



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

October 31, 2023

Chairman John J. Meier IV
Medical Care Commission
Sent via email only: jjmiv1964@gmail.com

Re: Emergency Rule Filing, 10A NCAC 13S

Dear Chairman Meier:

On October 30, 2023, the Medical Care Commission (“Commission”) 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 to promulgate emergency rules.¹

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 Commission’s Findings of Need Form points to the Rules Review Commission’s (“RRC’s”) objection to the same rules for lack of statutory authority as the impetus for emergency rulemaking. In general, RRC objected to these rules when proposed by DHHS because the authority rested with the Commission. The Commission takes no responsibility for reading and interpreting the new Session Law on its own but instead blames the RRC.

¹ *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

John C. Evans
Senior Administrative Law Judge

An Equal Employment Opportunity Employer
1711 New Hope Church Road, Raleigh, NC 27609
Telephone: (984) 236-1850 | Facsimile: (984) 236-1871
www.oah.nc.gov

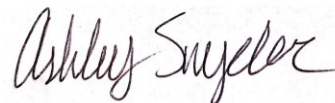
Part II of Session Law 2023-14 became effective October 1, 2023. Though an “emergency,” the Commission waited 30 days after the Session Law’s effective date to file emergency rules. At this point, the agency has nearly had sufficient time to engage in temporary rulemaking. The failure of DHHS and the Commission to read the Session Law and delineate which agency has authority over which rules does not negate the public’s due process rights, especially on an issue of such importance and public interest as abortion. The Commission has failed to show how temporary rulemaking is contrary to the public’s interest.

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 the Commission do not meet the criteria for emergency rulemaking in G.S. 150B-21.1A(a).

In Box 8 of its findings of need form, the Commission 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. It appears the Commission copied DHHS’s form. None of the cited statutes grant any authority to the Commission, but instead grant rulemaking authority to DHHS. 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 grants DHHS the authority to adopt rules by October 1, 2023. None of the cited authority in Box 8 belongs to the Commission and none of the authority provides a specific grant of authority to adopt emergency rules.

The rules filed by the Commission 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 written in a cursive, flowing style.

Ashley Snyder
Codifier of Rules

cc: Taylor Corpening