

HB # 4066

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SPEAKER OF HOUSE

# WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1994

— ● —

# ENROLLED

Com. Sub. for  
HOUSE BILL No. 4066

(By Delegate Gallagher)

— ● —

Passed Feb. 21, 1994

In Effect From Passage

**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR  
**H. B. 4066**  
(By DELEGATE GALLAGHER)

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[Passed February 21, 1994; in effect from passage.]

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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.**

**§29A-1-4. Application of open governmental proceedings law.**

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

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

24 (c) When the legislative rule-making review commit-  
25 tee is considering the form and substance of a rule or  
26 proposed rule, the informal occurrence of (1) consulta-  
27 tions between the members of the committee and its  
28 staff members, (2) deliberations by the governing  
29 members, or (3) the engagement of a governing member  
30 or members in the process of making a decision, does  
31 not constitute a meeting within the meaning of article  
32 nine-a, chapter six of this code when, during such  
33 stages, neither a quorum nor the convening of the  
34 members of the committee is required.

35 (d) After public hearing or the close of the public  
36 comment period, during which hearing or period an  
37 agency, board or commission has received statements  
38 concerning the form and substance of a rule or proposed

39 rule, the agency, board or commission shall not permit  
40 the filing or receipt of, nor shall it consider, any  
41 attempted ex parte communications directed to it in the  
42 form of additional comment, prior to the submission of  
43 its final agency-approved rule to the legislative rule-  
44 making review committee pursuant to the provisions of  
45 section eleven, article three of this chapter. Nothing  
46 contained herein shall prohibit the agency, board or  
47 commission from soliciting or receiving information  
48 relating to the rule or proposed rule from the federal  
49 government, from the Legislature or its members, or  
50 from another agency, board or commission of the  
51 executive branch of the government of this state.

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

**ARTICLE 2. STATE REGISTER.**

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

1 (a) Each proposed rule filed by an agency requiring  
2 a notice to be published in the state register in  
3 accordance with the provisions of section five, article  
4 three of this chapter shall include as its initial provi-  
5 sions: (1) A statement identifying such rule as a  
6 legislative rule, an interpretive rule or a procedural  
7 rule, as the case may be; (2) a statement of such section,  
8 article and chapter of this code to which such rule or  
9 any part thereof relates; and (3) a statement of the

10 section, article and chapter of this code or any other  
11 provision of law which provides authority for the  
12 promulgation of such rule. The agency shall be estopped  
13 from relying on any authority for the promulgation of  
14 such rule which is not stated therein in accordance with  
15 the requirements of this subdivision.

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

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

37 (d) Unless and until the secretary of state prescribes  
38 otherwise by rule issued and made effective under the  
39 provisions of subsection (c) of this section, each rule filed  
40 in this state register shall be on white paper measuring  
41 eight and one-half inches by eleven inches, typewritten  
42 and single-spaced, with a one inch margin at the top,  
43 bottom and each side of each page, and shall be  
44 reproduced photographically, or by xerography or other  
45 duplication process. The secretary of state may grant  
46 specific exceptions to such requirements in the case of  
47 maps, diagrams and exhibits, if the same may not be  
48 conveniently folded and fastened with the other pages  
49 of rules and in the case of rules which incorporate the  
50 promulgation of a federal agency or other organization

51 which could not be submitted in the standard size and  
52 format except at undue expense. Materials submitted  
53 for inclusion in the state register shall be fastened on  
54 the left side by two or more fasteners attached through  
55 holes suitable for insertion into ring binders.

56 (e) The secretary of state shall also prescribe by  
57 procedural rule a uniform system for the electronic  
58 filing of a proposed rule or emergency rule or a  
59 modification thereof, or a legislatively authorized rule,  
60 either (1) by the direct electronic transmission of data  
61 to a terminal in the office of the secretary of state, or  
62 (2) by the delivery to the secretary of state of a machine-  
63 readable copy of the filing on a medium such as  
64 magnetic tape or disk, or the like, which system shall  
65 be used in the process of filing proposed rules, emer-  
66 gency rules, modifications and authorized rules with the  
67 secretary of state. The secretary of state may grant  
68 exceptions to the requirement for electronic filing in the  
69 case of agencies, boards or commissions which do not  
70 have reasonable access to a compatible electronic  
71 transmission system or a means of creating a machine-  
72 readable copy, but, if an exception is granted, the  
73 secretary of state shall create a machine-readable copy  
74 of the proposed rule, emergency rule, modification or  
75 authorized rule. The electronic filing required by the  
76 provisions of this section shall not obviate any require-  
77 ment for the filing of printed paper copies of the  
78 proposed rule, emergency rule, modification or autho-  
79 rized rule as may be required by this chapter.

### ARTICLE 3. RULE MAKING.

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

1 When an agency proposes to promulgate a rule other  
2 than an emergency rule it shall file with the secretary  
3 of state, for publication in the state register, a notice of  
4 its action, including therein any request for the  
5 submission of evidence to be presented on any factual  
6 determinations or inquiries required by law to promul-  
7 gate such rule. At the time of filing the notice of its  
8 action, the agency shall also file with the secretary of  
9 state a copy of the full text of the rule proposed, and

10 a fiscal note as defined in subsection (b), section four of  
11 this article. If the agency is considering alternative  
12 draft proposals it may also file with the secretary of  
13 state the full text of such draft proposals.

14 The notice shall fix a date, time and place for the  
15 receipt of public comment in the form of oral state-  
16 ments, written statements, and documents bearing upon  
17 any findings and determinations which are a condition  
18 precedent to the final approval by the agency of the  
19 proposed rule, and shall contain a general description  
20 of the issues to be decided. If no specific findings and  
21 determinations are required as a condition precedent to  
22 the final approval by the agency of the approved rule,  
23 the notice shall fix a date, time and place for the receipt  
24 of general public comment on the proposed rule.

25 If findings and determinations are a condition  
26 precedent to the promulgation of such rule, then an  
27 opportunity for general public comment on the merits  
28 of the rule shall be afforded after such findings and  
29 determinations are made. In such event, notice of the  
30 hearing, or of the period for receiving public comment  
31 on the proposed rule shall be attached to and filed as  
32 a part of the findings and determinations of the agency  
33 when filed in the state register.

34 In any hearing for public comment on the merits of  
35 the rule, the agency may limit presentations to written  
36 material. The time, date and place fixed in the notice  
37 shall constitute the last opportunity to submit any  
38 written material relevant to any hearing, all of which  
39 may be earlier submitted by filing with the agency.  
40 After the public hearing or the close of the public  
41 comment period, whichever is later, the agency shall not  
42 permit the filing or receipt of, nor shall it consider, any  
43 attempted ex parte communications directed to it in the  
44 form of additional comment, prior to the submission of  
45 its final agency-approved rule to the legislative rule-  
46 making review committee pursuant to the provisions of  
47 section eleven of this article.

48 The agency may also, at its expense, cause to be  
49 published as a Class I legal publication in every county

50 of the state, any notice required by this section.

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

**§29A-3-9. Proposal of legislative rules.**

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

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

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

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

1 (a) When an agency finally approves a proposed  
2 legislative rule for submission to the Legislature,  
3 pursuant to the provisions of section nine of this article,  
4 the secretary of the executive department which  
5 administers the agency pursuant to the provisions of  
6 article two, chapter five-f of this code shall submit to  
7 the legislative rule-making review committee at its  
8 offices or at a regular meeting of such committee fifteen

9 copies of: (1) The full text of the legislative rule as  
10 finally approved by the agency, with new language  
11 underlined and with language to be deleted from any  
12 existing rule stricken through but clearly legible; (2) a  
13 brief summary of the content of the legislative rule and  
14 a description and a copy of any existing rule which the  
15 agency proposes to amend or repeal; (3) a statement of  
16 the circumstances which require the rule; (4) a fiscal  
17 note containing all information included in a fiscal note  
18 for either house of the Legislature and a statement of  
19 the economic impact of the rule on the state or its  
20 residents; and (5) any other information which the  
21 committee may request or which may be required by  
22 law. If the agency is an agency, board or commission  
23 which is not administered by an executive department  
24 as provided for in article two, chapter five-f of this code,  
25 the agency shall submit the final agency-approved rule  
26 as required by this subsection.

27 (b) The committee shall review each proposed legis-  
28 lative rule and, in its discretion, may hold public  
29 hearings thereon. Such review shall include, but not be  
30 limited to, a determination of:

31 (1) Whether the agency has exceeded the scope of its  
32 statutory authority in approving the proposed legislative  
33 rule;

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

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

41 (4) Whether the proposed legislative rule is necessary  
42 to fully accomplish the objectives of the statute under  
43 which the rule was proposed for promulgation;

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

47 (6) Whether the proposed legislative rule could be

48 made less complex or more readily understandable by  
49 the general public; and

50 (7) Whether the proposed legislative rule was pro-  
51 posed for promulgation in compliance with the require-  
52 ments of this article and with any requirements imposed  
53 by any other provision of this code.

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

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

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

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

62 (4) Recommend that the proposed rule be withdrawn.

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

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

**§29A-3-12. Submission of legislative rules to Legislature.**

1 (a) No later than forty days before the sixtieth day of  
2 each regular session of the Legislature, the cochairmen  
3 of the legislative rule-making review committee shall  
4 submit to the clerk of the respective houses of the  
5 Legislature copies of all proposed legislative rules which  
6 have been submitted to and considered by the committee  
7 pursuant to the provisions of section eleven of this article  
8 and which have not been previously submitted to the  
9 Legislature for study, together with the recommenda-  
10 tions of the committee with respect to such rules, a  
11 statement of the reasons for any recommendation that  
12 a rule be amended or withdrawn, and a statement that  
13 a bill authorizing the legislative rule has been drafted  
14 by the staff of the committee or by legislative services  
15 pursuant to section eleven of this article. The cochair-  
16 man of the committee may also submit such rules at the  
17 direction of the committee at any time before or during  
18 a special session in which consideration thereof may be  
19 appropriate. The committee may withhold from its  
20 report any proposed legislative rule which was submit-  
21 ted to the committee fewer than two hundred ten days  
22 before the end of the regular session. The clerk of each  
23 house shall submit the report to his or her house at the  
24 commencement of the next session.

25 All bills introduced authorizing the promulgation of  
26 a rule may be referred by the speaker of the House of  
27 Delegates and by the president of the Senate to  
28 appropriate standing committees of the respective  
29 houses for further consideration or the matters may be  
30 otherwise dealt with as each house or its rules provide.  
31 The Legislature may by act authorize the agency to  
32 adopt a legislative rule incorporating the entire rule, or  
33 may authorize the agency to adopt a rule with any  
34 amendments which the Legislature shall designate. The  
35 clerk of the house originating such act shall forthwith  
36 file a copy of any bill of authorization enacted with the  
37 secretary of state and with the agency proposing such  
38 rule and the clerk of each house may prepare and file  
39 a synopsis of legislative action during any session on any  
40 proposed rule submitted to the house during such  
41 session for which authority to promulgate was not by  
42 law provided during such session. In acting upon the

43 separate bills authorizing the promulgation of rules, the  
44 Legislature may, by amendment or substitution, com-  
45 bine the separate bills of authorization insofar as the  
46 various rules authorized therein are proposed by  
47 agencies which are placed under the administration of  
48 one of the single separate executive departments  
49 identified under the provisions of section two, article  
50 one, chapter five-f of this code, or, the Legislature may  
51 combine the separate bills of authorization by agency or  
52 agencies within an executive department. In the case of  
53 rules proposed for promulgation by an agency which is  
54 not administered by an executive department pursuant  
55 to the provisions of article two, chapter five-f of this  
56 code, the separate bills of authorization for the proposed  
57 rules of that agency may, by amendment or substitution,  
58 be combined. The foregoing provisions relating to  
59 combining separate bills of authorization according to  
60 department or agency are not intended to restrict the  
61 permissible breadth of bills of authorization and do not  
62 preclude the Legislature from otherwise combining  
63 various bills of authorization which have a unity of  
64 subject matter. Any number of provisions may be  
65 included in a bill of authorization, but the single object  
66 of the bill shall be to authorize the promulgation of  
67 proposed legislative rules.

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

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

80 (d) Whenever the Legislature is convened by procla-  
81 mation of the governor, upon his or her own initiative  
82 or upon application of the members of the Legislature,  
83 or whenever a regular session of the Legislature is

84 extended or convened by the vote or petition of its  
85 members, the Legislature may by act enacted during  
86 such extraordinary or extended session authorize, in  
87 whole or in part, any legislative rule whether submitted  
88 to the legislative rule-making review committee, or not,  
89 if legislative action on such rule during such session is  
90 a lawful order of business.

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

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

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

1 (a) Except as the Legislature may by law otherwise  
2 provide, within sixty days after the effective date of an  
3 act authorizing promulgation of a legislative rule, the  
4 rule shall be promulgated only in conformity with the  
5 provisions of law authorizing and directing the promul-  
6 gation of such rule. In the case of a rule proposed by  
7 an agency which is administered by an executive  
8 department pursuant to the provisions of article two,  
9 chapter five-f of this code, the secretary of the depart-  
10 ment shall promulgate the rule as authorized by the  
11 Legislature. In the case of an agency which is not  
12 subject to administration by the secretary of an  
13 executive department, the agency which proposed the  
14 rule for promulgation shall promulgate the rule as  
15 authorized by the Legislature.

16 (b) A legislative rule authorized by the Legislature  
17 shall become effective thirty days after such filing in the  
18 state register, or on the effective date fixed by the  
19 authorizing act or if none is fixed by law, such later date  
20 not to exceed ninety days, as is fixed by the agency.

21 (c) The secretary of state shall note in the state  
22 register the effective date of an authorized and promul-  
23 gated legislative rule, and shall promptly publish the  
24 duly promulgated rule in a code of state rules main-  
25 tained by his or her office.

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

1 (a) Any agency with authority to propose legislative  
2 rules may, without hearing, find that an emergency  
3 exists requiring that emergency rules be promulgated  
4 and promulgate the same in accordance with this  
5 section. Such emergency rules, together with a state-  
6 ment of the facts and circumstances constituting the  
7 emergency, shall be filed with the secretary of state, and  
8 a notice of such filing shall be published in the state  
9 register. Such emergency rules shall become effective  
10 upon the approval of the secretary of state in accordance  
11 with section fifteen-a of this article or upon the approval  
12 of the attorney general in accordance with section  
13 fifteen-b or upon the forty-second day following such  
14 filing, whichever occurs first. Such emergency rules  
15 may adopt, amend or repeal any legislative rule, but the  
16 circumstances constituting the emergency requiring  
17 such adoption, amendment or repeal shall be stated with  
18 particularity and be subject to de novo review by any  
19 court having original jurisdiction of an action challeng-  
20 ing their validity. Fourteen copies of the rules and of  
21 the required statement shall be filed immediately with  
22 the secretary of state and one copy shall be filed  
23 immediately with the legislative rule-making review  
24 committee.

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

28 (1) The secretary of state, acting under the authority  
29 provided for in section fifteen-a of this article, or the  
30 attorney general, acting under the authority provided  
31 for in section fifteen-b of this article, disapproves the  
32 emergency rule because: (A) The emergency rule or an  
33 amendment to the emergency rule exceeds the scope of

34 the law authorizing or directing the promulgation  
35 thereof; (B) an emergency does not exist justifying the  
36 promulgation of the emergency rule; or (C) the emer-  
37 gency rule was not promulgated in compliance with the  
38 provisions of this section. An emergency rule may not  
39 be disapproved pursuant to the authority granted by  
40 paragraphs (A) or (B) of this subdivision on the basis  
41 that the secretary of state or the attorney general  
42 disagrees with the underlying public policy established  
43 by the Legislature in enacting the supporting legisla-  
44 tion. An emergency rule which would otherwise be  
45 approved as being necessary to comply with a time  
46 limitation established by this code or by a federal statute  
47 or regulation may not be disapproved pursuant to the  
48 authority granted by paragraphs (A) or (B) of this  
49 subdivision on the basis that the agency has failed to file  
50 the emergency rule prior to the date fixed by such time  
51 limitation. When the supporting statute specifically  
52 directs an agency to promulgate an emergency rule, or  
53 specifically finds that an emergency exists and directs  
54 the promulgation of an emergency rule, the emergency  
55 rule may not be disapproved pursuant to the authority  
56 granted by paragraph (B) of this subdivision. An  
57 emergency rule may not be disapproved on the basis  
58 that the Legislature has not specifically directed an  
59 agency to promulgate the emergency rule, or has not  
60 specifically found that an emergency exists and directed  
61 the promulgation of an emergency rule,

62 (2) The agency has not previously filed and fails to file  
63 a notice of public hearing on the proposed rule within  
64 thirty days of the date the proposed rule was filed as  
65 an emergency rule; in which case the emergency rule  
66 expires on the thirty-first day.

67 (3) The agency has not previously filed and fails to file  
68 the proposed rule with the legislative rule-making  
69 review committee within ninety days of the date the  
70 proposed rule was filed as an emergency rule; in which  
71 case the emergency rule expires on the ninety-first day.

72 (4) The Legislature has authorized or directed  
73 promulgation of an authorized legislative rule dealing  
74 with substantially the same subject matter since such

75 emergency rule was first promulgated, and in which  
76 case the emergency rule expires on the date the  
77 authorized rule is made effective.

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

81 (b) Any amendment to an emergency rule made by the  
82 agency shall be filed in the state register and does not  
83 constitute a new emergency rule for the purpose of  
84 acquiring additional time or avoiding the expiration  
85 dates in subdivision (2), (3), (4) or (5), subsection (a) of  
86 this section: *Provided*, That such emergency amendment  
87 shall become effective upon the approval of the secretary  
88 of state in accordance with section fifteen-a of this  
89 article or upon approval of the attorney general in  
90 accordance with section fifteen-b of this article or upon  
91 the forty-second day following such filing, whichever  
92 occurs first.

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

98 <sup>it</sup> (e) The provision of this section shall not be used to  
99 avoid or evade any provision of this article or any other  
100 provisions of this code, including any provisions for  
101 legislative review and approval of proposed rules. Any  
102 emergency rule promulgated for any such purpose may  
103 be contested in a judicial proceeding before a court of  
104 competent jurisdiction.

105 <sup>it</sup> (f) The legislative rule-making review committee may  
106 review any emergency rule to determine (1) whether the  
107 emergency rule or an amendment to the emergency rule  
108 exceeds the scope of the law authorizing or directing the  
109 promulgation thereof; (2) whether there exists an  
110 emergency justifying the promulgation of such emer-  
111 gency rule; and (3) whether the emergency rule was  
112 promulgated in compliance with the requirements and  
113 prohibitions contained in this section. The committee  
114 may recommend to the agency, the Legislature, or the

115 secretary of state such action as it may deem proper.

116 <sup>ok</sup>  
*120.4* (g) For the purposes of this section, an emergency  
117 exists when the promulgation of an emergency rule is  
118 necessary (1) for the immediate preservation of the  
119 public peace, health, safety or welfare, (2) to comply  
120 with a time limitation established by this code or by a  
121 federal statute or regulation, or (3) to prevent substan-  
122 tial harm to the public interest.

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

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

13 (b) The secretary of state shall disapprove an emer-  
14 gency rule or an amendment to an emergency rule if he  
15 determines:

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

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

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

25 (c) If the secretary of state determines, based upon the  
26 contents of the rule or the supporting information filed  
27 by the agency, that the emergency rule should be

28 disapproved, he may disapprove such rule without  
29 further investigation, notice or hearing. If, however, the  
30 secretary of state concludes that the information  
31 submitted by the agency is insufficient to allow a proper  
32 determination to be made as to whether the emergency  
33 rule should be disapproved, he may make further  
34 investigation, including, but not limited to, requiring  
35 the agency or other interested parties to submit  
36 additional information or comment or fixing a date,  
37 time and place for the taking of evidence on the issues  
38 involved in making a determination under the provi-  
39 sions of this section.

40 (d) If the secretary of state determines, based upon the  
41 contents of the amendment to an emergency rule or the  
42 supporting information filed by the agency, that the  
43 amendment to the emergency rule should be disap-  
44 proved, he may disapprove such amendment without  
45 further investigation, notice or hearing. If, however, the  
46 secretary of state concludes that the information  
47 submitted by the agency is insufficient to allow a proper  
48 determination to be made as to whether the amendment  
49 should be disapproved, he may make further investiga-  
50 tion, including, but not limited to, requiring the agency  
51 or other interested parties to submit additional informa-  
52 tion or comment or fixing a date, time and place for the  
53 taking of evidence on the issues involved in making a  
54 determination under the provisions of this section.

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

60 (1) The agency which promulgated the emergency  
61 rule;

62 (2) A member of the Legislature; or

63 (3) Any person whose personal property interests will  
64 be significantly affected by the approval or disapproval  
65 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.**

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

9 (b) The attorney general shall disapprove an emer-  
10 gency rule or an amendment to an emergency rule if he  
11 determines:

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

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

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

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

36 (d) If the attorney general determines, based upon the

37 contents of the amendment to an emergency rule or the  
38 supporting information filed by the agency, that the  
39 amendment to the emergency rule should be disap-  
40 proved, he may disapprove such amendment without  
41 further investigation, notice or hearing. If, however, the  
42 attorney general concludes that the information submit-  
43 ted by the agency is insufficient to allow a proper  
44 determination to be made as to whether the amendment  
45 should be disapproved, he may make further investiga-  
46 tion, including, but not limited to, requiring the agency  
47 or other interested parties to submit additional informa-  
48 tion or comment or fixing a date, time and place for the  
49 taking of evidence on the issues involved in making a  
50 determination under the provisions of this section.

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

56 (1) The secretary of state;

57 (2) A member of the Legislature; or

58 (3) Any person whose personal property interests will  
59 be significantly affected by the approval or disapproval  
60 of the emergency rule by the attorney general.

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

##### §29A-3A-6. Notice of proposed rule making.

1 When the board proposes to promulgate a rule other  
2 than an emergency rule it shall file with the secretary  
3 of state, for publication in the state register, a notice of  
4 its action, including therein any request for the  
5 submission of evidence to be presented on any factual  
6 determinations or inquiries required by law to promul-  
7 gate such rule. At the time of filing the notice of its  
8 action, the board shall also file with the secretary of  
9 state a copy of the full text of the rule proposed, and  
10 a fiscal note as defined in subsection (b), section five of  
11 this article. If the board is considering alternative draft  
12 proposals it may also file with the secretary of state the  
13 full text of such draft proposals.

14       The notice shall fix a date, time and place for the  
15 receipt of public comment in the form of oral state-  
16 ments, written statements, and documents bearing upon  
17 any findings and determinations which are a condition  
18 precedent to the final approval by the board of the  
19 proposed rule, and shall contain a general description  
20 of the issues to be decided. If no specific findings and  
21 determinations are required as a condition precedent to  
22 the final approval by the board of the approved rule, the  
23 notice shall fix a date, time and place for the receipt of  
24 general public comment on the proposed rule.

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

34       In any hearing for public comment on the merits of  
35 the rule, the board may limit presentations to written  
36 material. The time, date and place fixed in the notice  
37 shall constitute the last opportunity to submit any  
38 written material relevant to any hearing, all of which  
39 may be earlier submitted by filing with the board. After  
40 the public hearing or the close of the public comment  
41 period, whichever is later, the board shall not permit the  
42 filing or receipt of, nor shall it consider, any attempted  
43 ex parte communications directed to it in the form of  
44 additional comment, prior to the submission of its final  
45 board-approved rule to the legislative oversight commis-  
46 sion on education accountability pursuant to the  
47 provisions of section twelve of this article.

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

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

**§29A-3A-10. Proposal of legislative rules.**

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

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

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

**§29A-3A-16. 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. Fifteen  
14 copies of the rules and of the required statement shall  
15 be filed forthwith with the legislative oversight commis-  
16 sion on 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 secretary of state, acting under the authority  
21 provided for in section sixteen-a of this article, disap-  
22 proves the emergency rule because: (A) The emergency  
23 rule or an amendment to the emergency rule exceeds the  
24 scope of the law authorizing or directing the promulga-  
25 tion thereof; (B) an emergency does not exist justifying  
26 the promulgation of the emergency rule; or (C) the  
27 emergency rule was not promulgated in compliance  
28 with the provisions of this section. An emergency rule  
29 may not be disapproved pursuant to the authority  
30 granted by paragraphs (A) or (B) of this subdivision on  
31 the basis that the secretary of state disagrees with the  
32 underlying public policy established by the Legislature  
33 in enacting the supporting legislation. An emergency  
34 rule which would otherwise be approved as being  
35 necessary to comply with a time limitation established  
36 by this code or by a federal statute or regulation may  
37 not be disapproved pursuant to the authority granted by  
38 paragraphs (A) or (B) of this subdivision on the basis  
39 that the board has failed to file the emergency rule prior  
40 to the date fixed by such time limitation. When the  
41 supporting statute specifically directs the board to  
42 promulgate an emergency rule, or specifically finds that  
43 an emergency exists and directs the promulgation of an  
44 emergency rule, the emergency rule may not be  
45 disapproved pursuant to the authority granted by  
46 paragraph (B) of this subdivision. An emergency rule  
47 may not be disapproved on the basis that the Legislature  
48 has not specifically directed the board to promulgate the  
49 emergency rule, or has not specifically found that an  
50 emergency exists and directed the promulgation of an  
51 emergency rule,

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

54 sixty days of the date the proposed rule was filed as an  
55 emergency rule; in which case the emergency rule  
56 expires on the sixty-first day.

57 (3) The board has not previously filed and fails to file  
58 the proposed rule with the legislative oversight commis-  
59 sion on education accountability within one hundred  
60 eighty days of the date the proposed rule was filed as  
61 an emergency rule; in which case the emergency rule  
62 expires on the one hundred eighty-first day.

63 (4) The Legislature has authorized or directed  
64 promulgation of an authorized legislative rule dealing  
65 with substantially the same subject matter since such  
66 emergency rule was first promulgated, and in which  
67 case the emergency rule expires on the date the  
68 authorized rule is made effective.

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

72 (b) Any amendment to an emergency rule made by the  
73 board shall be filed in the state register and does not  
74 constitute a new emergency rule for the purpose of  
75 acquiring additional time or avoiding the expiration  
76 dates in subdivision (2), (3), (4) or (5), subsection (a) of  
77 this section.

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

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

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

93 (f) The legislative oversight commission on education  
94 accountability may review any emergency rule to  
95 determine (1) whether the board has exceeded the scope  
96 of its statutory authority in promulgating the emer-  
97 gency rule; (2) whether there exists an emergency  
98 justifying the promulgation of such rule; and (3)  
99 whether the rule was promulgated in compliance with  
100 the requirements and prohibitions contained in this  
101 section. The commission may recommend to the board,  
102 the Legislature, or the secretary of state such action as  
103 it may deem proper.

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

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

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

7 (b) The secretary of state shall disapprove an emer-  
8 gency rule if he determines:

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

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

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

18 (c) If the secretary of state determines, based upon the

19 contents of the rule or the supporting information filed  
20 by the board, that the emergency rule should be  
21 disapproved, he may disapprove such rule without  
22 further investigation, notice or hearing. If, however, the  
23 secretary of state concludes that the information  
24 submitted by the board is insufficient to allow a proper  
25 determination to be made as to whether the emergency  
26 rule should be disapproved, he may make further  
27 investigation, including, but not limited to, requiring  
28 the board or other interested parties to submit addi-  
29 tional information or comment or fixing a date, time and  
30 place for the taking of evidence on the issues involved  
31 in making a determination under the provisions of this  
32 section.

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

38 (1) The board;

39 (2) A member of the Legislature; or

40 (3) Any person whose personal property interests will  
41 be significantly affected by the approval or disapproval  
42 of the emergency rule by the secretary of state.

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

*[Handwritten signature]*  
.....  
Chairman Senate Committee

*[Handwritten signature]*  
.....  
Ernest C. Moore  
Chairman House Committee

Originating in the House.

Takes effect from passage

*[Handwritten signature]*  
.....  
Clerk of the Senate

*[Handwritten signature]*  
.....  
Clerk of the House of Delegates

*[Handwritten signature]*  
.....  
President of the Senate

*[Handwritten signature]*  
.....  
Speaker of the House of Delegates

The within *is approved* this the *7<sup>th</sup>*  
day of *March*, 1994.

*[Handwritten signature]*  
.....  
Governor



PRESENTED TO THE

GOVERNOR

Date 2/24/94

Time 9:57 am