state may grant
specific exceptions to such requirements in the case of
maps, diagrams and exhibits, if the same may not be
conveniently folded and fastened with the other pages
of rules and in the case of rules which incorporate the
promulgation of a federal agency or other organization
which could not be submitted in the standard size and format except at undue expense. Materials submitted for inclusion in the state register shall be fastened on the left side by two or more fasteners attached through holes suitable for insertion into ring binders.

(e) The secretary of state shall also prescribe by procedural rule a uniform system for the electronic filing of a proposed rule or emergency rule or a modification thereof, or a legislatively authorized rule, either (1) by the direct electronic transmission of data to a terminal in the office of the secretary of state, or (2) by the delivery to the secretary of state of a machine-readable copy of the filing on a medium such as magnetic tape or disk, or the like, which system shall be used in the process of filing proposed rules, emergency rules, modifications and authorized rules with the secretary of state. The secretary of state may grant exceptions to the requirement for electronic filing in the case of agencies, boards or commissions which do not have reasonable access to a compatible electronic transmission system or a means of creating a machine-readable copy, but, if an exception is granted, the secretary of state shall create a machine-readable copy of the proposed rule, emergency rule, modification or authorized rule. The electronic filing required by the provisions of this section shall not obviate any requirement for the filing of printed paper copies of the proposed rule, emergency rule, modification or authorized rule as may be required by this chapter.

ARTICLE 3. RULE MAKING.

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

When an agency proposes to promulgate a rule other than an emergency rule it shall file with the secretary of state, for publication in the state register, a notice of its action, including therein any request for the submission of evidence to be presented on any factual determinations or inquiries required by law to promulgate such rule. At the time of filing the notice of its action, the agency shall also file with the secretary of state a copy of the full text of the rule proposed, and
a fiscal note as defined in subsection (b), section four of this article. If the agency is considering alternative draft proposals it may also file with the secretary of state the full text of such draft proposals.

The notice shall fix a date, time and place for the receipt of public comment in the form of oral statements, written statements, and documents bearing upon any findings and determinations which are a condition precedent to the final approval by the agency of the proposed rule, and shall contain a general description of the issues to be decided. If no specific findings and determinations are required as a condition precedent to the final approval by the agency of the approved rule, the notice shall fix a date, time and place for the receipt of general public comment on the proposed rule.

If findings and determinations are a condition precedent to the promulgation of such rule, then an opportunity for general 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 agency when filed in the state register.

In any hearing for public comment on the merits of the rule, the agency 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 agency. After the public hearing or the close of the public comment period, whichever is later, the agency shall not permit the filing or receipt of, nor shall it consider, any attempted ex parte communications directed to it in the form of additional comment, prior to the submission of its final agency-approved rule to the legislative rule-making review committee pursuant to the provisions of section eleven of this article.

The agency 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.


When an agency proposes a legislative rule, other than an emergency rule, it shall be deemed to be applying to the Legislature for permission, to be granted by law, to promulgate such rule as approved by the agency for submission to the Legislature or as amended and authorized by the Legislature by law.

An agency proposing a legislative rule, other than an emergency rule, after filing the notice of proposed rule-making required by the provisions of section five of this article, shall then proceed as in the case of a procedural and interpretive rule to the point of, but not including final adoption. In lieu of final adoption, the agency shall finally approve the proposed rule, including any amendments, for submission to the Legislature and file such notice of approval in the state register and with the legislative rule-making review committee.

Such final agency approval of the rule under this section is deemed to be approval for submission to the Legislature only and does not give any force and effect to the proposed rule. The rule shall have full force and effect only when authority for promulgation of the rule is granted by an act of the Legislature and the rule is promulgated pursuant to the provisions of section thirteen of this article.

§29A-3-11. Submission of legislative rules to the legislative rule-making review committee.

(a) When an agency finally approves a proposed legislative rule for submission to the Legislature, pursuant to the provisions of section nine of this article, the secretary of the executive department which administers the agency pursuant to the provisions of article two, chapter five-f of this code shall submit to the legislative rule-making review committee at its offices or at a regular meeting of such committee fifteen
copies of: (1) The full text of the legislative rule as finally approved by the agency, 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 committee may request or which may be required by law. If the agency is an agency, board or commission which is not administered by an executive department as provided for in article two, chapter five-f of this code, the agency shall submit the final agency-approved rule as required by this subsection.

(b) The committee 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 agency 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 rule was proposed for promulgation;

(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 pro-
posed for promulgation in compliance with the require-
ments of this article and with any requirements imposed
by any other provision of this code.

(c) After reviewing the legislative rule, the committee
shall recommend that the Legislature:

(1) Authorize the promulgation of the legislative rule,
or

(2) Authorize the promulgation of part of the legisla-
tive rule, or

(3) Authorize the promulgation of the legislative rule
with certain amendments, or

(4) Recommend that the proposed rule be withdrawn.

The committee shall file notice of its action in the state
register and with the agency proposing the rule:
Provided, That when the committee makes the recom-
mendations of subdivision (2), (3) or (4) of this subsec-
tion, the notice shall contain a statement of the reasons
for such recommendation.

(d) When the committee recommends that a rule be
authorized, in whole or in part, by the Legislature, the
committee shall instruct its staff or the office of
legislative services to draft a bill authorizing the
promulgation of all or part of the legislative rule, and
incorporating such amendments as the committee
desires. If the committee recommends that the rule not
be authorized, it shall include in its report a draft of a
bill authorizing promulgation of the rule together with
a recommendation. Any draft bill prepared under this
section shall contain a legislative finding that the rule
is within the legislative intent of the statute which the
rule is intended to implement, extend, apply or interpret
and shall be available for any member of the Legislature
to introduce to the Legislature.

§29A-3-12. Submission of legislative rules to Legislature.
(a) No later than forty days before the sixtieth day of each regular session of the Legislature, the cochairmen of the legislative rule-making review committee shall submit to the clerk of the respective houses of the Legislature copies of all proposed legislative rules which have been submitted to and considered by the committee pursuant to the provisions of section eleven of this article and which have not been previously submitted to the Legislature for study, together with the recommendations of the committee with respect to such rules, a statement of the reasons for any recommendation that a rule be amended or withdrawn, and a statement that a bill authorizing the legislative rule has been drafted by the staff of the committee or by legislative services pursuant to section eleven of this article. The cochairman of the committee may also submit such rules at the direction of the committee at any time before or during a special session in which consideration thereof may be appropriate. The committee may withhold from its report any proposed legislative rule which was submitted to the committee fewer than two hundred ten days before the end of the regular session. The clerk of each house shall submit the report to his or her house at the commencement of the next session.

All bills introduced authorizing the promulgation of a rule may be referred by the speaker of the House of Delegates and by the president of the Senate to appropriate standing committees of the respective houses for further consideration or the matters may be otherwise dealt with as each house or its rules provide. The Legislature may by act authorize the agency to adopt a legislative rule incorporating the entire rule, or may authorize the agency to adopt a rule with any amendments which the Legislature shall designate. The clerk of the house originating such act shall forthwith file a copy of any bill of authorization enacted with the secretary of state and with the agency proposing such rule and the clerk of each house may prepare and file a synopsis of legislative action during any session on any proposed rule submitted to the house during such session for which authority to promulgate was not by law provided during such session. In acting upon the
separate bills authorizing the promulgation of rules, the
Legislature may, by amendment or substitution, com-
bine the separate bills of authorization insofar as the
various rules authorized therein are proposed by
agencies which are placed under the administration of
one of the single separate executive departments
identified under the provisions of section two, article
one, chapter five-f of this code, or, the Legislature may
combine the separate bills of authorization by agency or
agencies within an executive department. In the case of
rules proposed for promulgation by an agency which is
not administered by an executive department pursuant
to the provisions of article two, chapter five-f of this
code, the separate bills of authorization for the proposed
rules of that agency may, by amendment or substitution,
be combined. The foregoing provisions relating to
combining separate bills of authorization according to
department or agency are not intended to restrict the
permissible breadth of bills of authorization and do not
preclude the Legislature from otherwise combining
various bills of authorization which have a unity of
subject matter. Any number of provisions may be
included in a bill of authorization, but the single object
of the bill shall be to authorize the promulgation of
proposed legislative rules.

(b) If the Legislature fails during its regular session
to act upon all or part of any legislative rule which was
submitted to it by the legislative rule-making review
committee during such session, no agency may thereaf-
ter issue any rule or directive or take other action to
implement such rule or part thereof unless and until
otherwise authorized to do so.

(c) Nothing herein shall be construed to prevent the
Legislature by law from authorizing, or authorizing and
directing, an agency to promulgate legislative rules not
proposed by the agency or upon which some procedure
specified in this chapter is not yet complete.

(d) Whenever the Legislature is convened by procla-
mation of the governor, upon his or her own initiative
or upon application of the members of the Legislature,
or whenever a regular session of the Legislature is
extended or convened by the vote or petition of its members, the Legislature may by act enacted during such extraordinary or extended session authorize, in whole or in part, any legislative rule whether submitted to the legislative rule-making review committee, or not, if legislative action on such rule during such session is a lawful order of business.

(e) Whenever a date is required by this section to be computed in relation to the end of a regular session of the Legislature, such date shall be computed without regard to any extensions of such session occasioned solely by the proclamation of the governor.

(f) Whenever a date is required to be computed from or is fixed by the first day of a regular session of the Legislature, it shall be computed or fixed in the year one thousand nine hundred eighty-four, and each fourth year thereafter without regard to the second Wednesday of January of such years.

§29A-3-13. Adoption of legislative rules; effective date.

(a) Except as the Legislature may by law otherwise provide, within sixty days after the effective date of an act authorizing promulgation of a legislative rule, the rule shall be promulgated only in conformity with the provisions of law authorizing and directing the promulgation of such rule. In the case of a rule proposed by an agency which is administered by an executive department pursuant to the provisions of article two, chapter five-f of this code, the secretary of the department shall promulgate the rule as authorized by the Legislature. In the case of an agency which is not subject to administration by the secretary of an executive department, the agency which proposed the rule for promulgation shall promulgate the rule as authorized by the Legislature.

(b) A legislative rule authorized by the Legislature shall become effective thirty days after such filing in the state register, or on the effective date fixed by the authorizing act or if none is fixed by law, such later date not to exceed ninety days, as is fixed by the agency.
(c) The secretary of state shall note in the state register the effective date of an authorized and promulgated legislative rule, and shall promptly publish the duly promulgated rule in a code of state rules maintained by his or her office.

§29A-3-15. Emergency legislative rules; procedure for promulgation; definition.

(a) Any agency with authority to propose legislative rules 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 with the secretary of state, and a notice of such filing shall be published in the state register. Such emergency rules shall become effective upon the approval of the secretary of state in accordance with section fifteen-a of this article or upon the approval of the attorney general in accordance with section fifteen-b or upon the forty-second day following such filing, whichever occurs first. 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. Fourteen copies of the rules and of the required statement shall be filed immediately with the secretary of state and one copy shall be filed immediately with the legislative rule-making review committee.

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

(1) The secretary of state, acting under the authority provided for in section fifteen-a of this article, or the attorney general, acting under the authority provided for in section fifteen-b of this article, disapproves the emergency rule because: (A) The emergency rule or an amendment to the emergency rule exceeds the scope of
the law authorizing or directing the promulgation thereof; (B) an emergency does not exist justifying the promulgation of the emergency rule; or (C) the emergency rule was not promulgated in compliance with the provisions of this section. An emergency rule may not be disapproved pursuant to the authority granted by paragraphs (A) or (B) of this subdivision on the basis that the secretary of state or the attorney general disagrees with the underlying public policy established by the Legislature in enacting the supporting legislation. An emergency rule which would otherwise be approved as being necessary to comply with a time limitation established by this code or by a federal statute or regulation may not be disapproved pursuant to the authority granted by paragraphs (A) or (B) of this subdivision on the basis that the agency has failed to file the emergency rule prior to the date fixed by such time limitation. When the supporting statute specifically directs an agency to promulgate an emergency rule, or specifically finds that an emergency exists and directs the promulgation of an emergency rule, the emergency rule may not be disapproved pursuant to the authority granted by paragraph (B) of this subdivision. An emergency rule may not be disapproved on the basis that the Legislature has not specifically directed an agency to promulgate the emergency rule, or has not specifically found that an emergency exists and directed the promulgation of an emergency rule,

(2) The agency has not previously filed and fails to file a notice of public hearing on the proposed rule within thirty 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 agency has not previously filed and fails to file the proposed rule with the legislative rule-making review committee within ninety days of the date the proposed rule was filed as an emergency rule; in which case the emergency rule expires on the ninety-first day.

(4) The Legislature has authorized or directed promulgation of an authorized 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.

(5) The Legislature has, by law, disapproved of such emergency rule; in which case the emergency rule expires on the date the law becomes effective.

(b) Any amendment to an emergency rule made by the agency 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 (2), (3), (4) or (5), subsection (a) of this section: Provided, That such emergency amendment shall become effective upon the approval of the secretary of state in accordance with section fifteen-a of this article or upon approval of the attorney general in accordance with section fifteen-b of this article or upon the forty-second day following such filing, whichever occurs first.

(c) Once an emergency rule expires due to the conclusion of fifteen months or due to the effect of subdivision (2), (3), (4) or (5), subsection (a) of this section, the agency may not refile the same or similar rule as an emergency rule.

(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 and approval 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 rule-making review committee may review any emergency rule to determine (1) whether the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; (2) whether there exists an emergency justifying the promulgation of such emergency rule; and (3) whether the emergency rule was promulgated in compliance with the requirements and prohibitions contained in this section. The committee may recommend to the agency, the Legislature, or the
secretary of state such action as it may deem proper.

For the purposes of this section, an emergency exists when the promulgation of an emergency rule is necessary (1) for the immediate preservation of the public peace, health, safety or welfare, (2) to comply with a time limitation established by this code or by a federal statute or regulation, or (3) to prevent substantial harm to the public interest.

§29A-3-15a. Disapproval of emergency rules and amendments to emergency rules by the secretary of state; judicial review.

(a) Upon the filing of an emergency rule or filing of an amendment to an emergency rule by an agency, under the provisions of section fifteen of this article, by any agency, except for the secretary of state, the secretary of state shall review such rule or such amendment and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rule or such amendment to an emergency rule should be disapproved. An emergency rule filed by the secretary of state shall be reviewed by the attorney general as provided for in section fifteen-b of this article.

(b) The secretary of state shall disapprove an emergency rule or an amendment to an emergency rule if he determines:

(1) That the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; or

(2) That an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or

(3) That the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of section fifteen of this article.

(c) If the secretary of state determines, based upon the contents of the rule or the supporting information filed by the agency, that the emergency rule should be
disapproved, he may disapprove such rule without further investigation, notice or hearing. If, however, the secretary of state concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(d) If the secretary of state determines, based upon the contents of the amendment to an emergency rule or the supporting information filed by the agency, that the amendment to the emergency rule should be disapproved, he may disapprove such amendment without further investigation, notice or hearing. If, however, the secretary of state concludes that the information submitted by the agency is insufficient to allow a proper determination to be made as to whether the amendment should be disapproved, he may make further investigation, including, but not limited to, requiring the agency or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(e) The determination of the secretary of state shall be reviewable by the supreme court of appeals under its original jurisdiction, based upon a petition for a writ of mandamus, prohibition or certiorari, as appropriate. Such proceeding may be instituted by:

(1) The agency which promulgated the emergency rule;

(2) A member of the Legislature; or

(3) Any person whose personal property interests will be significantly affected by the approval or disapproval of the emergency rule by the secretary of state.
§29A-3-15b. Disapproval of emergency rules and amendments to emergency rules by the attorney general; judicial review.

(a) Upon the filing of an emergency rule or filing of an amendment to an emergency rule by the secretary of state under the provisions of section fifteen of this article, the attorney general shall review such rule or such amendment and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rule or such amendment to an emergency rule should be disapproved.

(b) The attorney general shall disapprove an emergency rule or an amendment to an emergency rule if he determines:

(1) That the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; or

(2) That an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or

(3) That the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of section fifteen of this article.

(c) If the attorney general determines, based upon the contents of the rule or the supporting information filed by the secretary of state, that the emergency rule should be disapproved, he may disapprove such rule without further investigation, notice or hearing. If, however, the attorney general concludes that the information submitted by the secretary of state is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the secretary of state or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(d) If the attorney general determines, based upon the
contents of the amendment to an emergency rule or the
supporting information filed by the agency, that the
amendment to the emergency rule should be disap-
proved, he may disapprove such amendment without
further investigation, notice or hearing. If, however, the
attorney general concludes that the information submit-
ted by the agency is insufficient to allow a proper
determination to be made as to whether the amendment
should be disapproved, he may make further investiga-
tion, including, but not limited to, requiring the agency
or other interested parties to submit additional informa-
tion or comment or fixing a date, time and place for the
taking of evidence on the issues involved in making a
determination under the provisions of this section.

(e) The determination of the attorney general shall be
reviewable by the supreme court of appeals under its
original jurisdiction, based upon a petition for a writ of
mandamus, prohibition or certiorari, as appropriate.
Such proceeding may be instituted by:

(1) The secretary of state;
(2) A member of the Legislature; or
(3) Any person whose personal property interests will
be significantly affected by the approval or disapproval
of the emergency rule by the attorney general.

ARTICLE 3A. HIGHER EDUCATION RULE MAKING.


When the board proposes to promulgate a rule other
than an emergency rule it shall file with the secretary
of state, for publication in the state register, a notice of
its action, including therein any request for the
submission of evidence to be presented on any factual
determinations or inquiries required by law to promul-
gate such rule. At the time of filing the notice of its
action, the board shall also file with the secretary of
state a copy of the full text of the rule proposed, and
a fiscal note as defined in subsection (b), section five of
this article. If the board is considering alternative draft
proposals it may also file with the secretary of state the
full text of such draft proposals.
The notice shall fix a date, time and place for the receipt of public comment in the form of oral statements, written statements, and documents bearing upon any findings and determinations which are a condition precedent to the final approval by the board of the proposed rule, and shall contain a general description of the issues to be decided. If no specific findings and determinations are required as a condition precedent to the final approval by the board of the approved rule, the notice shall fix a date, time and place for the receipt of general public comment on the proposed rule.

If findings and determinations are a condition precedent to the promulgation of such rule, then an opportunity for general 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. After the public hearing or the close of the public comment period, whichever is later, the board shall not permit the filing or receipt of, nor shall it consider, any attempted ex parte communications directed to it in the form of additional comment, prior to the submission of its final board-approved rule to the legislative oversight commission on education accountability pursuant to the provisions of section twelve of this article.

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.

When the board proposes a legislative rule, other than an emergency rule, it shall be deemed to be applying to the Legislature for permission, to be granted by law, to promulgate such rule as approved by the board for submission to the Legislature or as amended and authorized by the Legislature by law.

When proposing a legislative rule, other than an emergency rule, and after filing the notice of proposed rule-making required by the provisions of section five of this article, the board shall then proceed as in the case of a procedural and interpretive rule to the point of, but not including final adoption. In lieu of final adoption, the board shall finally approve the proposed rule, including any amendments, for submission to the Legislature and file such notice of approval in the state register and with the legislative oversight commission on education accountability.

Such final approval of the rule under this section is deemed to be approval for submission to the Legislature only and does not give any force and effect to the proposed rule. The rule shall have full force and effect only when authority for promulgation of the rule is granted by an act of the Legislature and the rule is promulgated pursuant to the provisions of section fourteen of this article.


(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 jurisdic-
tion of an action challenging their validity. Fifteen 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 secretary of state, acting under the authority provided for in section sixteen-a of this article, disapproves the emergency rule because: (A) The emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; (B) an emergency does not exist justifying the promulgation of the emergency rule; or (C) the emergency rule was not promulgated in compliance with the provisions of this section. An emergency rule may not be disapproved pursuant to the authority granted by paragraphs (A) or (B) of this subdivision on the basis that the secretary of state disagrees with the underlying public policy established by the Legislature in enacting the supporting legislation. An emergency rule which would otherwise be approved as being necessary to comply with a time limitation established by this code or by a federal statute or regulation may not be disapproved pursuant to the authority granted by paragraphs (A) or (B) of this subdivision on the basis that the board has failed to file the emergency rule prior to the date fixed by such time limitation. When the supporting statute specifically directs the board to promulgate an emergency rule, or specifically finds that an emergency exists and directs the promulgation of an emergency rule, the emergency rule may not be disapproved pursuant to the authority granted by paragraph (B) of this subdivision. An emergency rule may not be disapproved on the basis that the Legislature has not specifically directed the board to promulgate the emergency rule, or has not specifically found that an emergency exists and directed the promulgation of an emergency rule,

2. The board has not previously filed and fails to file a notice of public hearing on the proposed rule within
(3) 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.

(4) The Legislature has authorized or directed promulgation of an authorized 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.

(5) The Legislature has, by law, disapproved of such emergency rule; in which case the emergency rule expires on the date the law becomes 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 (2), (3), (4) or (5), 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 (2), (3), (4) or (5), 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 under the provisions of this section.

(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 and approval 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.

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

§29A-3A-16a. Disapproval of emergency rules by the secretary of state; judicial review.

(a) Upon the filing of an emergency rule by the board, under the provisions of section sixteen of this article, the secretary of state shall review such rule and, within forty-two days of such filing, shall issue a decision as to whether or not such emergency rule should be disapproved.

(b) The secretary of state shall disapprove an emergency rule if he determines:

(1) That the emergency rule or an amendment to the emergency rule exceeds the scope of the law authorizing or directing the promulgation thereof; or

(2) That an emergency does not exist justifying the promulgation of the emergency rule or the filing of an amendment to the emergency rule; or

(3) That the emergency rule or an amendment to the emergency rule was not promulgated in compliance with the provisions of section sixteen of this article.

(c) If the secretary of state determines, based upon the
contents of the rule or the supporting information filed by the board, that the emergency rule should be disapproved, he may disapprove such rule without further investigation, notice or hearing. If, however, the secretary of state concludes that the information submitted by the board is insufficient to allow a proper determination to be made as to whether the emergency rule should be disapproved, he may make further investigation, including, but not limited to, requiring the board or other interested parties to submit additional information or comment or fixing a date, time and place for the taking of evidence on the issues involved in making a determination under the provisions of this section.

(d) The determination of the secretary of state shall be reviewable by the supreme court of appeals under its original jurisdiction, based upon a petition for a writ of mandamus, prohibition of certiorari, as appropriate. Such proceeding may be instituted by:

(1) The board;

(2) A member of the Legislature; or

(3) Any person whose personal property interests will be significantly affected by the approval or disapproval of the emergency rule by the secretary of state.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 7th day of March, 1994.

Governor