



## EMERGENCY RULE-MAKING FINDINGS OF NEED [G.S. 150B-21.1A]

<b><u>OAH USE ONLY</u></b>
<b>VOLUME:</b>
<b>ISSUE:</b>

<b>1. Rule-Making Agency: N.C. Department of Health and Human Services/Director, DHSR</b>	
<b>2. Rule citation(s): 10A NCAC 14E .0101, .0102, .0104, .0106, .0107, .0108, .0109, .0110, .0111, .0112, .0201, .0202, .0207, .0315</b>	
<b>3. Adoption by agency on: 06/19/23</b>	<b>4. Date agency requests entry of emergency rule in the Code: 6<sup>th</sup> business day from approval</b>
<p><b>5. What is the need for an emergency rule?</b> On May 16, 2023, Senate Bill 20 became law as S.L. 2023-14. This new law entitled "An Act to Make Various Changes to Health Care Laws and to Appropriate Funds for Health Care Programs" made revisions to various state laws governing abortions in North Carolina. The Department was made aware of the proposed changes on May 2, 2023, when a Proposed Conference Committee Substitute was issued that made the changes to the State's abortion laws. The revisions in Part I and Section 2.4 of Part II of the law go into effect on July 1, 2023, less than 2 months after the Department became aware of the proposed changes. Among other changes, S.L. 2023-14 makes significant changes to defining when an abortion is lawful. Current rules governing the certification of abortion clinics are found in Subchapter 14E of Title 10A of the Administrative Code. Given the changes to the law that will become effective July 1, and the fact that the Department cannot complete temporary or permanent rulemaking by that date, the Department is making certain amendments to the existing rules to conform with those provisions in S.L. 2023-14 that become effective on July 1st. The adoption of emergency rules will ensure continuity of care for patients, will resolve any uncertainty about the rules applicable to impacted providers from July 1<sup>st</sup> until the Department is able to promulgate temporary or permanent rules, and will protect the health and safety of people obtaining reproductive health care, and to provide certainty to medical providers. Therefore, the Department seeks to amend Subchapter 14E of Title 10A under emergency procedures.</p>	
<p><b>6. Has the agency provided the public with abbreviated notice? If so, describe.</b> No</p>	
<p><b>7. Why is adherence to notice and hearing requirements contrary to the public interest and that the immediate adoption of the rule required by a serious and unforeseen threat to the public health or safety?</b> Current rules governing the certification of abortion clinics are found in Subchapter 14E of Title 10A of the Administrative Code. The authority for these current rules derives from N.C.G.S. § 14-45.1. Session Law 2023-14, Part 1, Section 1.1, repeals N.C.G.S. § 14-45.1 effective July 1, 2023. The General Assembly stated in S.L. 2023-14 that:</p> <p style="padding-left: 20px;">SECTION 2.4. No later than October 1, 2023, the Department of Health and Human Services shall adopt the rules necessary to administer this Part.</p> <p style="padding-left: 20px;">SECTION 2.5. Section 2.4 of this Part becomes effective July 1, 2023. The remainder of this Part becomes effective on October 1, 2023.</p> <p>These newly enacted provisions provide a mandate for the Department to adopt rules necessary to regulate abortion clinics between July 1, 2023 and October 1, 2023, at which time additional authority for the rulemaking, including those rules governing the licensure of abortion clinics, is granted to the Medical Care Commission, as required by Section 2.2 of S.L. 2023-14. Given the changes to the law that will become effective July 1, and the fact that the Department cannot complete temporary or permanent rulemaking by this imminently approaching date, the Department must act with urgency to make certain amendments to the existing rules to conform with those provisions in S.L. 2023-14 that become effective on July 1<sup>st</sup>. Further, the repeal of existing laws governing abortions in North Carolina, which also is effective July 1, 2023, requires the Department to act swiftly in making conforming changes to these rules. While the Department understands that NCGS 150B-21.7 may apply to the existing rules regarding clinic certification, it is promulgating these emergency rules to resolve any uncertainty about the rules that apply to abortion clinics in North Carolina beginning July 1, 2023 until notice and comment rulemaking is completed. The adoption of emergency rules will ensure continuity of care for patients, resolve any uncertainty about the rules applicable to impacted providers beginning July 1<sup>st</sup> until the Department is able to promulgate temporary or permanent rules, and critically, will protect the health and safety of women in obtaining lawful abortions in a clinic regulated by the Department. Adherence to notice and hearing requirements is contrary to the public interest for the immediate and critical near term because it is not possible to complete notice and comment rulemaking by July 1, 2023. However, temporary rulemaking in conjunction with this emergency rulemaking will adhere to notice and hearing requirements.</p>	

[Emergency Rule-making Findings of Need Continued]

8. Does the agency have specific statutory authority for the adoption of an emergency rule? If so, has the agency met the statutory criteria for adoption? (attach copy of statutory authority)

Yes. G.S. 143B-10, S.L. 2023-14, Part I, s.1.1 and Part II, s. 2.4

9. Has the agency submitted the proposed temporary rule for publication on the Internet in accordance with G.S. 150B-21.1(a3)?

- Yes
- No

10. Rule establishes or increases a fee? (See G.S. 12-3.1)

- Yes  
Agency submitted request for consultation on:  
Consultation not required. Cite authority:
- No

11. Rule-making Coordinator: Nadine Pfeiffer

Phone: 919-855-3811

E-Mail: nadine.pfeiffer@dhhs.nc.gov

Agency contact, if any:

Phone:

E-Mail:

12. Signature of Agency Head\*:

DocuSigned by:  
  
 65A1EF320AD6419...

\* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.

Typed Name: Mark T. Benton

Title: Chief Deputy Secretary, N.C. DHHS

E-Mail: mark.benton@dhhs.nc.gov

REVIEW BY THE CODIFIER OF RULES

Approved. Entered into the North Carolina Administrative Code on: \_\_\_\_\_

Reviewed By: \_\_\_\_\_  
Date: \_\_\_\_\_

Comments:

Statement does not meet the criteria.

Reviewed By: Whitney Seuffert  
 Date: 01/20/23

Comments: See attached letter



**STATE OF NORTH CAROLINA  
OFFICE OF ADMINISTRATIVE HEARINGS**

June 22, 2023

Secretary Kody H. Kinsley  
Department of Health and Human Services  
**Sent via email only: [kody.kinsley@dhhs.nc.gov](mailto:kody.kinsley@dhhs.nc.gov)**

Re: Emergency Rule Filing, 10A NCAC 14E

Dear Secretary Kinsley:

On June 20, 2023, the Department of Health and Human Services (“DHHS”) filed emergency rules to implement Session Law 2023-14. The Administrative Procedure Act provides a path for agencies to quickly implement recent changes enacted by the General Assembly: temporary rulemaking. *See* G.S. 150B-21.1(a)(2). The need to implement a change in the law is not, in and of itself, a sufficient reason to engage in emergency rulemaking. Instead, to engage in emergency rulemaking, an agency would need to meet the criteria in G.S. 150B-21.1A(a) or provide specific statutory authority promulgate emergency rules.<sup>1</sup>

G.S. 150B-21.1A(a) sets forth a two-part test to engage in emergency rulemaking: (1) adherence to the notice and hearing requirements of G.S. 150B, Article 2A, Part 2 are contrary to the public interest and (2) the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety.

Session Law 2023-14, Section 2.4 states: “No later than October 1, 2023, the Department of Health and Human Services shall adopt the rules necessary to administer [*Part II* of the Session Law.]” DHHS cites this provision of the Session Law on its form and in the history note of each rule submitted. The agency would have sufficient time to engage in temporary rulemaking by the October 1, 2023

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<sup>1</sup> *See e.g.*, S.L. 2020-3, Sec. 4.38(e) (“State agencies may adopt emergency rules for the implementation of this section in accordance with G.S. 150B-21.1A.”)

**Donald R. van der Vaart**, Director  
Chief Administrative Law Judge

**Fred G. Morrison, Jr.**  
Senior Administrative Law Judge

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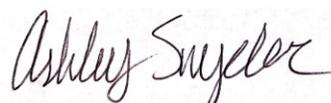
deadline<sup>2</sup> to adopt rules necessary to administer Part II of the Session Law. In fact, DHHS has already filed these rules as temporary rules with a comment period ending July 20. If approved by the Rules Review Commission, the temporary rules will be in effect before October. It is not in the public's interest to waive citizens' due process rights by engaging in rulemaking with no notice or comment when there is more than sufficient time to allow for public input.

Since the filing fails the first part of the test, there is no need to engage in any analysis of the second part of the test in G.S. 150B-21.1A(a). The rules submitted by DHHS do not meet the criteria for emergency rulemaking in G.S. 150B-21.1A(a).

In Box 8 of its findings of need form, DHHS cites G.S. 143B-10, Session Law 2023-14, Part I, Sec. 1.1 and Part II, Section 2.4 as specific statutory authority to engage in emergency rulemaking. None of the cited statutes specifically grant DHHS authority to promulgate emergency rules. G.S. 143-10 generally describes the power of heads of principal State departments to adopt rules in accordance with G.S. 150B. Part I, Sec. 1.1 of the Session Law repeals DHHS's current rulemaking authority. Part II, Section 2.4 of the Session Law does grant DHHS the authority to adopt rules by October 1, 2023, though the General Assembly did not specifically provide a grant of authority to engage in emergency rulemaking. Additionally, the effective date of Part II, Section 2.4 is July 1, 2023. When DHHS adopted these rules on June 19, 2023, Section 2.4 was not yet in effect to grant authority to adopt these rules.

The rules filed by DHHS do not meet the criteria for emergency rulemaking required in G.S. 150B-21.1A. Please respond to this letter in accordance with the provisions of G.S. 150B-21.1A(b).

Sincerely,



Ashley Snyder  
Codifier of Rules

cc: Nadine Pfeiffer, Rulemaking Coordinator, DHHS  
Mark T. Benton, Chief Deputy Secretary, DHHS

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<sup>2</sup> Even assuming *arguendo* DHHS needs rules in place by July 1, 2023, the agency had sufficient time to engage in the temporary rulemaking process since the enactment of the Session Law on May 16, 2023. For example, DHHS could have adopted the rules on May 18 with a public comment period running May 19 – June 12, putting the rules before the Rules Review Commission on June 15. DHHS acknowledges in its statement it was aware of the proposed Session Law changes as soon as May 2.