School Discipline Law Affecting North Carolina Public School Students

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For the most part, school discipline law is a matter of local and state level regulation. In North Carolina, as in most states, the state statutes set out the broad principles of public school discipline, and the local boards of education are authorized to develop their own policies. The state statutes, as well as all local district policies, must, of course, comport with the United States Constitution and the state Constitution. In addition, to obtain federal educational dollars, local school districts must abide by federal legislation that affects school discipline.

I. Federal Law

A. **Federal Constitution**

1. **Due Process in school suspensions**: There is no federal right to education[1], but the Supreme Court has nevertheless recognized that the right to attend public school is a state-created property right.[2] Children, therefore, cannot be deprived of the right to attend public school without due process of law. The due process rights of children facing a deprivation of the right to continued school attendance, i.e., facing either suspension or expulsion from school, have received only limited attention by the U.S. Supreme Court and the lower federal courts. The following principles have emerged:

[1]*San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)

[2]*Goss v. Lopez*, 419 U.S. 565 (1975)

a. **Notice and an opportunity to be heard.** Any student who will be involuntarily removed from school as a result of a disciplinary infraction, even if only for a short period of time (such as a few days), is entitled to oral or written notice of the alleged offense.[3] If the student denies the allegation, he must be given an explanation of the evidence the authorities have against him and an opportunity to present his side of the story. For a short-term suspension, which is defined as fewer than ten days, this can be a very informal interchange; no formal hearing is required. In most cases, this informal notice and opportunity to respond should occur prior to the suspension, although if the school authority determines that the continuing presence of the student represents a danger to the other students or staff, the student may be removed immediately. In such a case, the necessary notice and rudimentary hearing must occur as soon as practicable. No judicial appeal is allowed.[4]

b. **Hearing.** More formal procedures are due to a student who is facing a long-term suspension.[5] Neither the U.S. Supreme Court nor the Fourth Circuit Court of Appeals has itemized the extent of those due process protections. In 1972, a North Carolina federal district court stated, in dicta, that certain protections "appear essential if both the substance and the appearance of fairness are to be preserved."[6] The protections cited are:
   (1) Written notice to parents and the student of specific statement of charges
   (2) A full hearing, after adequate notice, before an impartial tribunal
   (3) The right to examine evidence against the student

[3]*Id.* The court ruled only on suspensions of up to ten days. As a rule, due process does not apply to in-school suspensions. *See Dickens v. Johnson County Bd. of Ed.*, 661 F. Supp. 155, 156 (E.D. Tenn. 1987). *But see Cole v. Newton Special Mun. Separate Sch. Dist.*, 676 F. Supp. 749, 752 (S.D. Miss. 1987) (where a high school student whose in-school suspension involved sitting in a detention room that isolated her entirely from the learning environment, this constituted a total exclusion from the education process, thus implicating due process protections).

[4]*Alexander v. Cumberland Co. Board of Education,* 615 S.E.2d 408 (N.C. App. 2005).

[5]*Goss, supra, note 2.*

[6]*Givens v. Poe*, 346 F. Supp. 202 (1972).

(4) The right to be represented by counsel, though not at state expense
(5) The right to confront and examine adverse witnesses
(6) The right to present evidence
(7) The right to a record of the proceeding
(8) The right to have the decision based on substantial evidence.

There is no universal agreement that all of the above protections are essential to a constitutional suspension/expulsion hearing. In North Carolina, all school districts provide for some type of hearing, after notice of the charges, but many do not provide for all of the listed procedures. The right to confront and examine adverse witnesses directly is frequently denied, with the evidence presented by the school consisting of hearsay reports by school authorities about what they were told by various unidentified students or staff persons about the events. The right to an "impartial" tribunal is arguably denied in some districts in which a panel of teachers, hired by the principal, is asked to determine whether the principal's decision should be upheld, or in which the attorney for the board of education is the hearing officer. Some districts fail to create a record of the proceeding, thus making it difficult to determine if the decision was based on substantial evidence.

The right to be represented by counsel at a school suspension hearing (though not at public expense) was confirmed in North Carolina, in the case of *In Re Roberts*.[7] The *Roberts* court also stated (arguably in dicta, as these issues were not before the court), that students facing long-term suspension are entitled to the right to a full hearing, an opportunity to examine evidence and to present evidence, to confront and cross-examine witnesses supporting the charge, and to call his own witnesses to verify his version of the incident. In *Alexander v. Cumberland Co. Board of Education*, [8] the court cited *In Re Roberts* as holding that those procedural due process rights must be accorded to a student facing long-term suspension.

2. **Due process for corporal punishment**: No notice or opportunity to be heard is required by due process before corporal punishment is

[7]*In Re Roberts*, 150 N.C. App. 86, *appeal dismissed as improvidently granted*, 356 N.C. 660, (2003).

[8]615 S.E.2d 408 (N.C. App. 2005).

administered.[9] After-the-fact common law tort remedies are considered to be adequate to afford due process to a child who is wrongly paddled or is subjected to excessive corporal punishment. The administration of corporal punishment does not violate the Eighth Amendment protection against cruel and unusual punishment, as that amendment applies only in the criminal context, not the school discipline context.[10]

3. **Privacy/ Search & Seizure**

[9]*Ingraham v. Wright*, 430 U.S. 651 (1977).

[10]*Id.*

a. **In general.** The Fourth Amendment right to be free of unreasonable search and seizures applies to children in public school.[11] The standards for what constitutes an unreasonable search is dependent on the circumstances, and children in school are not entitled to the same degree of privacy as adults in their homes would be. In the public school setting, a child and his belongings may be searched when there are reasonable grounds for suspecting that the search will turn up evidence that the student violated the law or school rules. The scope of the search must be reasonably related to the circumstances that justified the interference in the first place. A search may not be "excessively intrusive" in light of the age and sex of the student and the nature of the infraction.[12] A high school girl's purse could be searched by the principal when he had received a report from a teacher that she was smoking on campus, in violation of the school rules, and the search could continue more thoroughly when the principal found rolling papers that were associated with illegal drug use.[13]

b. **Drug searches.** Random drug testing for all students in public schools has not yet been authorized by the U.S. Supreme Court, although the most recent opinions on the subject point in that direction. Under current precedent, all participants in extracurricular events may be required to submit to random drug testing.[14] In a recent 8th Circuit case, the court disallowed a school from conducting a random, suspicionless search of all students' backpacks and other personal property.[15]

B. Federal Legislation

[11] *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

[12] *Id.*

[13] *Id.*

[14] *Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

[15] *Doe v. Little Rock School District*, 380 F.3d 349 (2004).

1. **Gun Free Schools Act.** In 2002, Congress passed the Gun Free Schools Act, which states that any state receiving federal education money must have a law in effect requiring local school districts to expel from school for a period of not less than one year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school.[16] The law allows for modification of the expulsion requirement for a student on a case-by-case basis if such modification is in writing.

2. **Individuals with Disabilities Education Act (IDEA).** Special protections are available to children with learning-related disabilities who have Individualized Education Programs (IEP's) or who, prior to the disciplinary event, should have been identified as having a learning-related disability. The 2004 reauthorization of The Individuals with Disabilities Education Act has changed these protections somewhat; the new provisions, noted below, will be effective July 1, 2005.
   a. **Continuation of educational services.** Under current state law in North Carolina, a suspended student is not entitled to alternative educational services during a period of suspension from school.[17] If the child has an IEP, however, due to eligibility for special education, he or she is entitled under federal law to continued educational services if a suspension extends longer than 10 days.[18] Those services do not need to be delivered in the traditional school setting, but the child must continue to have services necessary to enable the child to progress in the general curriculum and appropriately advance toward achieving IEP goals.[19]

[16] 20 U.S.C. §7151.

[17] *In re Jackson*, 84 N.C. App. 167, 352 S.E. 2d 449 (N.C. App. 1987).

[18] 20 U.S.C. §1415(k)(3).

[19] 20 U.S.C. §1412(1)(A); 20 U.S.C. §1415(k)(3); 34 C.F.R. § 300.121(d).

b. **Protection from suspension when the behavior is a manifestation of the child's disability.** Prior to suspending a child with a disability from school for more than ten days, a school must conduct a "Manifestation Determination Review."[20] The purpose of this review is to protect a child from being excluded from school if his or her behavior is a symptom of the disability. The particulars of how the MDR is conducted will change under the 2004 reauthorization of IDEA, and the standard is worded differently. Under the new law, a suspension may not occur "if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP."[21]

II. State Law

A. State Constitution

1. **Right to Education**. The state constitution grants the children of North Carolina the right to attend public school.[22] In *Leandro v. State,*[23] the N.C. Supreme Court interpreted the state constitution to require the state to provide students in the state with the opportunity to attain a sound basic education. *Leandro,* the holding in which was recently reaffirmed in *Hoke County v. State*[24], was a school finance case, the import of which is that the state must provide adequate resources so that each child has the opportunity to leave the public schools with sufficient academic skills that he or she can function in society, make informed choices with regard to issues that affect the local and national community, successfully engage in post-secondary education or vocational training, and compete on an equal basis with others in further formal education or gainful employment.[25] The Court did not comment on the relationship between this right and a school district's right to exclude children from the educational process by suspending or expelling them.

[20]20 U.S.C. §1415(k)(4).

[21]P.L. 108-446 Section 615(k)(1)(E).

[22]N.C. Const., Article I, Section 15 and Article IX, Section 2.

[23]346 N.C. 336, 488 S.E.2d 249 (1997).

[24]358 N.C. 605, 599 S.E.2d 365 (2004).

[25] 346 N.C. at 347, 488 S.E.2d 255.

Prior to the *Leandro* decision, the North Carolina Court of Appeals ruled that the N.C. Constitution's guarantee of the right to education did not prevent school authorities from excluding children from the educational process if they violated school rules.[26] The case of *In Re Jackson* involved a Gaston County student who was suspended for the remainder of the academic year for assault on a teacher and another student. He was also adjudicated delinquent due to numerous acts unrelated to the fight at school. In the delinquency proceeding, the district court judge ordered the Gaston County Board of Education to place the student in an appropriate public school program. The Board objected, saying it did not have an appropriate program for the student, nor funds to create one. The Court of Appeals supported the Board, holding that the General Statutes expressly allow boards of education to suspend students, and nothing in the Juvenile Code gives district court judges the authority to order creation of programs that do not exist. Addressing the constitutional right of a student to go to school, the court stated: "A student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system. As a general rule, a student may be constitutionally suspended or expelled for misconduct whenever the conduct is of a type the school may legitimately prohibit, and procedural due process is provided. Reasonable regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior."[27]

2. **Due Process**

a. Like the federal constitution, the North Carolina Constitution requires that property not be taken "but by the law of the land." [28] This has been interpreted as requiring fundamental due process: the right to notice and a meaningful opportunity to be heard.[29] Essentially, the same procedural due process protections that are guaranteed by the federal constitution (discussed above) are guaranteed by the state constitution.

B. State Legislation

[26] *In re Jackson*, 84 N.C. App. 167, 352 S.E. 2d 449 (N.C. App. 1987).

[27] *Id.*, 84 N.C. App. at 176; 352 S.E. 2d at 455.

[28] N.C. Constitution, Article 1, §19.

[29] *Jordan v. Civil Service Board*, 153 N.C. App. 691; 570 S.E.2d 912 (2002); *Affordable Care v. N.C. Board of Dental Examiners*, 153 N.C. App. 527; 571 S.E.2d 52 (2002)

l. Due Process – The general statutes require all local boards of education to "adopt policies not inconsistent with the provisions of the Constitutions of the United States and North Carolina, governing the conduct of students and establishing procedures to be followed by school officials in suspending or expelling any student, or in disciplining any student if the offensive behavior could result in suspension, expulsion, or the administration of corporal punishment."[30]

a. **Corporal punishment –** Local boards of education may determine if corporal punishment may be administered within their district. If the district chooses to allow corporal punishment, however, the following provisions must be in place:

(1) Parents and the student body must be informed in advance of the offenses that are punishable by corporal punishment;

(2) Only certain school personnel may administer corporal punishment (principal, assistant principal, teacher or substitute teacher);

(3) Corporal punishment must not be administered in the presence of other students;

(4) Corporal punishment must be administered in the presence of a witness (principal, assistant principal, teacher or substitute teacher, teacher assistant, or student teacher);

(5) The student must be informed, in the presence of the witness, the reason for the administration of corporal punishment;

[30] N.C. Gen. Stat. 115C-391(a).

(6) The student's parents must be informed that corporal punishment was administered, and be given additional information about the incident upon request.[31]

About half the school districts in North Carolina allow the administration of corporal punishment. In those districts that allow it, corporal punishment must be "reasonable in light of its purpose."[32] Tort remedies are available for students who can prove that the punishment was excessive punishment, that foreseeable serious or permanent injury resulted, or that the punishment was inflicted with malice.[33]

b. **Suspension and expulsion –** The general statutes do not spell out extensive procedural protections provided to students facing suspension or expulsion, leaving the decision to the local board about what must be provided to ensure that constitutional protections are afforded. The following mandates are in effect, however.

[31] *Id.*

[32]Gaspersohn v. Harnett Co. Board of Ed., 75 N.C. App. 23, 330 S.E.2d 489 (1985).

[33]*Id.*

(1) A board of education must have clear policies governing the conduct of students.[34] At a minimum, these policies must state the consequences of violent or assaultive behavior, possessions of weapons, and criminal acts committed on school property or at school-sponsored functions.[35]

(2) A student must be permitted to appeal to the board of education any suspension of more than ten days.[36]

(3) Final decisions of boards of education are subject to judicial review in superior court.[37]

(4) When notice of the suspension is given to parents, the notice must include the student's statutory rights under N.C. Gen. Stat. §115C-391. The notice must be in plain language, and, when resources permit, must be in the first language of the parents.[38]

(5) When notice of the suspension is given to parents, this notice shall identify what information will be included in the student's official record and the procedure for expungement of this information under G.S. §115C-402.[39]

c. **Alternative school –** North Carolina has no requirement that students be offered alternative school during periods of suspension. N.C. school districts are required to have some alternative schooling available in the district, but it need not be

[34] N.C. Gen. Stat. §115C-391(f).

[35] *Id.*

[36] N.C. Gen. Stat. §115C-391(c). Principals have the authority to suspend, for up to ten days, any student who violates the code of student conduct. Districts need not allow appeals from these short-term suspensions. *Stewart v. Johnston County Bd. of Educ.* 129 N.C.App. 108, 498 S.E.2d 382 (1998). Suspensions of eleven days up through the end of the school year must be approved by the superintendent.

[37] N.C. Gen. Stat. §115C-391(e); N.C. Gen. Stat. Article 4, Chapter 150B.

[38] N.C. Gen. Stat. §115C-391(d5).

[39] N.C. Gen. Stat. §115C-391(f).

available to all children in all grades.[40]

2. **Substantive law**

a. **Corporal punishment –** As noted above, corporal punishment is specifically allowed in North Carolina, at the discretion of the local school board.

b. **Suspension and expulsion –** Suspension from school, for periods ranging from one day to 365 days, as well as permanent expulsion, are specifically allowed in North Carolina. In general, the local school boards may develop their own rules governing the conduct of the students in their districts and set their own consequences for infractions. (These are found in the local board policies distributed to the students at the beginning of the year in the student handbook and usually published on the school district's website.) Nevertheless, the statute sets out mandatory consequences for certain behaviors, and permissive consequences for other behaviors.

[40]N.C. Gen. Stat.§115C-47(32a).

(1) **Expulsion**. Expulsion refers to the permanent exclusion of a child from public school. The expulsion from one district may be honored by all other school districts in the state.[41] Expulsion is limited by statute as follows:

(a) The student must be at least 14 years of age[42]

(b) Only the local board of education – not a principal or superintendent – has the authority to expel a student (although expulsion is on recommendation of both principal and superintendent)[43]

(c) Clear and convincing evidence must indicate that the student's continued presence in school constitutes a clear threat to the safety of other students or employees[44]

(d) The board must consider whether there is an alternative program within the district that is available for the student to attend[45]

[41]N.C. Gen. Stat. §115C-366(a5).

[42] N.C. Gen. Stat. §115C-391(d).

[43]*Id.*

[44]*Id.*

[45]*Id.*

(e) The student may petition the board for reinstatement after the first July 1 that is more than six months after the expulsion. If the student demonstrates to the satisfaction of the board that the student's presence in school no longer constitutes a threat to the safety of other students or employees, the board shall readmit the student.[46]

(2) 365-day suspension

(a) Weapons. The local board of education or the superintendent is required to suspend a student for 365 days if the student brings to or possesses a weapon on school property or at a school-related function.[47]

i) Weapons include guns, rifles, pistols, or other firearms of any kind, dynamite cartridges, bombs, grenades, mines, or powerful explosives, but do not include BB guns, air pistols, stun guns, air rifles, or fireworks.[48]

ii) Students are not to be subject to suspension if they take a weapon from another person and immediately turn it over to law enforcement.[49]

(b) **Bomb threats.** The local board of education or the superintendent is required to suspend a student for 365 days if the student falsely reports a bomb or other explosive device on school property or otherwise commits a hoax designed to make people believe a dangerous explosive is on school property.[50]

(c) The board may modify the 365-day suspension on a case-by-case basis.[51] Note, however, that there is no statutorily-specified opportunity for

[46] *Id.*

[47] N.C. Gen. Stat. §115C-391(d1).

[48] N.C. Gen. Stat. §14-269.2.

[49] N.C. Gen. Stat. §14-269.2(h).

[50] N.C. Gen. Stat. §115C-391(d3).

[51] N.C. Gen. Stat. §115C-391(d1).

reconsideration by the board at any particular time after the suspension has been issued, as there is for expulsions. Nevertheless, the board may always reconsider its own decisions.

(d) The board may provide for alternative education for the suspended student.[52]

(3) **300-365 day suspension –** The superintendent shall suspend for at least 300, but not more than 365, days, any student who assaults and seriously injures school personnel.[53]

(a) The student must be at least 13 years old

(b) The assault must have occurred on school property or at a school-related function

(c) The student must be assigned to an alternative setting is one is available.

(4) **Up to 365 day suspension –** The superintendent may suspend students, for up to 365 days, under certain circumstances.[54] The student must be assigned to an alternative school if one is available.

(a) Certain assaults:

i) The student must be at least 13 years old

ii) The student must have committed one of the following acts on school property or at a school-related function:

a) Physically assaults a teacher or other adult who is not a student;

b) Physically assaults another student if the assault is witnessed by school personnel;

c) Physically assaults and seriously injures another student.

(b) False report of dangerous?life-threatening substance[55]

(c) Hoax related to a package (etc.) believed to be capable of harm[56]

[52] *Id.*

[53] N.C. Gen. Stat. §115C-391(d2).

[54] N.C. Gen. Stat. §115C-391(d2)(2).

[55] N.C. Gen. Stat. §115C-391(d4)(1).

[56] N.C. Gen. Stat. §115C-391(d4)(2).

(d) Threat or false report of terror[57]

[57] N. C. Gen. Stat. §115C-391(b4)(3) & (4).

(e) Conspiracy to make a false report of the presence of a bomb, dangerous substance, package, or terror threat[58]

3. Appeals of long-term suspensions or expulsions

a. **Procedures –** Appeal processes differ substantially from district to district, but must be allowed.[59] It is critical to obtain a copy of the district's procedures before representing a student in an appeal of a long-term suspension or expulsion. The procedures are usually published in the student/parent handbook and are usually on the school district's website. Virtually all the districts provide the following:

(1) written notice to the student's parents or guardians informing them of the charges;

(2) a hearing at which the student may challenge the long-term suspension by testifying, presenting witnesses, and cross-examining the witnesses presented by the school;

(3) the right to appeal the superintendent's decision to the school district's board of education.

b. **Time constraints –** Because time is of the essence if a child is recommended for long-term suspension, most local policies require that an appeal be requested within a few days following the notice of suspension so that the hearing can be completed within 10 school days. While it is always advisable to adhere to the prescribed time limits, it is also always worthwhile asking for an extension of the limit if the limit has expired. The short time limits are for the protection of the student and can be waived.

c. **Hearing procedures – first level**. The typical hearing is relatively informal and the rules of evidence do not apply. There may be a hearing officer and a panel of teachers to hear the evidence, or the hearing may be directly before the superintendent. Usually, the principal or a representative of the principal presents information about what occurred that led to the recommendation of suspension or expulsion. A report of the investigation is read; witnesses to the event may or may not be present. Hearsay is permitted. Whoever presents the case for the school may be cross-

[58]N.C. Gen. Stat. §115C-391(b4)(5).

[59]N.C. Gen. Stat. §115C-391(e); § 115C-45(c).

examined by the student, his or her parent, or the student's counsel. Following the school's presentation, the student will be permitted to present testimony and will be permitted to present witnesses on his behalf. The student and his witnesses may be questioned by the hearing panel or superintendent. Often, each side will be permitted to make a closing statement. Most hearings are less than an hour in length.

d. **Strategy –** Sometimes, the student will simply deny that he/she engaged in the conduct he/she is accused of. More often, however, the student will admit to the conduct, but want to show that he or she is not as culpable as it appeared to the principal, or that the length of the suspension is excessive given all the circumstances. Particularly if the latter is the case, it is generally useful to build up the positive aspects of the student. Evidence that the student is now in a mentoring program, or is now getting counseling, or has gotten a job could be helpful. If the circumstances that led the student to violate the school rule are no longer present, those facts should be made known. Statements from the student's pastor, Sunday School teacher, scout leader, employer, neighbor, uncle, etc. about the student's character are worth submitting, either in person or in writing. If the student admits the conduct, the student should always apologize and say whatever he or she can that might persuade the decision-maker that the student does not pose a continuing threat to the safety or discipline of the school. If the student is willing to "make up" for the conduct in some other way (take on certain responsibilities at the school, for example) or is willing to accept certain other restrictions (offering to be searched, offering to be restricted from extra-curriculars), those should be offered. Both the principal and the superintendent can use their discretion to modify the length or terms of the suspension, so attempts at negotiation are worthwhile.

e. **Appeals to the board.** Although a record is often made of the lower hearing, most boards will accept new evidence when they hear the case. Thus, if the student represented himself at the initial hearing, but now has counsel, counsel should not feel bound by what the student did or said at the earlier stage (except to the extent that the student will lose credibility if he or she changes his story, and except to the extent that new evidence is restricted by board policy).

In most districts, the board will allow both written and oral advocacy. A written argument in support of the student should generally be presented before the board meeting, but it can usually be submitted at the meetings as well. Additional letters of support, a statement by the student, a statement by the student's parent, etc. are all fair game at the board level. Counsel may make an

argument as well. Remember that members of boards of education are not judges; they ran for office because they wanted to make a positive difference for children in their districts. They may well respond to non-legal arguments about the needs of the child, the future of the child, etc.

f. **Appeals to Superior Court.** A final decision of a local board of education on discipline matters is subject to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes (The Administrative Procedures Act).[60] A petition for judicial review must be filed on behalf of the student within 30 days of service of the written copy of the final decision of the board.[61] The statute allows the court to accept an untimely petition for good cause shown. Following receipt of a Petition for Judicial Review, the local board must produce the record of its proceedings. Generally, new evidence is not accepted at this level, but a court may remand to allow for the taking of new evidence by the board if shown the new evidence is material, not cumulative, and could not reasonably have been presented at the earlier proceeding.[62] Petitions for Judicial Review are heard without a jury; each side may present a brief and an oral argument. Counsel should check with the local rules regarding deadlines for filing briefs. The Superior Court may reverse the decision of the board of education if it is found to be in error for any of the following reasons:

(1) In violation of constitutional provisions;
(2) In excess of the statutory authority or jurisdiction of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
(6) Arbitrary, capricious, or an abuse of discretion.[63]

[60]N.C. Gen. Stat. §115C-391(e); § 115C-45; 150B-43 et seq.

[61]N.C. Gen. Stat. §150B-45.

[62]N.C. Gen. Stat. §150B-49.

[63]N.C. Gen. Stat.§150B-51.