

**RULEMAKING COMMENTS**  
**PROPOSED 20 N.C. ADMINISTRATIVE CODE 02B.0405**  
FROM THE DARE COUNTY SCHOOL BOARD OF EDUCATION

The Board of Trustees for the Teachers' and State Employees' Retirement System (TSERS) intends to adopt the proposed rule entitled “20 NCAC 02B.0405, ANTI-PENSION SPIKING CONTRIBUTION-BASED BENEFIT CAP FACTOR.” In response to the proposed rule, and on behalf of the Dare County Board of Education, we submit the following comments, consistent with N.C. Gen. Stat. § 150B-21.2(f)<sup>1</sup>.

**The Absence of an Explanation as to the Board of Trustees’ Choice**

The proposed rule sets the “Cap Factor” at 4.5 for retirees in the TSERS. While the Board of Trustees for TSERS has the ultimate discretion and legal authority to set the Cap Factor as stated in N.C. Gen. Stat. §135-5(a3), the Fiscal Note for this proposed rule makes clear that the Cap Factor selected is arbitrary. The Cap Factor does not take into account any individual facts and circumstances of employment situations that may trigger the Contribution-Based Benefits Cap (Pension Spiking) calculation. The Board of Trustees relies entirely on the opinion provided by a private actuary without evaluating other options or fulfilling its statutory duty to consider alternatives.

By law, the Board of Trustees for TSERS is to set the Cap Factor so that “no more than three quarters of one percent (0.75%) of retirement allowances” are impacted. N.C. Gen. Stat. §135-5(a3). However, the notion of impacting “no more than” 0.75% of retirees does not

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<sup>1</sup>N.C. Gen. Stat. §150B-21.2(f) “Comments. - An agency must accept comments on the text of a proposed rule that is published in the North Carolina Register and any fiscal note that has been prepared in connection with the proposed rule for at least 60 days after the text is published or until the date of any public hearing held on the proposed rule, whichever is longer. An agency must consider fully all written and oral comments received.”

establish clarity for any local board of education for annual budgeting purposes. Limiting the number impacted based on an arbitrary range of percentages between 0.00% and 0.75% of retirees does nothing to inform local boards of education or their local funding agents (Boards of County Commissioners) nor does it enable them to budget or plan to absorb or prevent huge financial assessments.

### **No Indication of Criteria Considered by the Board of Trustees**

Local boards are unable to identify which employees will in fact retire and when they may choose to retire, factors that potentially cause enormous swings in the potential adverse impact resulting from the application of this law. The manner in which anywhere from zero to 0.75% of retirees is calculated with respect to each local board of education is at best unclear and, at most, devastating to sound budgeting or fiscal management practices for a public school system.

With respect to the annual budgeting process, each local board of education's budget is entirely dependent on state and local funds as approved annually by the General Assembly and County Commissioners, respectively. Each year, a local board of education is unable to accurately request and plan for unforeseeable assessments of its hypothetical or potential retirees. Since the enactment of Session Law 2014-88, assessments related to pension spiking have been the direct result of employee-made decisions regarding when to retire and not the result of intentional "pension spiking" by the local board-employer.

### **No Attention Paid to Impact on Employer**

The effects of the proposed rule are arbitrary, unpredictable and extremely harmful to local boards of education and their appropriations as determined by County Commissioners.

Initially, the absence of a rule led to litigation by local boards of education which could not clearly determine or even reasonably estimate their potential liability. The proposed rule on the Cap Factor, based on one actuarial recommendation provided without any guidelines, does not adequately address the issue essential to those it impacts: How can local boards of education prepare for liability for pension spiking resulting from an employee's unpredictable retirement until it actually occurs?

A local board employer has no authority to mandate a retirement date of an employee for any reason, even if the reason is to avoid the huge financial liability imposed by the Cap Factor set in this proposed rule. Local boards are required to enter into employment contracts, by law, and must compete with each other and with public, private and charter schools, within and outside of North Carolina, for talented educators. Local boards of education will continue to be assessed hundreds of thousands of dollars by TSERS for largely unforeseeable and unpredictable financial liabilities beyond their control.

The Board of Trustees for TSERS has proposed a rule that has a devastating impact on budgets, recruiting, and retention for local boards of education that cannot be avoided and cannot be anticipated with any certainty. A proposed rule must include the ability for local boards to estimate with reasonable certainty the amount of additional assessments owed to TSERS, which cannot deplete the local boards of their operating budgets to fund their core mission of educating students.

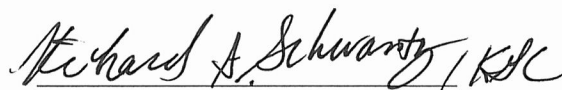
### **Conclusion**

The Board of Trustees has failed to comply with statutory and regulatory requirements in selecting the Cap Factor in the following manner: (1) The absence of an explanation as to the

Board's choice; (2) No indication of criteria considered; (3) No attention paid to the impact on the employer; and (4) Failing to comply with Administrative Procedure Act provisions pursuant to G.S. 150B-19.1(f) in considering alternatives where a substantial economic impact exists. In addition to these errors and omissions, the Board of Trustees has failed to undertake an independent assessment in setting the Cap Factor under the Administrative Procedure Act.

RESPECTFULLY SUBMITTED, this 5<sup>th</sup> day of March, 2018.

DARE COUNTY BOARD OF EDUCATION

A handwritten signature in cursive script that reads "Richard A. Schwartz, KSC". The signature is written in dark ink and is positioned above the printed contact information.

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