



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

July 7, 2023

Secretary Kody H. Kinsley
Department of Health and Human Services
Sent via email only: 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 14 emergency rules to implement Session Law 2023-14. For the remaining 24 rules governing abortion in 10A NCAC 14E, DHHS submitted a filing pursuant to G.S. §§ 150B-21.5 and 150B-21.20 to update the statutory authority in the history notes of those rules. However, the Department failed to address the criteria required in G.S. § 150B-21.7 when the law authorizing an agency to adopt rules is repealed. Upon notification, DHHS submitted a filing pursuant to G.S. 150B-21.7 to accompany its G.S. §§ 150B-21.5 and 150B-21.20 filings. Upon a determination that the new statutory authority for these 24 rules was not “substantially the same,” those rules were removed from the Code. Now the Department files those 24 rules as emergency rules, pointing to the removal of these rules from the Code as the basis for emergency rulemaking.

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.

The Department’s failure to choose the best path to transition from its existing rules to new rules implementing Session Law 2023-14 does not negate importance of the public’s due process rights. The Department’s argument for emergency rules hinges upon the removal of its rules from the Code, a product of the Department’s own actions.

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

Fred G. Morrison, Jr.
Senior Administrative Law Judge

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When a law granting rulemaking authority is repealed, G.S. § 150B-21.7 sets forth an analysis for determining whether the rules remain in the Code. The test is whether the authority to adopt rules is “substantially the same.” If the two laws are substantially similar, the agency can make that showing under G.S. § 150B-21.7 and then file a request for the history notes to be updated under G.S. 150B-21.5. In the event the laws are not substantially similar, “the rule adopted under the repealed law is repealed as of the date the law is repealed.”¹ In other words, the APA contemplates the removal of rules from the Code following the repeal of a law granting rulemaking authority when another law does not directly replace it. That is what happened here. Even so, the APA does not provide emergency rulemaking as a path forward in that situation. Instead, the APA provides temporary rulemaking with a notice and comment period as the path forward when an agency is proposing rules in response to a new Session Law.²

At its heart, this filing is still seeking to implement Session Law 2023-14. 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 in the history note of each rule submitted. In fact, DHHS has already filed these rules as temporary rules with a comment period ending August 4. 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 for emergency rulemaking, 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.

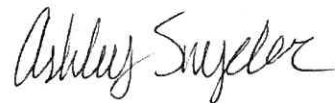
¹ G.S. 150B-21.7(a).

² See G.S. § 150B-21.1(a)(2).

In the event DHHS plans to overrule this objection and enter these rules into the Code pursuant to G.S. 150B-21.1A(b), please note emergency rules must be signed by the head of the agency prior to inclusion in the Code.³ This signature authority can be delegated as allowed by G.S. § 143B-10 which states: “the head of each principal State department may assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department.” Here, the authority to adopt rules was assigned by Secretarial Directive to the Chief Deputy Secretary with the ability to further “*specifically* delegate this authority to adopt rules as deemed necessary and appropriate.” (Emphasis added). Along with the emergency rule filing, a *general* delegation dated June 27, 2023 was provided, further delegating all duties delegated to the Chief Deputy Secretary to the Deputy Secretary for External Affairs. The general delegation does not specifically mention the authority to adopt rules. Further, based upon the plain reading of G.S. 140B-10, only the Secretary has the duty to delegate duties granted specifically to the head of a principal department, such as the authority to adopt emergency 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,

A handwritten signature in black ink that reads "Ashley Snyder". The signature is fluid and cursive, with the first name "Ashley" and last name "Snyder" clearly distinguishable.

Ashley Snyder
Codifier of Rules

cc: Nadine Pfeiffer, Rulemaking Coordinator, DHHS
Mark T. Benton, Chief Deputy Secretary, DHHS
Jonathan Kappler, Deputy Secretary for External Affairs

³ G.S. §§ 150B-21.1A(b); 150B-21.19(2).



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

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: N.C. Department of Health and Human Services/Director, DHR

2. Rule citation(s): 10A NCAC 14E .0113, .0114, .0209 - .0213, .0317 - .0331, .0403, .0404

3. Adoption by agency on: 07/06/23

**4. Date agency requests entry of emergency rule in the Code:
6th business day from approval**

5. What is the need for an emergency rule? On June 30, 2023, the Codifier of Rules notified N.C. DHHS that, "Pursuant to G.S. 150B-21.7, all permanent rules in 10A NCAC 14E are repealed effective July 1, 2023 following the repeal of G.S. 14-45.1 in Session Law 2023-14." The repeal of these rules occurred following a submission by the Department requesting the Codifier amend the history note of the rules to reflect the change in statutory authority from G.S. 14-45.1 to Session Law 2023-14, Part II, Section 2.4. The Department's rulemaking authority under both laws directs the Department to regulate facilities suitable for the performance of abortions through ensuring that minimum health and safety standards are implemented and adhered to by the facilities performing abortions and providing other reproductive health services. Specifically, the General Assembly states that enforcement of these basic standards are to ensure safe and adequate treatment of individuals in abortion clinics. 131E-153(b)(2). The rules repealed effective July 1, 2023 contain current minimum standards for nursing services, laboratory services, emergency back-up services, surgical services, medications and anesthesia, post-operative care, and staff qualifications. Additionally, rules regulating basic standards for building codes, sanitation, and record keeping in abortion clinics have also been removed from the Administrative Code. The repeal of these rules was an unforeseen action as the Department's rulemaking authority over the facilities suitable for the performance of abortions has remained substantially the same, and therefore, authority for maintaining and adopting rules to ensure that health and safety standards of these facilities remains in effect. In sum, the repeal of these rules represents a serious and unforeseen threat to public health and safety of those seeking reproductive health care and to the operation of facilities providing this care, and therefore, emergency rulemaking is both necessary and appropriate.

6. Has the agency provided the public with abbreviated notice? If so, describe.

No

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?

Notice would be contrary to public interest given the unforeseen repeal of these rules for minimum standards in the regulated clinics. The providers have been operating for years based upon these rules and have not received notice that the rules would be repealed. Unless emergency rules are adopted, there will be uncertainty about the minimum standards applicable to a clinic and how to operate. The adoption of emergency rules will ensure continuity of care for patients and resolve uncertainty about the rules applicable to impacted providers beginning July 1st until the Department is able to promulgate temporary or permanent rules. The emergency rules will allow the Department to regulate the clinics and hold the clinics to basic standards that are in place to protect the health and safety of women in obtaining lawful abortions. Adherence to notice and hearing requirements is contrary to the public interest for the immediate and critical near term because the timeframe for notice and comment rulemaking create a months long threat to the public health and safety of women and providers due to the elimination of these established minimum standards. However, temporary rulemaking in conjunction with this emergency rulemaking will adhere to notice and hearing requirements.

[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:

Jonathan Kappler
 88090A1BFA994E2...

*** 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: Jonathan Kappler

Title: Deputy Secretary for External Affairs, N.C. DHHS

E-Mail: jonathan.kappler@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: *Cheryl Snyder*
 Date: *7/7/23*

Comments: *See attached letter*