

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: DHHS Division of Adult Aging & Services

RULE CITATION: 10A NCAC 06Q .0201 (Temporary)

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

Before the Rules Review Commission (hereinafter "RRC") in May 2022 is a proposed temporary rule amending 10A NCAC 06Q .0201 (hereinafter "Rule") which was adopted on May 6, 2022 by the Division of Aging and Adult Services (hereinafter "Division") of the North Carolina Department of Health and Human Services (hereinafter "DHHS") in response to S.L. 2021-180.

On November 18, 2021, Session Law 2021-180 was approved. Section 9A.3B.(a) is an amendment to G.S. 143B-181.1 (11). Prior to the amendment, reimbursement rates for adult day cares services, adult day health services, and associated transportation services (hereinafter "rates") were capped by the Division pursuant to Rule 10A NCAC 06Q .0201¹. S.L. 2021-180 removed the cap by taking away the Division's authority to establish rates.

¹ ADOPTED BY THE DHHS SECRETARY PURSUANT TO G.S. 143B-181.1(c).

William W. Peaslee
Commission Counsel

Post adoption of S.L. 2021-180, reimbursement rates for services paid under the Home and Community Care Block Grant and the State Adult Day Care Fund “shall be established at the local level” and shall “reflect geographical differences, the availability of services, the cost to provide services, and other local variables.”

Section 9A.3B(c) of S.L. 2021-180 instructs the Division to promulgate rules to “allow” the rates “to be set by each county lead agency for planning and coordination.”

The Rule states that the reimbursement rates shall “be set by local entities or each county lead agency for planning and coordination” (Hereinafter “county lead agency for planning and coordination” shall be referred to as “CLA”). The Rule further requires the local entities or respective CLAs to set rates “per day, per client.”

The Division initially stated that it would “refrain” from defining “local entity” or “local level,” however it ultimately acknowledged that a CLA is at the “local level” pursuant to S.L. 2021-180. It has further acknowledged that there is a distinction between “local entities” (as used in the Rule) and CLAs.

In response to counsel’s request for changes, the agency added subsection (c) which defined “CLA” as:

"County Lead Agency for Planning and Coordination" means a public or private non-private agency or office which is designated annually by the Board of County Commissioners for the purpose of developing the County Funding Plan for the provision of services through the Block Grant. County Funding Plan development responsibilities include directing the work of the County Block Grant Advisory Committee, facilitating a public hearing for the County Funding Plan prior to submission to the Chairman of the Board of Commissioners, and ensuring that the approved County Funding Plan meets all requirements as specified by the Division of Aging prior to submission for approval to the Area Agency on Aging.”

pursuant to 10A NCAC 05G .0201(c).

William W. Peaslee
Commission Counsel

As the Division has stated that there is a distinction between “local entities” and “county lead agencies,” the Division has exceeded its rulemaking authority by enabling “local entities” to set rates. Accordingly, counsel recommends that the RRC object to the Rule pursuant to G.S. 150B-21.9(a)(1) as its adoption exceeds the authority granted to the Division in Section 9A.3B(c) of S.L. 2021-180.

Assuming *arguendo* that the Division did not exceed its authority by including “local entities”, “local entities” as used by the Division in the Rule is undefined. It is unclear to which local entities, other than CLAs, the Rule would empower to set rates. Accordingly, counsel recommends the RRC object to the Rule pursuant to G.S. 150B-21.9(a)(2) for lack of clarity.

Further, the Rule states rates may be set by local entities or CLAs. The Rule does not address how the rates will be determined in the event of a conflict between local entities, or between a local entity and the CLA, or if the CLA has supremacy. Accordingly, counsel recommends the RRC object to the Rule pursuant to G.S. 150B-21.9(a)(2) for lack of clarity.

Further, the Rule requires local entities or CLAs to set a rate “per day, per client.” This is an infringement upon the authority granted to the entities at the local level, including CLAs, to establish the rate pursuant to S.L. 2021-180. Accordingly, counsel recommends the RRC object to the Rule for lack of statutory authority pursuant to G.S. 150B-21.9(a)(1).

AUTHORIZATION FOR LOCAL ENTITIES TO SET REIMBURSEMENT RATES FOR ADULT DAY CARE, ADULT DAY HEALTH, AND ASSOCIATED TRANSPORTATION SERVICES FUNDED BY THE HOME AND COMMUNITY CARE BLOCK GRANT AND THE STATE ADULT DAY CARE FUND

SECTION 9A.3B.(a) G.S. 143B-181.1 reads as rewritten:

"§ 143B-181.1. Division of Aging – creation, powers and duties.

(a) There is hereby created within the office of the Secretary of the Department of Health and Human Services a Division of Aging, which shall have the following functions and duties:

...

- (11) To administer a Home and Community Care Block Grant for older adults, effective July 1, 1992. The Home and Community Care Block Grant shall be comprised of applicable Older Americans Act funds, Social Services Block Grant funding in support of the Respite Care Program (G.S. 143B-181.10), State funds for home and community care services administered by the Division of Aging, portions of the State In-Home and Adult Day Care funds (Chapter 1048, 1981 Session Laws) administered by the Division of Social Services which support services to older adults, and other funds appropriated by the General Assembly as part of the Home and Community Care Block Grant. Funding currently administered by the Division of Social Services to be included in the block grant will be based on the expenditures for older adults at a point in time to be mutually determined by the Divisions of Social Services and Aging. Reimbursement rates for adult day care services, adult day health services, and associated transportation services paid under the Home and Community Care Block Grant and the State Adult Day Care Fund shall be established at the local level. These rates shall reflect geographical differences, the availability of services, the cost to provide services, and other local variables. The total amount of Older Americans Act funds to be included in the Home and Community Care Block Grant and the matching rates for the block grant shall be established by the Department of Health and Human Services, Division of Aging. Allocations made to counties in support of older adults shall not be less than resources made available for the period July 1, 1990, through June 30, 1991, contingent upon availability of current State and federal funding; and

...

(c) The Secretary of Health and Human Services shall adopt rules to implement this Part and Title 42, Chapter 35, of the United States Code, entitled Programs for Older Americans."

SECTION 9A.3B.(c) The Department of Health and Human Services, Division of Aging and Adult Services, Division of Social Services, and the Social Services Commission shall amend or repeal any rules requiring a maximum statewide reimbursement rate for adult day care and adult day health services paid under the Home and Community Care Block Grant and the State Adult Day Care Fund. Rules shall be promulgated to allow the reimbursement rates for adult day care services, adult day health services, and associated transportation services to be set by each county lead agency

for planning and coordination. The rates shall reflect geographical differences, the availability of services, the cost to provide services, and other local variables.

William W. Peaslee
Commission Counsel

1 10A NCAC 06Q .0201 is amended under temporary procedures with changes as follows:

2
3 CHAPTER 06 - AGING - PROGRAMS OPERATIONS

4
5 SUBCHAPTER 06Q - ADULT DAY CARE

6
7 SECTION .0200 - REQUIREMENTS

8
9 10A NCAC 06Q .0201 ~~MAXIMUM REIMBURSEMENT RATES~~

10 (a) The ~~maximum~~ reimbursement rate for adult day care services shall ~~not exceed thirty three dollars and seven cents~~
11 ~~(\$33.07)~~ be set by the local entities or each county lead agency for planning and coordination per day, per client. The
12 ~~maximum~~ rate for adult day health services shall be set by the local entities or each county lead agency for planning
13 and coordination ~~not exceed forty dollars (\$40.00)~~ per day, per client. The rates shall reflect the factors as set forth in
14 section 9A.3B.(a) in Session Law 2021-180, amended-amending G.S. 143B-181.1(a)(11).

15 (b) The ~~maximum~~ reimbursement rate for transporting an adult day care client to an adult day care center shall be set
16 by local entities or each county lead agency for planning and coordination not exceed one dollar and fifty cents (\$1.50)
17 for a one-way trip. The ~~maximum~~ reimbursement rate for round-trip transportation of an adult day care client or adult
18 day health client to an adult day care center or adult day health center shall be set by the local entities or each county
19 lead agency for planning and coordination ~~not exceed three dollars (\$3.00)~~ per day, per client. The rates shall reflect
20 the factors as set forth in section 9A.3B.(a) in Session Law 2021-180, amended-amending G.S. 143B-181.1(a)(11).

21 (c) For the purpose of this Rule, county lead agency for planning and coordination shall have the same definition as
22 that employed in 10A NCAC 05G .0201.

23
24 *History Note:* Authority G.S. 143B-181.1(a)(11); 143B-181.1(e); 143B-181.1(c); S.L. 2021-180; S.L. 2021-180
25 9A.3B.(a) and (c);
26 Eff. July 1, 1992;
27 Readopted Eff. July 1, 2019;
28 Temporary Amendment Eff. July 1, 2022.