

NORTH CAROLINA

IN THIS ISSUE



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<http://oahnt.oah.state.nc.us/register/CI.pdf>

NORTH CAROLINA ADMINISTRATIVE CODE CLASSIFICATION SYSTEM

The North Carolina Administrative Code (NCAC) has four major classifications of rules. Three of these, titles, chapters, and sections are mandatory. The major classification of the NCAC is the title. Each major department in the North Carolina executive branch of government has been assigned a title number. Titles are further broken down into chapters which shall be numerical in order. Subchapters are optional classifications to be used by agencies when appropriate.

NCAC TITLES		TITLE 21 LICENSING BOARDS	TITLE 24 INDEPENDENT AGENCIES
1	ADMINISTRATION	1 Acupuncture	1 Housing Finance
2	AGRICULTURE & CONSUMER SERVICES	2 Architecture	2 Agricultural Finance Authority
3	AUDITOR	3 Athletic Trainer Examiners	3 Safety & Health Review Board
4	COMMERCE	4 Auctioneers	4 Reserved
5	CORRECTION	6 Barber Examiners	5 State Health Plan Purchasing Alliance Board
6	COUNCIL OF STATE	8 Certified Public Accountant Examiners	
7	CULTURAL RESOURCES	10 Chiropractic Examiners	
8	ELECTIONS	11 Employee Assistance Professionals	
9	GOVERNOR	12 General Contractors	
10A	HEALTH AND HUMAN SERVICES	14 Cosmetic Art Examiners	
11	INSURANCE	16 Dental Examiners	
12	JUSTICE	17 Dietetics/Nutrition	
13	LABOR	18 Electrical Contractors	
14A	CRIME CONTROL & PUBLIC SAFETY	19 Electrolysis	
15A	ENVIRONMENT & NATURAL RESOURCES	20 Foresters	
16	PUBLIC EDUCATION	21 Geologists	
17	REVENUE	22 Hearing Aid Dealers and Fitters	
18	SECRETARY OF STATE	25 Interpreter/Transliterater (Reserved)	
19A	TRANSPORTATION	26 Landscape Architects	
20	TREASURER	28 Landscape Contractors	
21*	OCCUPATIONAL LICENSING BOARDS	29 Locksmith Licensing	
22	ADMINISTRATIVE PROCEDURES (REPEALED)	30 Massage & Bodywork Therapy	
23	COMMUNITY COLLEGES	31 Marital and Family Therapy	
24*	INDEPENDENT AGENCIES	32 Medical Examiners	
25	STATE PERSONNEL	33 Midwifery Joint Committee	
26	ADMINISTRATIVE HEARINGS	34 Funeral Service	
27	NC STATE BAR	36 Nursing	
28	JUVENILE JUSTICE AND DELINQUENCY PREVENTION	37 Nursing Home Administrators	
		38 Occupational Therapists	
		40 Opticians	
		42 Optometry	
		44 Osteopathic Examination (Repealed)	
		45 Pastoral Counselors, Fee-Based Practicing	
		46 Pharmacy	
		48 Physical Therapy Examiners	
		50 Plumbing, Heating & Fire Sprinkler Contractors	
		52 Podiatry Examiners	
		53 Professional Counselors	
		54 Psychology	
		56 Professional Engineers & Land Surveyors	
		57 Real Estate Appraisal	
		58 Real Estate Commission	
		60 Refrigeration Examiners	
		61 Respiratory Care	
		62 Sanitarian Examiners	
		63 Social Work Certification	
		64 Speech & Language Pathologists & Audiologists	
		65 Therapeutic Recreation Certification	
		66 Veterinary Medical	
		68 Substance Abuse Professionals	
		69 Soil Scientists	

Note: Title 21 contains the chapters of the various occupational licensing boards and Title 24 contains the chapters of independent agencies.

NORTH CAROLINA REGISTER
 Publication Schedule for January 2004 – December 2004

FILING DEADLINES			NOTICE OF TEXT		PERMANENT RULE			TEMPORARY RULES
Volume & issue number	Issue date	Last day for filing	Earliest date for public hearing	End of required comment period	Deadline to submit to RRC for review at next meeting	Earliest Eff. Date of Permanent Rule	Delayed Eff. Date of Permanent Rule (first legislative day of the next regular session)	270 th day from publication in the Register
18:13	01/02/04	12/08/03	01/17/04	03/02/04	03/22/04	05/01/04	05/10/04	09/28/04
18:14	01/15/04	12/19/03	01/30/04	03/15/04	03/22/04	05/01/04	05/10/04	10/11/04
18:15	02/02/04	01/09/04	02/17/04	04/02/04	04/20/04	06/01/04	01/26/05	10/29/04
18:16	02/16/04	01/26/04	03/02/04	04/16/04	04/20/04	06/01/04	01/26/05	11/12/04
18:17	03/01/04	02/09/04	03/16/04	04/30/04	05/20/04	07/01/04	01/26/05	11/26/04
18:18	03/15/04	02/23/04	03/30/04	05/14/04	05/20/04	07/01/04	01/26/05	12/10/04
18:19	04/01/04	03/11/04	04/16/04	06/01/04	06/21/04	08/01/04	01/26/05	12/27/04
18:20	04/15/04	03/24/04	04/30/04	06/14/04	06/21/04	08/01/04	01/26/05	01/10/05
18:21	05/03/04	04/12/04	05/18/04	07/02/04	07/20/04	09/01/04	01/26/05	01/28/05
18:22	05/17/04	04/26/04	06/01/04	07/16/04	07/20/04	09/01/04	01/26/05	02/11/05
18:23	06/01/04	05/10/04	06/16/04	08/02/04	08/20/04	10/01/04	01/26/05	02/26/05
18:24	06/15/04	05/24/04	06/30/04	08/16/04	08/20/04	10/01/04	01/26/05	03/12/05
19:01	07/01/04	06/10/04	07/16/04	08/30/04	09/20/04	11/01/04	01/26/05	03/28/05
19:02	07/15/04	06/23/04	07/30/04	09/13/04	09/20/04	11/01/04	01/26/05	04/11/05
19:03	08/02/04	07/12/04	08/17/04	10/01/04	10/20/04	12/01/04	01/26/05	04/29/05
19:04	08/16/04	07/26/04	08/31/04	10/15/04	10/20/04	12/01/04	01/26/05	05/13/05
19:05	09/01/04	08/11/04	09/16/04	11/01/04	11/22/04	01/01/05	01/26/05	05/29/05
19:06	09/15/04	08/24/04	09/30/04	11/15/04	11/22/04	01/01/05	01/26/05	06/12/05
19:07	10/01/04	09/10/04	10/16/04	11/30/04	12/20/04	02/01/05	05/00/06	06/28/05
19:08	10/15/04	09/24/04	10/30/04	12/14/04	12/20/04	02/01/05	05/00/06	07/12/05
19:09	11/01/04	10/11/04	11/16/04	12/31/04	01/20/05	03/01/05	05/00/06	07/29/05
19:10	11/15/04	10/22/04	11/30/04	01/14/05	01/20/05	03/01/05	05/00/06	08/12/05
19:11	12/01/04	11/05/04	12/16/04	01/31/05	02/21/05	04/01/05	05/00/06	08/28/05
19:12	12/15/04	11/22/04	12/30/04	02/14/05	02/21/05	04/01/05	05/00/06	09/11/05

EXPLANATION OF THE PUBLICATION SCHEDULE

This Publication Schedule is prepared by the Office of Administrative Hearings as a public service and the computation of time periods are not to be deemed binding or controlling. Time is computed according to 26 NCAC 2C .0302 and the Rules of Civil Procedure, Rule 6.

GENERAL

The North Carolina Register shall be published twice a month and contains the following information submitted for publication by a state agency:

- (1) temporary rules;
- (2) notices of rule-making proceedings;
- (3) text of proposed rules;
- (4) text of permanent rules approved by the Rules Review Commission;
- (5) notices of receipt of a petition for municipal incorporation, as required by G.S. 120-165;
- (6) Executive Orders of the Governor;
- (7) final decision letters from the U.S. Attorney General concerning changes in laws affecting voting in a jurisdiction subject of Section 5 of the Voting Rights Act of 1965, as required by G.S. 120-30.9H;
- (8) orders of the Tax Review Board issued under G.S. 105-241.2; and
- (9) other information the Codifier of Rules determines to be helpful to the public.

COMPUTING TIME: In computing time in the schedule, the day of publication of the North Carolina Register is not included. The last day of the period so computed is included, unless it is a Saturday, Sunday, or State holiday, in which event the period runs until the preceding day which is not a Saturday, Sunday, or State holiday.

FILING DEADLINES

ISSUE DATE: The Register is published on the first and fifteen of each month if the first or fifteenth of the month is not a Saturday, Sunday, or State holiday for employees mandated by the State Personnel Commission. If the first or fifteenth of any month is a Saturday, Sunday, or a holiday for State employees, the North Carolina Register issue for that day will be published on the day of that month after the first or fifteenth that is not a Saturday, Sunday, or holiday for State employees.

LAST DAY FOR FILING: The last day for filing for any issue is 15 days before the issue date excluding Saturdays, Sundays, and holidays for State employees.

NOTICE OF TEXT

EARLIEST DATE FOR PUBLIC HEARING: The hearing date shall be at least 15 days after the date a notice of the hearing is published.

END OF REQUIRED COMMENT PERIOD
An agency shall accept comments on the text of a proposed rule for at least 60 days after the text is published or until the date of any public hearings held on the proposed rule, whichever is longer.

DEADLINE TO SUBMIT TO THE RULES REVIEW COMMISSION: The Commission shall review a rule submitted to it on or before the twentieth of a month by the last day of the next month.

FIRST LEGISLATIVE DAY OF THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY: This date is the first legislative day of the next regular session of the General Assembly following approval of the rule by the Rules Review Commission. See G.S. 150B-21.3, Effective date of rules.

Note from the Codifier: This Section contains public notices that are required to be published in the Register or have been approved by the Codifier of Rules for publication.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

PUBLIC NOTICE

This is to provide notice that the Department of Health and Human Services has received the Bi-Annual Report required by its First Amended Certificate of Public Advantage with Mission Hospitals of Asheville, North Carolina. The Amended Certificate was issued October 8, 1998, under the North Carolina Hospital Cooperation Act.

Anyone wishing to review that report may contact Mr. Robert J. Fitzgerald, Director, Division of Facility Services, 2701 Mail Service Center, Raleigh NC, 27699-2701, or by telephone at (919) 855-3750.

Comments on the Report are invited any time on or prior to March 31, 2004.

TITLE 26 - OFFICE OF ADMINISTRATIVE HEARINGS

CHAPTER 3 - HEARINGS DIVISION

The Office of Administrative Hearings published a notice of text on a proposed amendment to rule 26 NCAC 03 .0107 in the NC Register on December 15, 2003, pages 997-998. A public hearing was held on Tuesday, February 17, 2004. Due to adverse weather conditions at the time of the hearing, the Director of the Office of Administrative Hearings is continuing the hearing and extending the comment period.

Public Hearing:

Date: March 17, 2004

Time: 10:00am

Location: Lee House, 422 N Blount Street, Raleigh, NC 27601

Comment period is extended to March 17, 2004

Written comments may be submitted to Julian Mann, Director of the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714; fax: 919.733.3462; or email: julian.mann@ncmail.net.

Note from the Codifier: The notices published in this Section of the NC Register include the text of proposed rules. The agency must accept comments on the proposed rule(s) for at least 60 days from the publication date, or until the public hearing, or a later date if specified in the notice by the agency. If the agency adopts a rule that differs substantially from a prior published notice, the agency must publish the text of the proposed different rule and accept comment on the proposed different rule for 60 days.

Statutory reference: G.S. 150B-21.2.

TITLE 01 – DEPARTMENT OF ADMINISTRATION

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Administration, State Energy Office intends to adopt the rules cited as 01 NCAC 41B .0101-.0104, .0301-.0307, .0401-.0405, .0501-.0511, .0701-.0702, .0901.

Proposed Effective Date: July 1, 2004

Public Hearing:

Date: March 19, 2004

Time: 3:00-5:00 p.m.

Location: Auditorium/NC Archives and History/State Library Building, 109 East Jones St., Raleigh, NC

Reason for Proposed Action: Legislation enacted S.L. 2001-616, s. 1-8; S.L. 2003-138, s. 1-3.

Procedure by which a person can object to the agency on a proposed rule: Written objections may be submitted to the Director of the State Energy Office. Objections will be received by mail, delivery service, hand delivery or facsimile transmission. Objections may be directed to Larry Shirley, Director, NC State Energy Office, 1340 Mail Service Center, Raleigh, NC 27699-1340 or 1830A Tillery Place, Raleigh, NC 27604.

Written comments may be submitted to: Larry Shirley, Director, NC State Energy Office, 1340 Mail Service Center, Raleigh, NC 27699-1340, (919) 733-2230, fax (919) 733-2953, and email larry.shirley@ncmail.net.

Comment period ends: April 30, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 41 – STATE ENERGY OFFICE

SUBCHAPTER 41B – GUARANTEED ENERGY SAVINGS CONTRACTS

SECTION .0100 – GENERAL PROVISIONS

01 NCAC 41B .0101 RESPONSIBILITY

The Department of Administration is responsible for adopting rules as specified in G.S. 143-64.17F as well as compiling data and providing information as specified in G.S. 143-64.17H.

Authority G.S. 143-64.17A(c1); 143-64.17F; 143-64.17H.

01 NCAC 41B .0102 SCOPE

This Subchapter shall apply to State governmental units engaging in guaranteed energy savings contracts as defined in G.S. 143-64.17(7).

Authority G.S. 143-64.17A(c1); 143-64.17F; 143-64.17H.

01 NCAC 41B .0103 RULE MAKING AUTHORITY

Authority for these Rules is G.S. 143-64.17F.

Authority G.S. 143-64.17A(c1); 143-64.17F; 143-64.17H.

01 NCAC 41B .0104 DEFINITIONS

For the purposes of this Chapter, the following definitions apply:

- (1) Terms used herewithin that are defined in G.S. 143-64.17 shall assume the definition in G.S. 143-64.17.
- (2) "Agency." A North Carolina State governmental unit that is soliciting, through a Request for Proposals (RFP), to enter into a guaranteed energy savings contract.
- (3) "Annual reconciliation statement." A report disclosing shortfalls or surplus between guaranteed energy and operational savings specified in the guaranteed energy savings contract and actual energy and operational savings incurred during each 12 month term commencing from the time that the energy conservation measures became fully operational.
- (4) "Contract." A guaranteed energy savings contract.

- (5) "Offer." The response to an RFP. Coterminal to a "bid" or "proposal."
- (6) "Investment grade audit" or "investment grade analysis." A detailed cost-benefit analysis of energy efficiency investments including a review of potential cost savings through operation and/or maintenance changes.
- (7) "Life-cycle cost analysis." A method for estimating the total cost of an energy-using component or building over its useful life, including cost factors such as purchase price, or construction, renovation, or leasing costs, energy use, maintenance, interest, and inflation.
- (8) "Measurement and verification review." An examination of energy measures installed under each contract, using specific methodology to measure the operation of energy-using systems before and after change, to verify the performance and savings of the installed equipment.
- (9) "Qualified provider." A person, business, or organization experienced in the design, implementation, and installation of energy conservation measures and determined by the administering and contracting agencies to have the capability in all respects to fully perform the contract requirements.

- may change from one RFP to another RFP from an agency based upon the particular needs of that agency.
- (g) Solicitation documents shall stipulate that employee or time savings cannot be included in the offer unless a position is eliminated as a result of contract implementation.
- (h) Solicitation documents shall stipulate that the qualified provider is responsible for all costs incurred in preparing the initial proposal.
- (i) Solicitation documents shall stipulate that the contractor cannot include costs or allowances for contingencies in the contract.
- (j) Solicitation documents may include a three-year history of usage and billing for all utilities for the facilities subject to the proposal.

Authority G.S. 143-64.17F; 143-64.17H.

01 NCAC 41B .0303 TREASURER'S COST ESTIMATE OF FINANCING

Agencies shall obtain an estimate of financing cost from the Director of Debt Management, Office of the Treasurer. This estimate shall not be binding upon the State and is subject to change by the Office of the Treasurer. The Office of the Treasurer may reject any potential contract if the actual cost of financing has exceeded the estimated cost of financing when the contract is submitted to the Office of the Treasurer for approval.

Authority G.S. 143-64.17F.

01 NCAC 41B .0304 GENERAL FUND PREFERENCE

- (a) The agency shall give preference to projects where the energy costs are paid through General Fund appropriations as compared to receipts or federal funds or other sources. This preference shall be stipulated in the solicitation documents.
- (b) Solicitation documents shall include, when feasible, a breakdown of the source of funds for energy costs and shall direct the vendors to break down savings by source of funds if the aforementioned information is included in the solicitation document.
- (c) The Council of State may give preference to projects where the energy costs are paid through General Fund Appropriations as compared to receipts or federal funds or other sources.

Authority G.S. 143-64.17F; 143-64.17H.

01 NCAC 41B .0305 PROHIBITION ON FEDERAL FUNDS

The agency shall not solicit proposals for projects that include payment from federal funds unless the agency has obtained, and includes in both the solicitation and contract, documentation from the Federal Government or the Office of State Controller stating that the use of federal funds for payment of the contract is authorized.

Authority G.S. 143-64.17F.

01 NCAC 41B .0306 ADVERTISEMENT REQUIREMENTS

In addition to advertising requirements stated in G.S. 143-64.17A(a), agencies shall list notification of the solicitation on

Authority G.S. 143-64.17A(c1); 143-64.17F; 143-64.17H.

SECTION .0300 – SOLICITATIONS

01 NCAC 41B .0301 NORTH CAROLINA PRODUCTS

Where quality and availability allow, specifications shall be based on products manufactured and services available in North Carolina. This special interest in North Carolina products is intended to encourage and promote their use, but shall not be exercised to the exclusion of other products or to prevent fair and open competition.

Authority G.S. 143-64.17F.

01 NCAC 41B .0302 SOLICITATION DOCUMENTS

- (a) Agencies shall solicit for guaranteed energy savings contracts through a Request for Proposal (RFP).
- (b) Agencies may use the RFP template available on the home page of the State Energy Office.
- (c) Solicitation documents shall include a Treasurer's estimated cost of financing.
- (d) Solicitation documents may allow for qualified provider or third party financing.
- (e) Solicitation documents may include a copy of the Facilities Condition Assessment Program (FCAP) report covering part or all of the facilities subject to the solicitation.
- (f) Solicitation documents shall state the evaluation criteria specified by G.S. 143-64.17A (b) and (d) as well as those in this Chapter. The documents shall also state the criteria weighting defined by the agency for each particular project. Weighting

the State Energy Office's home page at <http://www.energy.net> and shall include in the notification instructions on how to obtain the complete solicitation.

Authority G.S. 143-64.17F.

01 NCAC 41B .0307 CONFERENCES/SITE VISITS
Agencies may conduct vendor conferences and site visits before the Request for Proposals closing date.

Authority G.S. 143-64.17F.

SECTION .0400 - PRECERTIFICATION OF PROVIDERS

01 NCAC 41B .0401 INFORMATION REQUIRED FOR PRECERTIFICATION

Organizations may establish capability to provide services under performance contracts with state agencies by providing, as a minimum, the following information to the State Energy Office:

- (1) past experience with energy performance contracting with a minimum of three years operation and completed installation of a minimum of three projects;
- (2) performance contracting experience and resumes of key individuals expected to work on North Carolina projects including a minimum of one professional engineer licensed in North Carolina;
- (3) summary information, with client contact information, on all performance contracting projects in North Carolina during the previous five years listing only completed projects with at least one year in repayment;
- (4) summary information, with client contact information, on all performance contracts with any state government agencies in the United States with a maximum of five projects for each of the previous five years;
- (5) summary information, with client contact information, on any performance contracting projects which resulted in the company paying energy costs to clients;
- (6) summary of the history and operation of the business and organization, including volume, bonding capacity and type of clients; and
- (7) financial statements of the performance contracting organization and (if applicable) parent company for the previous two years.

Additional information may be required for specific project needs or at the later discretion of the State Energy Office. Other factors including integrity, reliability, and working relationship may be considered.

Authority G.S. 143-64.17F.

01 NCAC 41B .0402 PRECERTIFICATION EVALUATION

Organizations may present information required for precertification to the State Energy Office at time periods set by the State Energy Office with a request for consideration for

inclusion as a precertified entity. The State Energy Office shall offer a precertification period for providers at three-year intervals.

Authority G.S. 143-64.17F.

01 NCAC 41B .0403 CONTESTING PRECERTIFICATION

If the State Energy Office denies an organization's request for precertification, a written appeal from the organization may be provided by the organization within 60 days after date of notification of the denial. A letter appealing the decision may be filed with:

Director, State Energy Office
North Carolina Department of Administration
Mail Service Center 1340
Raleigh, North Carolina 27699-1340

In the event that an organization wishes to contest the case further, contested case hearings are available as provided in G.S. 150B, and petitions for contested case hearings shall be filed in accordance with the provisions of that Chapter.

Authority G.S. 143-64.17F.

01 NCAC 41B .0404 PUBLISHED LIST OF PRECERTIFIED ENTITIES

Organizations precertified by the State Energy Office to provide services under performance contracts may be included on a list available on the Website of the State Energy Office <http://www.energync.net>.

Authority G.S. 143-64.17F.

01 NCAC 41B .0405 PRECERTIFIED ENTITY RESTRICTION

Only precertified organizations may enter into a performance contract with a state governmental agency.

Authority G.S. 143-64.17F.

SECTION .0500 - EVALUATION, SELECTION, AND AWARD

01 NCAC 41B .0501 LATE OFFERS, MODIFICATIONS, OR WITHDRAWALS

No late offer, late modification, or late withdrawal shall be considered unless received before contract award, and the offer, modification, or withdrawal would have been timely but for the action or inaction of agency personnel directly serving the bid process. The offeror shall have his offer delivered on time, regardless of the mode of delivery used, including the U.S. Postal Service or any other delivery services available.

Authority G.S. 143-64.17F.

01 NCAC 41B .0502 EXTENSION OF ACCEPTANCE TIME

When in the public interest, companies may be requested to extend the time offered for the acceptance of offers.

Authority G.S. 143-64.17F.

01 NCAC 41B .0503 ERROR/CLARIFICATION

When an offer contains an obvious error or otherwise where an error is suspected, the circumstances may be investigated and then may be considered and acted upon. Any action taken shall not prejudice the rights of the public or other offering companies. Where offers are submitted substantially in accordance with the request for response document but are not entirely clear as to intent or to some particular fact or where there are other ambiguities, clarification may be sought and accepted provided that, in doing so, no change is permitted in prices.

Authority G.S. 143-64.17F.

01 NCAC 41B .0504 BASIS FOR REJECTION

In soliciting offers, any and all offers received may be rejected. Basis for rejection shall include, but are not limited to, the offer being deemed unsatisfactory as to the quantity, quality, delivery, price or service offered; the offer not complying with conditions in the RFP or with the intent of the proposed contract; lack of competitiveness by reason of collusion or knowledge that reasonable available competition was not received; error(s) in specifications or indication that revision(s) would be to the state's advantage; cancellation of or changes in the intended project or other determination that the proposed requirement is no longer needed; limitation or lack of available funds; circumstances which prevent determination of the lowest responsible or most advantageous offer; or any determination that rejection would be to the best interest of the state.

Authority G.S. 143-64.17F.

01 NCAC 41B .0505 PUBLIC RECORD

Action in rejecting offers shall be made a matter of record.

Authority G.S. 143-64.17F.

01 NCAC 41B .0506 RECIPROCAL PREFERENCE

(a) 01 NCAC 05B .1522(a), (b), (c), (d), and (g) shall apply to this Subchapter.

(b) If the use of the reciprocal preference changes which bidder is the low bidder, the agency may waive the use of the reciprocal preference, after consultation with the Council of State, and after taking into consideration such factors as, competition, price, product origination, and available resources.

Authority G.S. 143-64.17F.

01 NCAC 41B .0507 PROPOSAL EVALUATION

(a) Evaluation criteria shall include those specified by G.S. 143-64.17A(b) and (d).

(b) Evaluation criteria for the purpose shall also include the following:

- (1) Life cycle cost analysis as defined in GS 143-64-15;
- (2) Certification by a registered engineer that the measurement and verification protocol

presented in the proposal is capable of measuring actual or projected savings;

(3) A process of annual third party measurement and verification of savings in accordance with the pre-defined and certified protocol found in 01 NCAC 41B .0510. The cost of this process shall be included in the total cost of the contract; and

(4) The total cost based on Office of Treasurer cost of financing estimate and cost based on Qualified Provider or third party financing in the response.

Authority G.S. 143-64.17F; 143-64.17H.

01 NCAC 41B .0508 PRE-AWARD REPORTS

Before the award of a guaranteed energy savings contract, the qualified provider shall provide a report, as part of its proposal, which shall be available for public inspection, summarizing estimates of all costs of installation, maintenance, repairs and debt service and estimates of the amounts by which energy or operating costs will be reduced.

Authority G.S. 143-64.17F.

01 NCAC 41B .0509 TABULATIONS AND ABSTRACTS

Telephone, electronic, and written requests for detailed or written tabulations and abstracts of offers shall not be honored.

Authority G.S. 143-64.17F.

01 NCAC 41B .0510 MEASUREMENT AND VERIFICATION

Any guaranteed energy and operational savings shall be determined by using one of the measurement and verification methodologies listed in the United States Department of Energy's "Measurement and Verification Guideline for Energy Savings Performance Contracting," the "International Performance Measurement and Verification Protocol," or "ASHRAE 14-2002." If due to existing data limitations or the nonconformance of specific project characteristics, none of the methods listed in either the United States Department of Energy's "Measurement and Verification Guideline for Energy Savings Performance Contracting," the "International Performance Measurement and Verification Protocol," or "ASHRAE 14-2002" is sufficient for measuring guaranteed savings, the qualified provider shall develop an alternate method that is compatible with one of the three and mutually agreeable with the agency.

Authority G.S. 143-64.17F; 143-64.17H.

01 NCAC 41B .0511 CONTRACT EXECUTION

Contract execution by the successful companies shall occur upon contract award and before the agency sends the documents to the Office of State Budget and Management. Contracts shall stipulate that the execution is contingent upon approval and financing. Upon execution, the agency shall forward the documents to the Capital Improvement Section of the Office of

State Budget and Management with a copy to the Director of the State Energy Office.

Authority G.S. 143-64.17F.

SECTION .0700 – APPROVAL

01 NCAC 41B .0701 OFFICE OF STATE BUDGET AND MANAGEMENT CERTIFICATION

The Office of State Budget and Management (OSBM) shall certify, within 10 business days of receipt, expected availability of resources and set up appropriate reserve accounts or other accounting procedures to transfer funds from the agency to the Office of the Treasurer for payment. Upon certification, the OSBM shall forward the documentation to the Office of the Treasurer's Director of Debt Management.

Authority G.S. 143-64.17F.

01 NCAC 41B .0702 OFFICE OF THE TREASURER APPROVAL

The Office of the Treasurer shall, within 10 business days of receipt, review the documentation and select the desired financing option. Upon review and selection, the Treasurer shall forward the documentation to the Secretary of the Department of Administration.

Authority G.S. 143-64.17F.

SECTION .0900 - POST-APPROVAL PROCEDURES

01 NCAC 41B .0901 ANNUAL REPORTS AND INSPECTIONS

(a) The State Energy Office may inspect any and all documentation and facilities it deems appropriate at the agency to determine the effectiveness of the guaranteed energy savings contract and to provide information to the Council of State and the General Assembly on the effectiveness of the contract.

(b) Agencies failing to provide documentation to the State Energy Office as requested, shall be reported to the Council of State and shall be prohibited from engaging in further energy savings contracts until the deficient documentation is provided to the State Energy Office.

(c) Requested information, by definition, includes timely submission of the "Annual Report of Savings Report" located on the State Energy Office homepage.

Authority G.S. 143-64.17F; 143-64.17H.

TITLE 10A – HEALTH AND HUMAN SERVICES

Notice is hereby given in accordance with G.S. 150B-21.2 that the DHHS and Commission for MH/DD/SAS intends to adopt the rules cited as 10A NCAC 27I .0101-.0102, .0201-.0210, .0301-.0308 and amend the rules cited as 10A NCAC 27G .0101, .0103, .0201 and repeal the rules cited as 10A NCAC 27G .0205, .0501-.0506, .0601-.0608, .0701-.0707.

Proposed Effective Date: July 1, 2004

Instructions on How to Demand a Public Hearing: (must be requested in writing within 15 days of notice): A person may demand a public hearing on the proposed rules by submitting a request in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018, by March 16, 2004.

Reason for Proposed Action:

10A NCAC 27I .0101-.0102, .0201-.0210, .0301-.0308 are necessary as a result of Session Law 2001-437 (Mental Health Reform Legislation). Additionally, the proposed adoptions are necessary as a result of Session Law 2002-164 (SB-163).

10A NCAC 27G .0101, .0103, .0201 are necessary as a result of Session Law 2001-437 (Mental Health Reform Legislation), and modify current rules to apply only to services and facilities and agencies providing services.

10A NCAC 27G .0205, .0501-.0506, .0601-.0608, .0701-.0707 are necessary as a result of Session Law 2001-437 (Mental Health Reform Legislation), and modify current rules to apply only to services and facilities and agencies providing services.

Procedure by which a person can object to the agency on a proposed rule: The objection, reasons for the objection and the clearly identified portion of the rule to which the objection pertains, may be submitted in writing to Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 27699-3018.

Written comments may be submitted to: Cindy Kornegay, 3018 Mail Service Center, Raleigh, NC 276099-3018, Phone (919)733-7011, Fax (919)733-9455, email cindy.kornegay@ncmail.net.

Comment period ends: April 30, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
Local
Substantive (≥\$3,000,000)
None

SUBCHAPTER 27G – PROVIDER REQUIREMENTS AND

LICENSURE RULES FOR MENTAL HEALTH,
DEVELOPMENTAL DISABILITIES, AND SUBSTANCE
ABUSE FACILITIES AND SERVICES

SECTION .0100 - GENERAL INFORMATION

10A NCAC 27G .0101 SCOPE

(a) This Subchapter sets forth rules for mental health, developmental disabilities and substance abuse ~~services, services~~ and the facilities and agencies providing such ~~services, services,~~ and the area programs administering such services within the scope of G.S. 122C.

(b) These Rules and the applicable statutes govern licensing of ~~facilities, facilities, and accreditation of programs and services.~~

(1) ~~Facilities are licensed by the Division of Facilities Services (DFS) in accordance with G.S. 122 and these Rules. Licensable facilities as defined in G.S. 122C-3 shall comply with these Rules to receive and maintain the licenses required by the statute.~~

(2) ~~Area programs are accredited by the Division of Mental Health, Development Disabilities, and Substance Abuse Services (DMH/DD/SAS) to provide services in accordance with these Rules. Area programs shall comply with the rule to maintain accreditation of their programs and services.~~

(c) Unless otherwise provided in these Rules, when a facility ~~or area program~~ contracts with a person to provide services within the scope of these Rules, the facility ~~or area program~~ shall require that the contract services be provided in accordance with these Rules, and that the service provider be licensed if it is a licensable facility.

(d) These Rules are organized in the following manner:

(1) general rules governing mental health, developmental disabilities and substance abuse services are contained in Sections .0100 through .0900. These Rules are "core" rules that, unless otherwise specified, apply to all ~~programs, services, and facilities, facilities; and~~

(2) ~~Service specific licensure category - specific~~ rules are contained in Sections .1000 through .6900. Generally, ~~the rules related to service specific facilities and services are grouped; are~~ grouped as follows:

(A) .1000 - .1900: ~~Mental Health~~ mental health;

(B) .2000 - .2900: ~~Developmental Disabilities~~ developmental disabilities;

(C) .3000 - .4900: ~~Substance Abuse~~ substance abuse; and

(D) .5000 - .6900: ~~for More Than One Disability.~~ licensure category applicable for more than one disability.

~~(e)(3) Service specific licensure category-specific~~ rules may modify or expand the requirements of core rules.

~~(e)(f) Failure to comply with these Rules shall be grounds for DFS to deny or revoke a license, license or for DMH/DD/SAS to deny or revoke area program service accreditation.~~

Authority G.S. 122C-23; 122C-24; 122C-26; 143B-147.

10A NCAC 27G .0103 GENERAL DEFINITIONS

(a) This Rule contains definitions that apply to all of the rules in this Subchapter.

(b) Unless otherwise indicated, the following terms shall have the meanings specified:

~~(1) "Accreditation" means the authorization granted to an area program by DMH/DD/SAS, as a result of demonstrated compliance with the standards established in these Rules, to provide specified services.~~

~~(2)(1) "Administering medication" means direct application of a drug to the body of a client by injection, inhalation, ingestion, or any other means.~~

~~(3)(2) "Adolescent" means a minor from 13 through 17 years of age.~~

~~(4)(3) "Adult" means a person 18 years of age or older or a person under 18 years of age who has been married or who has been emancipated by a court of competent jurisdiction or is a member of the armed forces.~~

~~(5)(4) "Alcohol abuse" means psychoactive substance abuse which is a residual category for noting maladaptive patterns of psychoactive substance use that have never met the criteria for dependence for that particular class of substance and which continues despite adverse consequences. The criteria for alcohol abuse delineated in the DSM IV is incorporated by reference.~~

~~(6)(5) "Alcohol dependence" means psychoactive substance dependence which is a cluster of cognitive behavioral, and physiologic symptoms that indicate that a person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences. The criteria for alcohol dependence delineated in the DSM IV is incorporated by reference.~~

~~(7) "Area program" means a legally constituted public agency providing mental health, developmental disabilities and substance abuse services for a catchment area designated by the Commission. For purposes of these Rules, the term "area program" means the same as "area authority" as defined in G.S. 122C-3.~~

~~(8) "Assessment" means a procedure for determining the nature and extent of the need for which the individual is seeking service.~~

~~(9)(6) "Child" means a minor from birth through 12 years of age.~~

~~(10)(7) "Children and adolescents with emotional disturbance" means minors from birth through~~

- 17 years of age who have behavioral, mental, or emotional problems which are severe enough to significantly impair their ability to function at home, in school, or in community settings.
- (11)(8) "Client" means the same as defined in G.S. 122C-3. Unless otherwise specified, when used in the context of consent, consultation, or other function for a minor or for an adult who lacks the capacity to perform the required function, the term "client" shall include the legally responsible person.
- (12)(9) "Client record" means a documented account of all services provided to a client.
- (13)(10) "Commission" means the same as defined in G.S. 122C-3.
- (14)(11) "Contract agency" means a legally constituted entity with which the ~~area program provider~~ contracts for a service exclusive of intermittent purchase of service for an individually identified client.
- (15)(12) "Day/night service" means a service provided on a regular basis, in a structured environment that is offered to the same individual for a period of three or more hours within a 24-hour period.
- (16)(13) "Detoxification" means the physiological withdrawal of an individual from alcohol or other drugs in order that the individual can participate in rehabilitation activities.
- (17)(14) "DFS" means the Division of Facility Services, 701 Barbour Drive, Raleigh, N.C. 27603.
- (18)(15) "Direct care staff" means an individual who provides active direct care, treatment, rehabilitation or habilitation services to clients.
- (19)(16) "Division Director" means the Director of DMH/DD/SAS.
- (20)(17) "DMH/DD/SAS" means the Division of Mental Health, Developmental Disabilities and Substance Abuse Services, 3001 Mail Service Center, Raleigh, NC 27699-3001.
- (21)(18) "Documentation" means provision of written or electronic, dated and authenticated evidence of the delivery of client services or compliance with statutes or rules, e.g., entries in the client record, policies and procedures, minutes of meetings, memoranda, reports, schedules, notices and announcements.
- (22)(19) "Drug abuse" means psychoactive substance abuse which is a residual category for noting maladaptive patterns of psychoactive substance use that have never met the criteria for dependence for that particular class of substance which continues despite adverse consequences. The criteria for drug abuse delineated in the DSM IV is incorporated by reference.
- (23)(20) "Drug dependence" means psychoactive substance dependence which is a cluster of cognitive behavioral, and physiologic symptoms that indicate that a person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences. The criteria for drug dependence delineated in the DSM IV is incorporated by reference.
- (24)(21) "DSM IV" means the publication of that title published by the American Psychiatric Association, 1400 K Street, N.W., Washington, D.C. 20005 at a cost of thirty nine dollars and ninety-five cents (\$39.95) for the soft cover edition and fifty four dollars and ninety-five cents (\$54.95) for the hard cover edition. Where used in these definitions, incorporation by reference of DSM IV includes subsequent amendments and editions of the referenced material.
- (25)(22) "DWI" means driving while impaired, as defined in G.S. 20-138.1.
- (26) ~~"Evaluation" means an assessment service that provides for an appraisal of a client in order to determine the nature of the client's problem and his need for services. The services may include an assessment of the nature and extent of the client's problem through a systematic appraisal of any combination of mental, psychological, physical, behavioral, functional, social, economic, and intellectual resources, for the purposes of diagnosis and determination of the disability of the client, the client's level of eligibility, and the most appropriate plan, for services.~~
- (27)(23) "Facility" means the same as defined in G.S. 122C-3.
- (28) ~~"Foster parent" means an individual who provides substitute care for a planned period for a child when his own family or legal guardian cannot care for him; and who is licensed by the N.C. Department of Health and Human Services and supervised by the County Department of Social Services, or by a private program licensed or approved to engage in child care or child placing activities.~~
- (29)(24) "Governing body" means, in the case of a corporation, the board of ~~directors; directors in the case of an area authority, the area board;~~ and in all other cases, the owner of the facility.
- (30)(25) "Habilitation" means the same as defined in G.S. 122C-3.
- (31)(26) "Hearing" means, unless otherwise specified, a contested case hearing under G.S. 150B, Article 3.
- (32)(27) "Incident" means any happening which is not consistent with the routine operation of a facility or service or the routine care of a client and that is likely to lead to adverse effects upon a client.
- (33)(28) "Infant" means an individual from birth to one year of age.

- (34)(29) "Individualized education program" means a written statement for a child with special needs that is developed and implemented pursuant to 16 NCAC 2E .1500 (Rules Governing Programs and Services for Children with Special Needs) available from the Department of Public Instruction.
- (35)(30) "Inpatient service" means a service provided in a hospital setting on a 24-hour basis under the direction of a physician. The service provides continuous, close supervision for individuals with moderate to severe mental or substance abuse problems.
- (36)(31) "Legend drug" means a drug that cannot be dispensed without a prescription.
- (37)(32) "License" means a permit to operate a facility which is issued by DFS under G.S. 122C, Article 2.
- (38)(33) "Medication" means a substance recognized in the official "United States Pharmacopoeia" or "National Formulary" intended for use in the diagnosis, mitigation, treatment or prevention of disease.
- (39)(34) "Minor" means a person under 18 years of age who has not been married or who has not been emancipated by a decree issued by a court of competent jurisdiction or is not a member of the armed forces.
- (40)(35) "Operator" means the designated agent of the governing body who is responsible for the management of a licensable facility.
- (41)(36) "Outpatient service" means the same as periodic service.
- (42)(37) "Parent" means the legally responsible person unless otherwise clear from the context.
- (43)(38) "Periodic service" means a service provided on an episodic basis, either regularly or intermittently, through short, recurring visits for persons with mental illness, developmental disability or who are substance abusers.
- (44)(39) "Preschool age child" means a child from three to five years old.
- (45)(40) "Prevailing wage" means the wage rate paid to an experienced worker who is not disabled for the work to be performed.
- (46)(41) "Private facility" means a facility not operated by or under contract with an area program.
- (47)(42) "Provider" means an individual, agency or organization that provides mental health, developmental disabilities or substance abuse services.
- (48)(43) "Rehabilitation" means training, care and specialized therapies undertaken to assist a client to reacquire or maximize any or all lost skills or functional abilities.
- (49)(44) "Residential service," unless otherwise provided in these Rules, means a service provided in a 24-hour living environment in a non-hospital setting where room, board, and supervision are an integral part of the care, treatment, habilitation or rehabilitation provided to the individual.
- (50)(45) "School aged youth" means individuals from six through twenty-one years of age.
- (51) ~~"Screening" means an assessment service that provides for an appraisal of an individual who is not a client in order to determine the nature of the individual's problem and his need for services. The service may include an assessment of the nature and extent of the individual's problem through a systematic appraisal of any combination of mental, psychological, physical, behavioral, functional, social, economic, and intellectual resources, for the purposes of diagnosis and determination of the disability of the individual, level of eligibility, if the individual will become a client, and the most appropriate plan, if any, for services.~~
- (52)(46) "Secretary" means the Secretary of the Department of Health and Human Services or designee.
- (53)(47) "Service" means an activity or interaction intended to benefit another, with, or on behalf of, an individual who is in need of assistance, care, habilitation, intervention, rehabilitation or treatment.
- (54)(48) "Service plan" means the same as treatment/habilitation plan defined in this Section.
- (55)(49) "Staff member" means any individual who is employed by the facility.
- (56)(50) "State facility" means the term as defined in G.S. 122C.
- (57)(51) "Support services" means services provided to enhance an individual's progress in his primary treatment/habilitation program.
- (58)(52) "System of care" means a spectrum of community based mental health and other necessary services which are organized into a coordinated network to meet the multiple and changing needs of emotionally disturbed children and adolescents.
- (59)(53) "Toddler" means an individual from one through two years of age.
- (60)(54) "Treatment" means the process of providing for the physical, emotional, psychological and social needs of clients through services.
- (61)(55) "Treatment/habilitation plan" means a plan in which one or more professionals, privileged in accordance with the governing body's policy, working with the client and family members or other service providers, document which services will be provided and the goals, objectives and strategies that will be implemented to achieve the identified outcomes. A treatment plan may also be called a service plan.

~~(62)~~(56) "Twenty-four hour service" means a service which is provided to a client on a 24-hour continuous basis.

Authority G.S. 122C-3; 122C-26; 143B-147.

10A NCAC 27G .0201 GOVERNING BODY POLICIES

(a) The governing body responsible for each facility or service shall develop and implement written policies for the following:

- (1) delegation of management authority for the operation of the facility and services;
- (2) criteria for admission;
- (3) criteria for discharge;
- (4) admission assessments, including:
 - (A) who will perform the assessment; and
 - (B) time frames for completing assessment.
- (5) client record management, including:
 - (A) persons authorized to document;
 - (B) transporting records;
 - (C) safeguard of records against loss, tampering, defacement or use by unauthorized persons;
 - (D) assurance of record accessibility to authorized users at all times; and
 - (E) assurance of confidentiality of records.
- (6) screenings, which shall include:
 - (A) an assessment of the individual's presenting problem or need;
 - (B) an assessment of whether or not the facility can provide services to address the individual's needs; and
 - (C) the disposition, including referrals and recommendations;
- (7) quality assurance and quality improvement activities, including:
 - (A) composition and activities of a quality assurance and quality improvement committee;
 - (B) written quality assurance and quality improvement plan;
 - (C) methods for monitoring and evaluating the quality and appropriateness of client care, including delineation of client outcomes and utilization of services;
 - (D) professional or clinical supervision, including a requirement that staff who are not qualified professionals and provide direct client services shall be supervised by a qualified professional in that area of service;
 - (E) strategies for improving client care;
 - (F) review of staff qualifications and a determination made to grant treatment/habilitation privileges;
 - (G) review of all fatalities of active clients who were being served in ~~area~~ operated provider-operated or

contracted residential programs at the time of death;

- (H) adoption of standards that assure operational and programmatic performance meeting applicable standards of practice. For this purpose, "applicable standards of practice" means a level of competence established with reference to the prevailing and accepted methods, and the degree of knowledge, skill and care exercised by other practitioners in the field;
- (8) use of medications by clients in accordance with the rules in this Section;
- (9) reporting of any incident, unusual occurrence or medication error;
- (10) voluntary non-compensated work performed by a client;
- (11) client fee assessment and collection practices;
- (12) medical preparedness plan to be utilized in a medical emergency;
- (13) authorization for and follow up of lab tests;
- (14) transportation, including the accessibility of emergency information for a client;
- (15) services of volunteers, including supervision and requirements for maintaining client confidentiality;
- (16) areas in which staff, including nonprofessional staff, receive training and continuing education;
- (17) safety precautions and requirements for facility areas including special client activity areas; and
- (18) client grievance policy, including procedures for review and disposition of client grievances.

(b) Minutes of the governing body shall be permanently maintained.

Authority G.S. 122C-26; 143B-147.

10A NCAC 27G .0205 ASSESSMENT AND TREATMENT/HABILITATION OR SERVICE PLAN

~~(a) An assessment shall be completed for a client, according to governing body policy, prior to the delivery of services, and shall include, but not be limited to:~~

- ~~(1) the client's presenting problem;~~
- ~~(2) the client's needs and strengths;~~
- ~~(3) a provisional or admitting diagnosis with an established diagnosis determined within 30 days of admission, except that a client admitted to a detoxification or other 24 hour medical program shall have an established diagnosis upon admission;~~
- ~~(4) a pertinent social, family, and medical history; and~~
- ~~(5) evaluations or assessments, such as psychiatric, substance abuse, medical, and vocational, as appropriate to the client's needs.~~

~~(b) When services are provided prior to the establishment and implementation of the treatment/habilitation or service plan, hereafter referred to as the "plan," strategies to address the client's presenting problem shall be documented.~~

~~(c) The plan shall be developed based on the assessment, and in partnership with the client or legally responsible person or both, within 30 days of admission for clients who are expected to receive services beyond 30 days.~~

~~(d) The plan shall include:~~

- ~~(1) client outcome(s) that are anticipated to be achieved by provision of the service and a projected date of achievement;~~
- ~~(2) strategies;~~
- ~~(3) staff responsible;~~
- ~~(4) a schedule for review of the plan at least annually in consultation with the client or legally responsible person or both;~~
- ~~(5) basis for evaluation or assessment of outcome achievement; and~~
- ~~(6) written consent or agreement by the client or responsible party, or a written statement by the provider stating why such consent could not be obtained.~~

Authority G.S. 122C-26; 130A-144; 130A-152; 143B-147.

SECTION .0500 - AREA PROGRAM REQUIREMENTS

10A NCAC 27G .0501 REQUIRED SERVICES

Each area program shall provide or contract for the provision of the following services:

- ~~(1) Outpatient for Individuals of all Disability Groups;~~
- ~~(2) Emergency for Individuals of all Disability Groups;~~
- ~~(3) Consultation & Education for Individuals of all Disability Groups;~~
- ~~(4) Case Management for Individuals of all Disability Groups;~~
- ~~(5) Inpatient Hospital Treatment for Individuals Who Have Mental Illness or Substance Abuse Disorders;~~
- ~~(6) Psychosocial Rehabilitation for Individuals with Severe and Persistent Mental Illness or Partial Hospitalization Services for Individuals Who are Acutely Mentally Ill;~~
- ~~(7) Developmental Day Services for Preschool Children with or at Risk for Developmental Disabilities or Delays or Atypical Development;~~
- ~~(8) Adult Developmental and Vocational Programs (ADVP) for Individuals with Developmental Disabilities;~~
- ~~(9) Alcohol and Drug Education Traffic Schools (ADETS);~~
- ~~(10) Drug Education Schools (DES);~~
- ~~(11) Social Setting, Nonhospital Medical, or Outpatient Detoxification Services for Individuals With Substance Abuse Disorders;~~

~~(12) Forensic Screening and Evaluation for Individuals of all Disability Groups; and~~

~~(13) Early Childhood Intervention Services for Children with or at Risk for Developmental Delay, Disabilities, or Atypical Development and Their Families (ECIS).~~

Authority G.S. 143B-147.

10A NCAC 27G .0502 AREA PROGRAM/HOSPITAL AGREEMENT

~~(a) Each area program shall make provisions for inpatient services for individuals with mental illness or substance abuse disorders, including access for both voluntary and involuntary admissions. The area program may provide these services, develop written agreements, or have written referral procedures to a general hospital or private hospital, to ensure that both voluntary and involuntary clients shall have access to needed inpatient services.~~

~~(b) A written agreement between the area program and a general hospital or private hospital shall specify at least the following:~~

- ~~(1) criteria for service availability for area program patients;~~
- ~~(2) responsibilities of both parties related to admission, treatment, and discharge of patients;~~
- ~~(3) parties responsible for the operation of the inpatient service;~~
- ~~(4) responsibilities of each party regarding continuity of service for patients discharged from the inpatient service; and~~
- ~~(5) provision for the exchange of information.~~

~~(c) When services are provided out of state, the written agreement shall be approved by DMH/DD/SAS. DMH/DD/SAS shall review the agreement to ensure compliance with Paragraph (b) of this Rule and to determine that comparable services suitable to meet the client's needs are not available in the state.~~

Authority G.S. 143B-147.

10A NCAC 27G .0503 STAFF REQUIREMENTS

Each area program shall employ or contract for the services of a:

- ~~(1) psychiatrist;~~
- ~~(2) licensed psychologist;~~
- ~~(3) psychiatric nurse;~~
- ~~(4) psychiatric social worker;~~
- ~~(5) certified alcoholism counselor and certified drug abuse counselor, or at least one certified substance abuse counselor;~~
- ~~(6) qualified developmental disabilities professional; and~~
- ~~(7) qualified client record manager.~~

Authority G.S. 122C-121; 122C-154; 122C-155; 143B-147.

10A NCAC 27G .0504 CLIENT RIGHTS COMMITTEE

~~(a) The area board shall bear ultimate responsibility for the assurance of client rights.~~

~~(b) Each area board shall establish at least one Client Rights Committee, and may require that the governing body of a~~

contract agency also establish a Client Rights Committee. The area board shall also develop and implement policy which delineates:

- (1) composition, size, and method of appointment of committee membership;
- (2) training and orientation of committee members;
- (3) frequency of meetings, which shall be at least quarterly;
- (4) rules of conduct for meetings and voting procedures to be followed;
- (5) procedures for monitoring the effectiveness of existing and proposed methods and procedures for protecting client rights;
- (6) requirements for routine reports to the area board regarding seclusion, restraint and isolation time out; and
- (7) other operating procedures.

(c) The area board established Client Rights Committee shall oversee, for area operated services and area contracted services, implementation of the following client rights protections:

- (1) compliance with G.S. 122C, Article 3;
- (2) compliance with the provisions of 10A NCAC 27C, 27D, 27E, and 27F governing the protection of client rights, and 10A NCAC 26B governing confidentiality;
- (3) establishment of a review procedure for any of the following which may be brought by a client, client advocate, parent, legally responsible person, staff or others:
 - (A) client grievances;
 - (B) alleged violations of the rights of individuals or groups, including cases of alleged abuse, neglect or exploitation;
 - (C) concerns regarding the use of restrictive procedures; or
 - (D) failure to provide needed services that are available in the area program.

(d) Nothing herein stated shall be interpreted to preclude or usurp the authority of a county Department of Social Services to conduct an investigation of abuse, neglect, or exploitation or the authority of the Governor's Advocacy Council for Persons with Disabilities to conduct investigations regarding alleged violations of client rights.

(e) If the area board requires a contract agency to establish a Client Rights Committee, that Committee shall carry out the provisions of this Rule for the contract agency.

(f) Each Client Rights Committee shall be composed of a majority of non-area board members, with a reasonable effort made to have all applicable disabilities represented, with consumer and family member representation. Staff who serve on the committee shall not be voting members.

(g) The Client Rights Committee shall maintain minutes of its meetings and shall file at least an annual report of its activities with the area board. Clients shall not be identified by name in minutes or in written or oral reports.

(h) The area board Client Rights Committee shall review grievances regarding incidents which occur within a contract agency after the governing body of the agency has reviewed the

incident and has had opportunity to take action. Incidents of actual or alleged Client Rights violations, the facts of the incident, and the action, if any, made by the contract agency shall be reported to the area director within 30 days of the initial report of the incident, and to the area board within 90 days of the initial report of the incident.

Authority G.S. 122C-64; 143B-147.

10A NCAC 27G .0504 CLIENT RIGHTS COMMITTEE

(a) The area board shall bear ultimate responsibility for the assurance of client rights.

(b) Each area board shall establish at least one Client Rights Committee, and may require that the governing body of a contract agency also establish a Client Rights Committee. The area board shall also develop and implement policy which delineates:

- (1) composition, size, and method of appointment of committee membership;
- (2) training and orientation of committee members;
- (3) frequency of meetings, which shall be at least quarterly;
- (4) rules of conduct for meetings and voting procedures to be followed;
- (5) procedures for monitoring the effectiveness of existing and proposed methods and procedures for protecting client rights;
- (6) requirements for routine reports to the area board regarding seclusion, restraint and isolation time out; and
- (7) other operating procedures.

(c) The area board established Client Rights Committee shall oversee, for area operated services and area contracted services, implementation of the following client rights protections:

- (1) compliance with G.S. 122C, Article 3;
- (2) compliance with the provisions of 10A NCAC 27C, 27D, 27E, and 27F governing the protection of client rights, and 10A NCAC 26B governing confidentiality;
- (3) establishment of a review procedure for any of the following which may be brought by a client, client advocate, parent, legally responsible person, staff or others:
 - (A) client grievances;
 - (B) alleged violations of the rights of individuals or groups, including cases of alleged abuse, neglect or exploitation;
 - (C) concerns regarding the use of restrictive procedures; or
 - (D) failure to provide needed services that are available in the area program.

(d) Nothing herein stated shall be interpreted to preclude or usurp the authority of a county Department of Social Services to conduct an investigation of abuse, neglect, or exploitation or the authority of the Governor's Advocacy Council for Persons with Disabilities to conduct investigations regarding alleged violations of client rights.

~~(e) If the area board requires a contract agency to establish a Client Rights Committee, that Committee shall carry out the provisions of this Rule for the contract agency.~~

~~(f) Each Client Rights Committee shall be composed of a majority of non-area board members, with a reasonable effort made to have all applicable disabilities represented, with consumer and family member representation. Staff who serve on the committee shall not be voting members.~~

~~(g) The Client Rights Committee shall maintain minutes of its meetings and shall file at least an annual report of its activities with the area board. Clients shall not be identified by name in minutes or in written or oral reports.~~

~~(h) The area board Client Rights Committee shall review grievances regarding incidents which occur within a contract agency after the governing body of the agency has reviewed the incident and has had opportunity to take action. Incidents of actual or alleged Client Rights violations, the facts of the incident, and the action, if any, made by the contract agency shall be reported to the area director within 30 days of the initial report of the incident, and to the area board within 90 days of the initial report of the incident.~~

Authority G.S. 122C-64; 143B-147.

10A NCAC 27G .0505 NOTIFICATION PROCEDURES FOR PROVISION OF SERVICES

~~(a) If an area program plans to operate or contract for a service located within the catchment area of another area program, the Director of the area program that plans to operate or contract for the service shall notify the Director of the area program in which the service is to be located prior to the provision of the service.~~

~~(b) The notification shall be in writing and shall include the following:~~

- ~~(1) name of the provider;~~
- ~~(2) service to be provided; and~~
- ~~(3) anticipated dates of service.~~

~~In the event of an emergency, notification prior to the provision of service may be by telephone with written notification occurring the next working day.~~

~~(c) Should a dispute resolution concerning such service as described in Paragraph (a) of this Rule be necessary, the Division Director shall arbitrate a resolution between the respective area programs.~~

~~(d) If the Division plans to operate or contract for a service in an area program, the Division Director shall notify the Director of the area program in which the service is to be located, prior to the provision of the service, according to the procedures set forth in Paragraph (b) of this Rule.~~

Authority G.S. 122C-113; 122C-141(b); 122C-142(a); 122C-191(d).

10A NCAC 27G .0506 COMMUNICATION PROCEDURES FOR OUT OF HOME COMMUNITY PLACEMENT

~~(a) The purpose of this Rule is to address communication procedures concerning out of the home community placements for children and adolescents. This includes children and adolescents served through the area authority or county program developmental disabilities, mental health and substance abuse~~

~~services system and those children and adolescents residing in ICF-MR facilities in their catchment areas.~~

~~(b) Area authority or county program representative(s) shall meet with the parent(s) or legal guardian and other representatives involved in the care and treatment of the child or adolescent, including local Department of Social Services (DSS), Local Education Agency (LEA) and criminal justice agency, to make service planning decisions prior to the placement of the child and adolescent out of the home community. The area authority or county program may use existing child and family teams for this purpose.~~

~~(c) The home community area authority or county program shall be responsible for notification of placement. The notification of placement shall be made via e-mail, fax or hard copy within three business days after out of home placement occurs. In case of an emergency, notification may be by telephone with written notification occurring the next day. The following entities shall be notified:~~

- ~~(1) legal guardian;~~
- ~~(2) other representatives involved in the care and treatment of the child or adolescent;~~
- ~~(3) host community provider; and~~
- ~~(4) host community representatives (may include the court counselor, county DSS, regional Children's Developmental Services Agency (CDSA) or the LEA.~~

~~(d) Notification shall be completed on a form provided by the Secretary, to include the following information:~~

- ~~(1) child or adolescent information: name, date of birth, grade, identification number, social security number, date of placement out of home community;~~
- ~~(2) parent/legal guardian information: name, address, telephone number;~~
- ~~(3) home and host DSS information: county; contact person name, address, telephone number;~~
- ~~(4) home and host area authority/county program information: name of program; contact person name, address, telephone number;~~
- ~~(5) home and host school information: school name, address, telephone number, principal, special education program administrator; and~~
- ~~(6) person completing notification form information: name, date form completed, agency, address and telephone number.~~

Authority G.S. 122C-113; 122C-141(b); 143B-139.1; 150B-21.1.

SECTION .0600 - AREA AUTHORITY OR COUNTY PROGRAM MONITORING OF FACILITIES AND SERVICES

10A NCAC 27G .0601 SCOPE

~~This Section governs area authority or county program monitoring of the provision of mental health, developmental disabilities or substance abuse services (services) in the area authority or county program's catchment area. Area authority or county program monitoring shall include:~~

- (1) receiving and reviewing critical incident reports and identifying trends based on such reports;
- (2) receiving, mediating, investigating or referring complaints concerning the provision of services; or
- (3) monitoring of providers of services to improve the quality of care received by clients.

- (j) any fire or equipment failure that places the health or safety of a client in jeopardy.
- (4) "ICF/MR" means a facility certified for Medicaid as an Intermediate Care Facility for the Mentally Retarded.
- (5) "Jeopardy" means a situation which has caused death, or may cause death or permanent impairment to a client.

- (6) "Monitor" or "Monitoring" means the interaction between the area authority or county program and a provider of mental health, developmental disability or substance-abuse services to assure the health, safety and well being of clients receiving services. Monitoring includes technical assistance.

- (7) "Provider category" means the type of facility in which a client receives services or resides. The provider category determines the extent of monitoring that a provider receives and is determined as follows:

- (a) Category A facilities licensed pursuant to G.S. 122C, Article 2, except for hospitals; these include 24-hour residential facilities, day treatment and outpatient services;
- (b) Category B community based providers not requiring State licensure;
- (c) Category C hospitals, state operated facilities, nursing homes, adult care homes, family care homes, foster care homes or child care facilities; and
- (d) Category D individuals providing only outpatient or day services and are licensed or certified to practice in the State of North Carolina.

- (8) "Quality indicators" means the set of statutes and rules that affect the quality of services provided to clients. These statutes and rules determine the scope and content of actions that may be addressed through a plan of correction. Monitoring of quality indicators shall be documented on a form provided by the Secretary. Quality indicators include the following:

- (a) compliance with the quality improvement and quality assurance requirements specified in Rule .0201(a)(7) of this Subchapter;
- (b) compliance with the personnel and staff competency requirements specified in Rules .0202, .0203 and .0204 of this Subchapter;
- (c) compliance with the assessment and service plan requirements specified in Rule .0205 of this Subchapter;
- (d) compliance with the client services requirements specified in Rule .0208 of this Subchapter;

Authority G.S. 122C-112.1; G.S. 143B-139.1.

10A NCAC 27G .0602 DEFINITIONS

In addition to the terms defined in G.S. 122C-3 and Rules .0103 and .0104 of this Subchapter, the following terms shall apply:

- (1) "Complaint investigation" means the process of determining if an allegation made against a provider concerning the quality of services is substantiated.
- (2) "Complaint mediation" means the process of mediating and resolving a complaint concerning the quality of services.
- (3) "Critical incident" (incident) means an occurrence which has led or may result in a situation that is contrary to a client's welfare. Critical incidents include:
 - (a) any accident or injury, including self-injurious behavior, which requires treatment by a physician. First aid provided by a nurse or other facility staff would not be included in this category;
 - (b) any medication error, including lack of administration of a prescribed medication, which causes the client discomfort or places his or her health or safety in jeopardy;
 - (c) use of any hazardous substance which requires treatment by a physician. First aid provided by a nurse or other facility staff would not be included in this category;
 - (d) any client elopement (escape, run away from or abscond) lasting more than three hours;
 - (e) any client death;
 - (f) suspension or expulsion of a client from services;
 - (g) any case of abuse, neglect or exploitation against a client which is under investigation or has been substantiated by a county Department of Social Services (DSS) or the DFS Health Care Personnel Registry Section;
 - (h) any suicide attempt which results in injury or places the client in jeopardy;
 - (i) the arrest of a client for violations of state, municipal, county, or federal law; or

- ~~(e) compliance with the medication requirements specified in Rule .0209(a) and (c) of this Subchapter;~~
- ~~(f) compliance with client rights statutes specified in G.S. 122C, Article 3 and the rules promulgated under those statutes; and~~
- ~~(g) compliance with confidentiality rules specified in 10A NCAC 26B.~~
- ~~(9) "Routine monitoring" means monitoring that is performed to determine compliance with quality indicators.~~
- ~~(10) "Service coordination" means the process that an area authority or county program coordinates services for clients.~~
- ~~(11) "Technical assistance" means the dissemination of skills, knowledge and experience to promote improvement in the quality of care received by clients. Technical assistance may include training, referrals, on-site visits, peer-to-peer interaction or the promotion of tools providers can utilize to improve the quality of services or perform self-assessment of the quality of services provided.~~

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 27G .0603 CRITICAL INCIDENT REPORTING

~~(a) All Category A and Category B providers shall report to the area authority or county program responsible for the catchment area where services are being provided, a critical incident within 72 hours of the critical incident. The report shall be submitted on a form provided by the Secretary.~~

~~(b) The critical incident report may be submitted via mail, in person, facsimile, or electronic mail. The report shall include the following information:~~

- ~~(1) reporting provider: name, address, county, license number (if applicable), name and title of person preparing report, first person to learn of the incident and first staff to receive report of incident, facility telephone number, and date and time report prepared;~~
- ~~(2) client information: name, social security number, date of birth, unit/ward (if applicable), diagnoses, whether the client has been treated by a physician for the incident and the date of the treatment;~~
- ~~(3) circumstances of incident: place where incident occurred, cause of incident (if known), and if the client was restrained or in seclusion at the time of the incident;~~
- ~~(4) investigation of incident: any investigation the provider has done to determine the cause of the incident and any corrective measures the provider has put in place or plans to put in place as a result of the incident; and~~
- ~~(5) other information: list of other authorities such as law enforcement, county DSS or DFS~~

~~Health Care Personnel Registry Section that have been notified, have investigated or are in the process of investigating the incident or events related to the incident.~~

~~(c) If the provider is unable to obtain any information sought, or if any such information is not yet available, the provider shall explain on the form.~~

~~(d) The provider shall maintain documentation regarding critical incidents. The provider shall:~~

- ~~(1) notify the area authority or county program whenever it has reason to believe that information provided may be erroneous, misleading, or otherwise unreliable;~~
- ~~(2) submit to the area authority or county program information required on the critical incident form that was previously unavailable; and~~
- ~~(3) provide, upon request by the area authority or county program, other information the provider may obtain regarding the critical incident, including hospital records and reports by other authorities.~~

~~(e) The area authority or county program shall review, not less than quarterly, critical incident reports to identify trends based on such reports. Trends may include the type, frequency and severity of critical incidents related to a provider. A report prepared by the area authority or county program containing the review and identification of trends shall be provided to DMH/DD/SAS not less than quarterly.~~

~~(f) If the circumstances surrounding a critical incident reveal that a disabled adult of a Category A or Category B provider may be abused, neglected or exploited and in need of protective services, the area authority or county program shall initiate the procedures outlined in G.S. 108A, Article 6.~~

~~(g) If the circumstances surrounding a critical incident reveal that a juvenile of a Category A or Category B provider may be abused, neglected or exploited and in need of protective services, the area authority or county program shall initiate the procedures outlined in G. S. 7B, Article 3.~~

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 27G .0604 AREA AUTHORITY OR COUNTY PROGRAM RESPONSE TO COMPLAINTS

~~The area authority or county program shall respond to complaints regarding the provision of services within its catchment area. The area authority or county program shall mediate complaints involving the provision of services for any provider category.~~

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 27G .0605 COMPLAINTS PERTAINING TO CATEGORY A OR CATEGORY B PROVIDERS EXCLUDING ICF/MR FACILITIES

~~Complaints received by an area authority or county program pertaining to Category A or Category B providers excluding ICF/MR facilities shall be processed as follows:~~

- ~~(1) The area authority or county program shall ask the complainant to communicate the complaint~~

- to the provider to allow the provider an opportunity to resolve the complaint.
- (2) If the complainant does not wish to communicate the complaint to the provider or the complaint remains unresolved, the area authority or county program shall ask the complainant for permission to mediate the complaint.
- (3) If the complainant refuses to give permission for the area program or county authority to mediate the complaint, the area authority or county program shall initiate an investigation of the complaint without naming the complainant.
- (4) When complaint mediation has been achieved, the area authority or county program shall document any resolution.
- (5) When the area authority or county program initiates investigation of the complaint, efforts shall be made to protect the complainant's identity.
- (6) The area authority or county program shall notify DFS whenever it investigates a complaint for a Category A provider. DFS may participate with the area authority or county program during any phase of the investigation. The area authority or county program shall notify DMH/DD/SAS whenever it investigates a complaint for a Category B provider. DMH/DD/SAS may participate with the area authority or county program during any phase of the investigation.
- (7) When investigating a complaint, the area authority or county program shall make contact with the provider. The area authority or county program shall state the purpose of the contact and inform the provider that the area authority or county program is in receipt of a complaint concerning the provider.
- (8) During the course of a complaint investigation or complaint mediation, the area authority or county program may provide technical assistance to the provider in an attempt to offer solutions to address and resolve the complaint.
- (9) Upon completion of the complaint investigation, a report shall be submitted to the provider within 10 working days of the date of completion of the investigation.
- (10) If the complaint report identifies any deficiencies in the quality indicators, the provider shall submit to the area authority or county program a plan of correction for each identified deficiency. The provider shall be allowed 10 working days to submit a plan of correction from the date the provider initially received the deficiency report from the area authority or county program. The plan of correction must specify the following:
- (a) the measures that will be put in place to correct the deficiency;
 - (b) the systems that will be put in place to prevent a re-occurrence of the deficiency;
 - (c) the individual or individuals who will monitor the corrective action; and
 - (d) the date the deficiency will be corrected which shall be no later than 60 days from the date the investigation was concluded.
- (11) The area authority or county program shall conduct monitoring to follow up cited deficiencies no later than 90 days from the date the investigation was concluded. An area authority or county program may provide technical assistance to a provider with identified deficiencies. The area authority or county program shall submit reports of monitoring for Category A providers to DFS and for Category B providers to DMH/DD/SAS within 30 days completion of the monitoring.
- (12) Monitoring shall be conducted in accordance with Rule .0607 of this Subchapter.
- (13) The area authority or county program may refer the monitoring of a Category A provider to DFS, or a Category B provider to DMH/DD/SAS based on the following factors:
- (a) the provider's failure to submit a plan of correction for deficiencies within the timeframe designated in the deficiency report;
 - (b) the provider's failure to correct deficiencies after technical assistance has been provided by the area authority or county program; or
 - (c) the possibility that continuation of uncorrected deficiencies may be detrimental to the client or place the client's psychological or physical health or safety in jeopardy.

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 27G .0606 COMPLAINTS PERTAINING TO CATEGORY C, CATEGORY D PROVIDERS OR ICF/MR FACILITIES

(a) Complaints received by an area authority or county program pertaining to Category A, Category B providers or ICF/MR facilities shall be processed as follows:

- (1) The area authority or county program may mediate complaints for Category C, or Category D providers or ICF/MR facilities.
- (2) The area authority or county program shall ask the complainant to communicate the complaint to the provider to allow the provider an opportunity to resolve the complaint.
- (3) If the complainant does not wish to communicate the complaint to the provider or the complaint remains unresolved, the area authority or county program shall ask the

complainant for permission to mediate the complaint.

- (4) If the complainant refuses to give permission for the area authority or county program to mediate the complaint, the area authority or county program shall refer the complaint for investigation to the State or local government agency responsible for the regulation and oversight of the provider.
- (5) If the complaint is mediated, the area authority or county program shall document any resolution.
- (6) During the course of complaint mediation, the area authority or county program may provide technical assistance to the provider in an attempt to offer solutions to address and resolve the complaint.
- (7) If mediation is unsuccessful, the area authority or county program shall refer the complaint for investigation to the State or local government agency responsible for the regulation and oversight of the provider. The area authority or county program shall send a letter to the complainant informing them of the referral and the contact person at the agency the complaint was referred.

(b) If the circumstances identified during a complaint reveal that a disabled adult may be abused, neglected or exploited and in need of protective services, the area authority or county program shall initiate the procedures outlined in G.S. 108A, Article 6.

(c) If the circumstances identified during a complaint reveal that a juvenile may be abused, neglected or exploited and in need of protective services, the facility shall initiate the procedures outlined in G.S. 7B, Article 3.

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 27G .0607 ROUTINE MONITORING

(a) The area authority or county program may conduct routine monitoring for any Category A or Category B provider based on the following factors:

- (1) number and severity of critical incident reports received from a provider;
- (2) number and severity of complaints received or investigated concerning a provider;
- (3) results of State inspections conducted by DFS or DMH/DD/SAS;
- (4) concerns about compliance with quality indicators while the area authority or county program is providing service coordination;
- (5) addition of a new service which the provider has not provided in the past; or
- (6) whether the provider is accredited by the Joint Commission on the Accreditation of Healthcare Organizations, the Council on Accreditation of Rehabilitation Facilities or the Council on Quality and Leadership, or has been reviewed by the North Carolina Council of Community Programs.

(b) The area authority or county program shall notify DFS when it conducts routine monitoring for a Category A provider. DFS may participate with the area authority or county program during any phase of the monitoring. The area authority or county program shall notify DMH/DD/SAS when it conducts routine monitoring for a Category B provider. DMH/DD/SAS may participate with the area authority or county program during any phase of the monitoring.

(c) When an area authority or county program has notified another area authority or county program pursuant to Rule .0505 of this Subchapter, the notifying area authority or county program may request that the area authority or county program conduct routine monitoring of their client's provider to assure compliance with quality indicators.

(d) When routine monitoring occurs, a monitoring report shall be submitted to the provider within 10 working days of the completion of on-site monitoring.

(e) If the routine monitoring identifies deficiencies in quality indicators, the provider shall submit to the area authority or county program a plan of correction for each identified deficiency. The provider shall be allowed 10 working days to submit a plan of correction from the date the provider initially received the deficiency report from the area authority or county program. The plan of correction shall specify the following:

- (1) the measures that will be put in place to correct the deficiency;
- (2) the systems that will be put in place to prevent a re-occurrence of the deficiency;
- (3) the individual or individuals who will monitor the corrective action; and
- (4) the date the deficiency will be corrected which shall be no later than 60 days from the date the routine monitoring was concluded.

(f) The area authority or county program shall follow up on cited deficiencies no later than 90 days from the date the routine monitoring was concluded. An area authority or county program may provide technical assistance to a provider with identified deficiencies. The area authority or county program shall submit reports of routine monitoring for Category A providers to DFS and for Category B providers to DMH/DD/SAS within 30 days completion of the routine monitoring.

(g) The area authority or county program may refer the monitoring of a Category A provider to DFS, or a Category B provider to DMH/DD/SAS based on the following factors:

- (1) the provider's failure to submit a plan of correction for deficiencies within the timeframe designated in the deficiency report;
- (2) the provider's failure to correct deficiencies after technical assistance has been provided by the area authority or county program; or
- (3) the possibility that continuation of uncorrected deficiencies may be detrimental to the client or place the client's psychological or physical health or safety in jeopardy.

(h) If the circumstances identified during monitoring reveal that a disabled adult may be abused, neglected or exploited and in need of protective services, the area authority or county program shall initiate the procedures outlined in G.S. 108A, Article 6.

(i) If the circumstances identified during monitoring reveal that a juvenile may be abused, neglected or exploited and in need of

protective services, the area authority or county program shall initiate the procedures outlined in G.S. 7B, Article 3.

Authority G.S. 122C-111; 143B-139.1.

10A NCAC 27G .0608 REPORTING REQUIREMENTS

The area authority or county program shall report to DMH/DD/SAS annually, beginning July 1, 2003, the following information:

- (1) the number of complaints mediated according to provider category;
- (2) the number of complaints investigated and the number of complaints substantiated for Category A and Category B providers; and
- (3) the number of on site monitoring visits completed for Category A and Category B providers.

Authority G.S. 122C-112.1; 143B-139.1.

SECTION .0700 - ACCREDITATION OF AREA PROGRAMS AND SERVICES

10A NCAC 27G .0701 GENERAL

(a) For purposes of this Section, "service" means those services described in Sections .1000 through .6900 of these Rules, and offered by an area program, either directly or through a contract provider, as a required or optional service to clients.

(b) Area programs shall be accredited by DMH/DD/SAS to provide specific services according to the rules in this Section. No area program shall provide a service, either directly or through a contract provider, unless that specific service is accredited, except by reciprocity with another area program pursuant to Rule .0606 of this Section.

(c) An area program offering an accredited service may modify the means by which it delivers the service, including adding or changing service providers. DMH/DD/SAS may require an area program to notify it of changes in contract provider status. Changes in providers may constitute a change in circumstances warranting a reexamination of an accredited service pursuant to Rule .0603(e) of this Section.

(d) Area programs may receive interim accreditation for new services in accordance with Rule .0605 of this Section. Area programs shall maintain accreditation of services through the Accreditation Review process described in Rules .0602 and .0603 of this Section.

(e) DMH/DD/SAS funding of services provided by area programs shall be contingent upon accreditation.

(f) DMH/DD/SAS shall not accredit contract providers. Area programs retain their statutory obligations to assure that contract providers comply with State law and these Rules, and to monitor the performance of contract providers as required by G.S. 122C.

Authority G.S. 122C-112; 122C-141(b); 122C-142(a); 122C-191(d).

10A NCAC 27G .0702 ACCREDITATION REVIEW

(a) The Area Authority shall assure that all area-operated and contracted services of an area program comply with applicable

Federal requirements, General Statutes, and rules of the Commission, the Secretary and DMH/DD/SAS.

(b) An area program shall be reviewed under the auspices of DMH/DD/SAS periodically, and not less than once every three years, except when its accreditation period has been extended as provided in Rule .0603(f) of this Section.

(c) The Accreditation Review shall examine each area program service for:

- (1) compliance with applicable rules;
- (2) client outcomes;
- (3) achieved levels of client satisfaction; and
- (4) operational and programmatic performance meeting applicable standards of practice.

(d) For purposes of the accreditation process, "applicable standards of practice" means a level of competence established with reference to the prevailing and accepted methods, and the degree of knowledge, skill and care exercised by other practitioners in the same discipline.

(e) Upon completion of the Accreditation Review, DMH/DD/SAS shall provide the area authority with an oral summary and written report of results.

(f) At each regularly scheduled public meeting of the Commission, DMH/DD/SAS shall report the results of all Accreditation Reviews completed since the last Commission meeting.

Authority G.S. 122C-112; 122C-141(b); 122C-142(a); 122C-191(d).

10A NCAC 27G .0703 ACCREDITATION OF THE AREA PROGRAM

(a) Upon completion of an Accreditation Review, DMH/DD/SAS shall accredit the area program for a period of between one and three years. The length of the accreditation period shall be determined by DMH/DD/SAS based on the results of the review and an evaluation of the area program's current status, planned changes, and anticipated future needs.

(b) DMH/DD/SAS may accredit an area program to provide a specific service for a shorter period of time than the area program's overall accreditation.

(c) An area program or service accreditation of one year shall be accompanied by the development of corrective action plans for services or operations specified by DMH/DD/SAS. These plans shall be developed by the area program, which shall submit them to DMH/DD/SAS for approval. These plans shall be developed and implementation begun within 90 days following the accreditation review.

(d) As a condition of accreditation for more than one year, DMH/DD/SAS may require an area program to develop and submit plans for corrective action and service enhancement. The Division Director may specify the scope and time frame for submission of the plans based upon the needs determined by the Accreditation Review.

(e) DMH/DD/SAS may conduct Accreditation Reviews at any time during an accreditation period in the event of significant changes in the membership of the area board, a change in area director, complaints by consumers, consumer organizations or advocacy groups, failure to submit acceptable corrective action or service enhancement plans, failure to implement required plans, or other occurrences that suggest a change in

circumstances warranting a reexamination of the area program, its operations, or one or more of the services it provides. This review may be a full Accreditation Review of the area program, or it may be limited to selected services provided by the area program.

(f) In a case where the Division Director determines that the results of an Accreditation Review demonstrate such superior program performance that accreditation for a period longer than three years is justified, the Division Director may recommend to the Commission that an area program's accreditation be extended for an additional period not to exceed two years, and the Commission may approve such an extension.

Authority G.S. 122C-112; 122C-141(b); 122C-142(a); 122C-191(d).

10A NCAC 27G .0704 DENIAL OR REVOCATION OF ACCREDITATION

(a) DMH/DD/SAS may deny or revoke accreditation for an area program service:

- (1) upon confirmation that a service subject to licensure is not licensed;
- (2) upon receipt of evidence of a condition that DMH/DD/SAS determines is a threat to the health, safety or welfare of an individual served;
- (3) upon an area program's failure to complete corrective action or service enhancement in accordance with a plan approved by DMH/DD/SAS;
- (4) upon determination that:
 - (A) the services rendered are not provided at the applicable standards of practice in the appropriate discipline;
 - (B) the area program has received notice of the deficiencies and a specified time period for remedial action; and
 - (C) the area program has failed or refused to take appropriate remedial action to bring the service to the required level of competence; or
- (5) Upon determination of a pattern of behaviors that over time show a failure to maintain applicable standards of practice or show repeated threats to or disregard for the health, safety and welfare of clients.

(b) Upon denial or revocation of accreditation for a service, DMH/DD/SAS shall take appropriate steps to withhold funds for the service pending re-accreditation as set forth in the DMH/DD/SAS accounting rules 10A NCAC 27A .0100 and .0200.

Authority G.S. 122C-112; 122C-141(b); 122C-142(a); 122C-191(d).

10A NCAC 27G .0705 INTERIM ACCREDITATION FOR NEW SERVICES

(a) An area program desiring to offer a new service may receive interim accreditation and start-up or interim funding according to the following procedures:

(1) The area program shall notify DMH/DD/SAS in advance of the new service and its anticipated date of commencement, and shall provide such additional information related to compliance with the accreditation standards set forth in these Rules as DMH/DD/SAS may request.

(2) In its notification, the area program shall offer assurances that the service shall comply with applicable standards for accreditation.

(b) Upon receipt of notification, DMH/DD/SAS shall deem the new service to have received interim accreditation effective as of the anticipated date of commencement. Unless revoked pursuant to Rule .0604 of this Section, interim accreditation shall remain in effect until completion of an on site review of the new service by DMH/DD/SAS.

(c) After the on-site review, DMH/DD/SAS may accredit the new service pursuant to Rule .0603 of this Section for a specified period of time, but not beyond the expiration of the area program accreditation, or it may deny accreditation pursuant to Rule .0604 of this Section.

Authority G.S. 122C-112; 122C-141(b); 122C-142(a); 122C-191(d).

10A NCAC 27G .0706 RECIPROCITY

(a) By agreement between area programs, one area program may place clients with another area program's accredited service to provide that service without obtaining its own accreditation to provide that service.

(b) Nothing herein shall be deemed to relieve any area program of its responsibility to monitor contract service providers pursuant to G.S. 122C-141 and 122C-142.

Authority G.S. 122C-112; 122C-141(b); 122C-142(a); 122C-191(d).

10A NCAC 27G .0707 PURCHASE OF SERVICE AND CAPITATION CONTRACTS

(a) In the case of services provided pursuant to purchase of service or capitation contracts with individuals or groups of individuals licensed under other provisions of state law and who are not facilities requiring licensing under these Rules or G.S. 122C, area programs may exempt the contract providers from complying with the requirements of Section .0200 of these Rules, except for Rules .0203, .0204, .0207, and .0208 of this Subchapter.

(b) For purposes of this Rule, "capitation contract" means a contract in which the provider is paid a specified flat rate per enrollee to meet clients' service needs within the parameters of the contract.

(c) For purposes of this Rule, "purchase of service contract" means a contract in which the provider is paid an agreed-upon rate for a specific service as the service is rendered.

Authority G.S. 122C-112; 122C-141(b); 122C-142(a); 122C-191(d).

SUBCHAPTER 27I - LOCAL MANAGEMENT ENTITY REQUIREMENTS

SECTION .0100 - GENERAL INFORMATION

10A NCAC 27I .0101 SCOPE

This Subchapter sets forth the rules for local management entities administering mental health, developmental disabilities and substance abuse services within the scope of G.S. 122C.

Authority G.S. 122C-101; 122C-102; 122C-112.1; 122C-115.1; 122C-115.2; 122C-117; 143B-147.

10A NCAC 27I .0102 DEFINITIONS

(a) This Rule contains definitions that apply to all of the rules in this Subchapter.

(b) Unless otherwise indicated, the following terms shall have the meanings specified:

- (1) "Assessment" means a procedure for determining the nature and extent of the need for which the individual is seeking service.
- (2) "Evaluation" means an assessment service that provides for an appraisal of a client in order to determine the nature of the client's problem and his need for services. The services may include an assessment of the nature and extent of the client's problem through a systematic appraisal of any combination of mental, psychological, physical, behavioral, functional, social, economic, and intellectual resources, for the purposes of diagnosis and determination of the disability of the client, the client's level of eligibility, and the most appropriate plan, if any, for services.
- (3) "Governing body" means in the case of an area authority the area board, and in the case of a county program the entity designated in accordance with G.S. 122C-115.1
- (4) "Local management entity" means an area authority or county program whose local business plan has been approved by the Secretary in accordance with G.S. 122C-112.1.
- (5) "Screening" means an assessment service that provides for an appraisal of an individual who is not a client in order to determine the nature of the individual's problem and his need for services. The service may include an assessment of the nature and extent of the individual's problem through a systematic appraisal of any combination of mental, psychological, physical, behavioral, functional, social, economic, and intellectual resources, for the purposes of diagnosis and determination of the disability of the individual, level of eligibility, if the individual will become a client, and the most appropriate plan, if any, for services.

Authority G.S. 122C-2; 122C-3; 122C-101; 122C-102; 122C-112.1; 122C-115.1; 122C-117; 143B-147.

SECTION .0200 – OPERATION AND MANAGEMENT RULES

10A NCAC 27I .0201 REQUIRED SERVICE MANAGEMENT POLICIES

Each LME shall develop and implement written policies for the following:

- (1) Screening, assessment and referral services to include the application of protocols to determine the need for:
 - (A) Emergent: Receipt of services within one hour
 - (B) Urgent care: Receipt of services within 48 hours
 - (C) Routine need: Receipt of services within seven days]
- (2) A system of crisis/emergency services to include:
 - (A) Maintenance of a 24-hour, seven day a week crisis response service
 - (B) Crisis prevention, intervention and resolution; and
 - (C) Collaboration with all other community emergency response systems.
- (3) The provision of prevention programs.
- (4) The provision of administrative, mental health, substance abuse and developmental disability supports and services to clients in the catchment area.
- (5) The provision of utilization management that delineates processes for service authorization and utilization review.

Authority G.S. 122C-2; 122C-3; 122C-112.1; 122C-115.1; 122C-115.2; 122C-117; 143B-147.

10A NCAC 27I .0202 ASSESSMENT AND TREATMENT/HABILITATION OR SERVICE PLAN

(a) An assessment shall be completed for a client, according to governing body policy, prior to the delivery of services, and shall include, but not be limited to:

- (1) the client's presenting problem;
- (2) the client's needs and strengths;
- (3) a provisional or admitting diagnosis with an established diagnosis determined within 30 days of admission, except that a client admitted to a detoxification or other 24-hour medical program shall have an established diagnosis upon admission;
- (4) a pertinent social, family, and medical history; and
- (5) evaluations or assessments, such as psychiatric, substance abuse, medical, and vocational, as appropriate to the client's needs.

(b) When services are provided prior to the establishment and implementation of the treatment/habilitation or service plan, hereafter referred to as the "plan," strategies to address the client's presenting problem shall be documented.

(c) The plan shall be developed based on the assessment, and in partnership with the client or legally responsible person or both, within 30 days of admission for clients who are expected to receive services beyond 30 days.

(d) The plan shall include:

- (1) client outcome(s) that are anticipated to be achieved by provision of the service and a projected date of achievement;
- (2) strategies;
- (3) staff responsible;
- (4) a schedule for review of the plan at least annually in consultation with the client or legally responsible person or both;
- (5) basis for evaluation or assessment of outcome achievement; and
- (6) written consent or agreement by the client or responsible party, or a written statement by the provider stating why such consent could not be obtained.

Authority G.S. 122C-2; 122C-101; 122C-102; 122C-112.1; 122C-115.1; 122C-117; 143B-147.

10A NCAC 27I .0203 MANAGEMENT RECORDS

(a) A management record shall be maintained for each individual service recipient, which shall contain, but not limited to:

- (1) an identification face sheet which includes:
 - (A) name (last, first, middle, maiden);
 - (B) client record number;
 - (C) date of birth;
 - (D) race, gender and marital status;
 - (E) date of service initiation;
 - (F) date of termination of service;
 - (G) responsible party;
- (2) documentation of mental illness, developmental disabilities or substance abuse diagnosis coded according to the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV)) including subsequent amendments and editions;
- (3) documentation of the screening and assessment;
- (4) if applicable:
 - (A) treatment/habilitation or service plan;
 - (B) emergency information for each client which shall include the name, address and telephone number of the person to be contacted in case of sudden illness or accident and the name, address and telephone number of the client's preferred physician;
 - (C) signed statement from the client or legally responsible person granting permission to seek emergency care from a hospital or physician;
- (5) documentation of physical disorders diagnosis according to the International Classification of Diseases, Ninth Revision, Clinical

Modification (ICD-9-CM), including subsequent amendments and editions;

- (6) documentation of financial information to include private insurance carrier, public benefits and entitlements; and
- (7) signed statement from the client or legally responsible person stating a choice of provider(s) of services was presented and explained.

(b) The LME shall ensure that information relative to AIDS or related conditions is disclosed only in accordance with the communicable disease laws as specified in G.S. 130A-143.

Authority G.S. 122C-2; 122C-112.1; 122C-115.1; 122C-115.2; 122C-117; 143B-147.

10A NCAC 27I .0204 NOTIFICATION PROCEDURES FOR PROVISION OF SERVICES

(a) If an LME plans to contract for a service located within the catchment area of another LME, the Director of the LME that plans to contract for the service shall notify the Director of the LME where the service is located prior to the provision of the service.

(b) The notification shall be in writing and shall include the following:

- (1) name of the provider;
- (2) service to be provided; and
- (3) anticipated dates of service.

In the event of an emergency, notification prior to the provision of service may be by telephone with written notification occurring the next working day.

(c) Should a dispute resolution concerning such service as described in Paragraph (a) of this Rule be necessary, the Division Director shall arbitrate a resolution between the respective LMEs.

(d) If the Division plans to contract for a service in an LME's catchment area, the Division Director shall notify the Director of the LME where the service is located, prior to the provision of the service, according to the procedures set forth in Paragraph (b) of this Rule.

Authority G.S. 122C-112-1; 122C-113; 122C-141(b); 122C-142(a); 143B-147.

10A NCAC 27I .0205 COMMUNICATION PROCEDURES FOR OUT OF HOME COMMUNITY PLACEMENT

(a) The purpose of this Rule is to address communication procedures concerning out of the home community placements for children and adolescents. This includes children and adolescents served through the area authority or county program mental health, developmental disabilities and substance abuse services system and those children and adolescents residing in ICF-MR facilities in their catchment areas.

(b) The LME representative(s) shall meet with the parent(s) or legal guardian and other representatives involved in the care and treatment of the child or adolescent, including local Department of Social Services (DSS), Local Education Agency (LEA) and criminal justice agency, to make service planning decisions prior to the placement of the child and adolescent out of the home

community. The LME may use existing child and family teams for this purpose.

(c) The home community LME shall be responsible for notification of placement. The notification of placement shall be made via e-mail, fax or hard copy within three business days after out of home placement occurs. In case of an emergency, notification may be by telephone with written notification occurring the next day. The following entities shall be notified:

- (1) legal guardian;
- (2) other representatives involved in the care and treatment of the child or adolescent;
- (3) host community provider; and
- (4) host community representatives (may include the court counselor, county DSS, regional Children's Developmental Services Agency (CDSA) or the LEA.

(d) Notification shall be completed on a form provided by the Secretary, to include the following information:

- (1) child or adolescent information: name, date of birth, grade, identification number, social security number, date of placement out of home community;
- (2) parent/legal guardian information: name, address, telephone number;
- (3) home and host DSS information: county; contact person name, address, telephone number;
- (4) home and host LME/information: name of program; contact person name, address, telephone number;
- (5) home and host school information: school name, address, telephone number, principal, special education program administrator; and
- (6) person completing notification form information: name, date form completed, agency, address and telephone number.

Authority G.S. 122C-113; 122C-141(b); 143B-139.1; 150B-21.1.

10A NCAC 27I.0206 CLIENT RIGHTS COMMITTEE

(a) The governing body of the LME shall bear ultimate responsibility for the assurance of client rights.

(b) Each governing body of the LME shall establish at least one Client Rights Committee, and may require that the governing body of a contract agency also establish a Client Rights Committee. The governing body of the LME shall also develop and implement policy which delineates:

- (1) composition, size, and method of appointment of committee membership;
- (2) training and orientation of committee members;
- (3) frequency of meetings, which shall be at least quarterly;
- (4) rules of conduct for meetings and voting procedures to be followed;
- (5) procedures for monitoring the effectiveness of existing and proposed methods and procedures for protecting client rights;

- (6) requirements for routine reports to the governing body of the LME regarding seclusion, restraint and isolation time out; and
- (7) other operating procedures.

(c) The governing body of the LME established Client Rights Committee shall oversee, for network services, implementation of the following client rights protections:

- (1) compliance with G.S. 122C, Article 3;
- (2) compliance with the provisions of 10A NCAC 27C, 27D, 27E, and 27F governing the protection of client rights, and 10A NCAC 26B governing confidentiality;
- (3) establishment of a review procedure for any of the following which may be brought by a client, client advocate, parent, legally responsible person, staff or others:
 - (A) client grievances;
 - (B) alleged violations of the rights of individuals or groups, including cases of alleged abuse, neglect or exploitation;
 - (C) concerns regarding the use of restrictive procedures; or
 - (D) failure to provide needed services that are available in the LME.

(d) Nothing herein stated shall be interpreted to preclude or usurp the authority of a county Department of Social Services to conduct an investigation of abuse, neglect, or exploitation or the authority of the Governor's Advocacy Council for Persons with Disabilities to conduct investigations regarding alleged violations of client rights.

(e) If the governing body of the LME requires a contract agency to establish a Client Rights Committee, that Committee shall carry out the provisions of this Rule for the contract agency.

(f) Each Client Rights Committee shall be composed of a majority of non-governing body members, with a reasonable effort made to have all applicable disabilities represented, with consumer and family member representation. Staff who serve on the committee shall not be voting members.

(g) The Client Rights Committee shall maintain minutes of its meetings and shall file at least an annual report of its activities with the governing body of the LME. Clients shall not be identified by name in minutes or in written or oral reports.

(h) The governing body of the LME Client Rights Committee shall review grievances regarding incidents which occur within a contract agency after the governing body of the agency has reviewed the incident and has had opportunity to take action. Incidents of actual or alleged Client Rights violations, the facts of the incident, and the action, if any, made by the contract agency shall be reported to the LME director within 30 days of the initial report of the incident, and to the governing body of the LME within 90 days of the initial report of the incident.

Authority G.S. 122C-64; 143B-147.

10A NCAC 27I.0207 PROVIDER NETWORK REQUIREMENTS

(a) Each LME shall develop and implement written policies governing agreements with network providers.

(b) Each LME shall continually evaluate a network of providers that may include one or more of the following: licensed facilities, certified provider organizations, state operated facilities or independent practitioners

(c) Each LME shall develop and implement written policies to manage a network of contract providers to include:

- (1) assessing and maintaining the capacity of the network to meet the needs of the target population and facilitate client choice;
- (2) providing information on DHHS/LME policies and procedures to contract providers; and
- (3) a written dispute resolution and appeals policies for contract providers.

Authority G.S. 122C-2; 122C-3; 122C-112.1; 122C-115.1; 122C-115.2; 122C-117; 143B-147.

10A NCAC 27I .0208 CERTIFICATION OF PROVIDERS

(a) Each LME shall develop and implement written policies which include the requirements listed below, for certifying organizations to provide a service or services as a part of the LME provider network.

- (1) For organizations that seek to qualify as a provider of services for which licensure is required, the LME certification process shall include:
 - (A) verification that the facility is licensed as required by the service definition; and
 - (B) verification that the organization has qualified staff and policies and procedures in place to meet the program requirements for the service definition.
- (2) For organizations that seek to qualify as a provider of services for which licensure is not required and for which the organization is accredited by a national accrediting body, the LME certification process shall include:
 - (A) verification that the organization is accredited by a national accrediting body to provide the specific service or services, and
 - (B) verification that the organization has qualified staff and policies and procedures in place to meet program requirements for the service definition.
- (3) For organizations that seek to qualify as a provider of services for which licensure is not required and for which the organization is not accredited by a national accrediting body, the LME certification process shall include:
 - (A) verification of the organization's administrative, financial, clinical, quality improvement and information services infrastructure necessary to provide the service(s); and

(B) verification that the organization has qualified staff and policies and procedures in place to meet program requirements for the service definition.

(b) Each LME shall develop and implement written policies governing the inclusion of independent practitioners in its provider network.

(c) Providers that meet the requirements set forth in this rule shall be certified as qualified providers of service(s) within the LME's provider network

Authority G.S. 122C-2; 122C-3; 122C-112.1; 122C-115.1; 122C-115.2; 122C-117; 143B-147.

10A NCAC 27I .0209 RECIPROCITY

(a) By written agreement between LMEs or their contracted designee, one LME may authorize another LME's qualified provider of service(s) to provide a service without conducting its own certification review.

(b) Nothing herein shall be deemed to relieve any LME of its responsibility to monitor service providers pursuant to G.S. 122C-141 and G.S. 122C-142.

Authority G.S. 122C-112; 122C-14(b); 122C-142(a); 122C-191(d).

10A NCAC 27I .0210 REQUIRED SYSTEM MANAGEMENT POLICIES

(a) Each LME shall develop and implement written policies to implement a quality management system that addresses:

- (1) quality assurance practices;
- (2) annual strategic planning; and
- (3) continuous quality improvement strategies.

(b) Each LME shall develop and implement written policies governing the training, education, experience and orientation of LME staff as applicable to fulfill the requirements of their position.

(c) Each LME shall develop and implement written policies specific to the coordination of service delivery through collaboration with community and government agencies and individuals.

(d) Each LME shall develop and implement written policies to establish a grievance, appeal and request for hearing process.

(e) Each LME shall develop and implement written policies governing client involvement and the protection of client rights in accordance with 10A NCAC 27C, 27D, 27E, 27F.

Authority G.S. 122C-2; 122C-3; 122C-102; 122C-112.1; 122C-113; 122C-115.1; 122C-115.2; 122C-117; 143B-147.

SECTION .0300 – LOCAL MANAGEMENT ENTITY MONITORING OF FACILITIES AND SERVICES

10A NCAC 27I .0301 SCOPE

This Section governs LME monitoring of the provision of mental health, developmental disabilities or substance abuse services (services) in the LME's catchment area. The LME shall monitor providers of services for the purpose of assuring and improving the quality of care and protecting the human rights of

clients receiving mh/dd/sa services. Each LME shall develop and implement policies and procedures, which describe how the LME will:

- (1) receive, review and respond to critical incident reports;
- (2) receive and respond to complaints concerning the provision of services, rights protections defined in G.S. 122-C, Article 3 and the requirements of this Chapter;
- (3) conduct routine monitoring of Category A and B providers of services; and
- (4) analyze trends in the information collected in Items (1) through (3) of this Rule and integrate results into the quality improvement system of the LME to improve the quality of care received by clients receiving mh/dd/sa services.

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 27I .0302 DEFINITIONS

In addition to the terms defined in G.S. 122C-3 and Rule .0102 of this Subchapter, the following terms shall apply:

- (1) "Complaint investigation" means the process of determining if an allegation made against a provider concerning the protection of rights or provision of services is substantiated.
- (2) "Critical incident" (incident) means an unexpected adverse occurrence of physical or psychological harm to a client, an occurrence that potentially involves a continuing threat to a client's health or safety or an occurrence that signals a serious problem within the system of client care. Critical incidents include:
 - (a) any accident or injury, including self-injurious behavior, that requires treatment. First aid provided by a licensed practical nurse or non-medical staff would not be included in this category;
 - (b) any medication error that causes the client discomfort or places his or her health or safety in jeopardy, including failure to administer a medication within the prescribed time range, administration of the wrong dosage or administration of the wrong medication;
 - (c) exposure to any hazardous substance which requires treatment. First aid provided by a licensed practical nurse or non-medical staff would not be included in this category;
 - (d) any unplanned or unexplained client absence lasting more than three hours;
 - (e) any client death;
 - (f) suspension or expulsion of a client from services;

- (g) any alleged abuse, neglect or exploitation against a client;
 - (h) any suicide attempt;
 - (i) the arrest of a client for violations of state, municipal, county or federal law;
 - (j) any alleged rights violation in G.S. 122-C, Article 3;
 - (k) any use of seclusion or physical restraint as defined in 10A NCAC 27C .0102(b)(23) which is used more than four times or for more than 40 hours in a calendar month; or
 - (l) any fire, equipment or building failure that places the health or safety of a client in jeopardy.
- (3) "ICF/MR" means a facility certified for Medicaid as an Intermediate Care Facility for the Mentally Retarded.
 - (4) "Jeopardy" means a situation which has caused death, or is likely to cause death or permanent impairment to a client.
 - (5) "Monitor" or "Monitoring" means the interaction between the LME and a provider of mental health, developmental disability or substance abuse services to assure the health, safety and well being of clients receiving services, whether on site or through a review of submitted data.
 - (6) "Provider category" means the type of facility or person through which a client receives services or supports. The provider category determines the extent of monitoring that a provider receives and is determined as follows:
 - (a) Category A - facilities licensed pursuant to G.S. 122C, Article 2, excluding hospitals. Category A includes 24-hour residential facilities, day treatment and outpatient services;
 - (b) Category B - community-based providers not requiring State licensure;
 - (c) Category C - hospitals, state-operated facilities, nursing homes, adult care homes, family care homes, foster care homes or child care facilities; and
 - (d) Category D - individuals providing only outpatient or day services whom are licensed or certified to practice in the State of North Carolina.
 - (7) "Legal requirements" means the requirements established in NC General Statutes or Rule for services and rights protections provided to clients. These statutes and rules determine the scope and content of actions that may be addressed through a plan of correction. Monitoring of legal requirements shall be documented on a form provided by the Secretary. Legal requirements include the following:

- (a) compliance with the quality improvement and quality assurance requirements specified in 10A NCAC 27G .0201(a)(7);
 - (b) compliance with the personnel and staff competency requirements specified in 10A NCAC 27G .0202 - .0204;
 - (c) compliance with the assessment and service plan requirements specified in 10A NCAC 27G .0205;
 - (d) compliance with the client services requirements specified in 10A NCAC 27G .0208;
 - (e) compliance with the medication requirements specified in 10A NCAC 27G .0209(a) and (c);
 - (f) compliance with client rights statutes specified in G.S. 122C, Article 3 and the rules promulgated under those statutes;
 - (g) compliance with confidentiality rules specified in 10A NCAC 26B; and
 - (h) the requirements for reporting and responding to complaints and critical incidents specified in Rules .0303-.0306 of this Subchapter.
- (8) "Routine monitoring" means monitoring that is performed to determine compliance with legal requirements.
- (9) "Service coordination" means the process through which an LME coordinates services for clients.
- (10) "Technical assistance" means the dissemination of skills, knowledge and experience to promote improvement in the quality of care received by clients. Technical assistance may include training, referrals, on-site visits, peer-to-peer interaction or the promotion of tools providers can utilize to improve the quality of services or perform self-assessment of the quality of services provided.

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 27I .0304 LME RESPONSE TO COMPLAINTS

The LME shall respond to complaints regarding the provision of services within its catchment area. The LME shall seek to resolve complaints involving the provision of services for any provider category, at the level closest to the root of the problem.

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 27I .0305 COMPLAINTS PERTAINING TO CATEGORY A OR CATEGORY B PROVIDERS EXCLUDING ICF/MR FACILITIES

(a) For complaints received pertaining to Category A and B providers, except ICF/MR facilities, the LME shall be the first receiver of and responder to formal complaints. The LME shall:

- (1) establish a notification process to inform clients upon admission about the complaint process and rights in G.S. 122-C. The process shall include written materials and support for notifying advocacy groups, including the Governor's Advocacy Council for Persons with Disabilities (GACPD);
- (2) seek to resolve issues of concern at the level closest to the root of the problem through informal agreement between the client and the provider whenever possible; and
- (3) establish and implement policies and procedures for receiving, processing, referring or investigating and following up on complaints. Policies and procedures shall include:
 - (A) safeguards for protecting the identity of the complainant;
 - (B) safeguards for protecting the complainant and any staff person from harassment or retaliation;
 - (C) procedures to receive, track and help a client file a complaint;
 - (D) methods to be used in investigating a complaint; and
 - (E) options to be considered in resolving a complaint, including assisted communication between the parties, corrective action, technical assistance and referral to other agencies, including DMH/DD/SAS or DFS.

(b) The LME shall notify DFS prior to investigating a complaint for a Category A provider. The DFS may participate with the LME during any phase of the investigation. The LME shall notify DMH/DD/SAS prior to investigating a complaint for a Category B provider. The DMH/DD/SAS may participate with the LME during any phase of the investigation. The LME, DFS and DMH/DD/SAS shall collaborate as necessary to ensure there is no duplication of processes and redundancy of process occurs only to the extent required to verify corrections and improvements have been made.

(c) When investigating a complaint, the LME shall make contact with the provider. The LME shall state the purpose of the contact and inform the provider that the LME is in receipt of a complaint concerning the provider. During the course of a complaint investigation, the LME may provide technical assistance to the provider in an attempt to offer solutions to address and resolve the complaint.

(d) The LME shall complete the complaint investigation within 30 days of the date of the receipt of the complaint.

(e) Upon completion of the complaint investigation, the LME shall submit a report of investigation findings to the complainant, the provider and the LME's Human Rights Committee in accordance with confidentiality requirements of G.S. 122-C-54-56 within 10 working days of the date of completion of the investigation. The complaint investigation report shall include:

- (1) statements of the allegations or complaints lodged;
- (2) steps taken and information reviewed to reach conclusions about each allegation or complaint;
- (3) conclusions reached regarding each allegation or complaint;
- (4) citations of law, rule or policy pertinent to each allegation or complaint; and
- (5) recommended action regarding each allegation or complaint.

(f) If the complaint investigation report identifies any issues needing correction, the provider shall submit to LME a plan of correction for each identified issue needing correction within 10 working days of the date the provider initially received the complaint investigation report from the LME. The plan of correction must specify the following:

- (1) the analysis or investigation conducted by the provider to determine the cause of the issue requiring correction;
- (2) the measures that the provider will put in place to resolve the issue requiring correction;
- (3) the improvements that the provider will put in place to prevent a re-occurrence of the issue requiring correction;
- (4) the individual or individuals who will monitor the corrective action;
- (5) the date by which the provider will resolve the issue requiring correction, which shall be no later than 30 days from the date the plan of correction is approved by the LME; and
- (6) the timeline for implementation of improvements to prevent re-occurrence of the issue requiring correction.

(g) The LME shall review and respond to the provider's proposed plan of correction with approval or a description of additional required information and timelines for approval within 10 working days of LME's receipt of the provider's proposed plan of correction.

(h) The LME shall conduct monitoring to follow-up on issues needing correction cited in the complaint investigation report no later than 90 days from the date the investigation was concluded. An LME may provide technical assistance to a provider with identified deficiencies.

(i) Monitoring shall be conducted in accordance with Rule .0607 of this Subchapter.

(j) The LME may refer the monitoring of a Category A provider to DFS, or a Category B provider to DMH/DD/SAS based on the following factors:

- (1) the providers failure to submit an accepted plan of correction for issues needing correction within the timeframe designated in the complaint investigation report;
- (2) the provider's failure to resolve issues needing correction after technical assistance has been provided by the LME;
- (3) the possibility that continuation of cited issues needing correction is likely to be detrimental to the client or place the client's psychological or physical health or safety in jeopardy;

- (4) the existence of a potential conflict of interest for the LME to conduct the investigation; or
- (5) a contention by the complainant that the findings of the investigation are not consistent with the facts or with law, rules, policies or guidelines.

(k) The LME shall provide follow-up information to the complainant and the LME's Human Rights Committee within 90 days of the date the investigation was concluded. The LME shall maintain a file with copies of complaint investigation and resolution reports for Category A providers for review by DFS or DMH/SDD/SAS. The LME shall maintain a file with copies of complaint investigation and resolution reports for Category B providers for review by DMH/DD/SAS.

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 271.0306 COMPLAINTS PERTAINING TO CATEGORY C, CATEGORY D PROVIDERS OR ICF/MR FACILITIES

(a) For complaints received pertaining to Category C, Category D providers or ICF/MR facilities, the LME shall:

- (1) establish a notification process to inform clients upon admission about the complaint process and rights in G.S. 122-C. The process shall include written materials and support for notifying advocacy groups, including the Governor's Advocacy Council for Persons with Disabilities (GACPD);
- (2) seek to resolve issues of concern at the level closest to the root of the problem through informal agreement between the client and the provider whenever possible; and
- (3) develop and implement policies and procedures for receiving, processing, referring and following up on complaints. Policies and procedures shall include:
 - (A) safeguards for protecting the identity of the complainant;
 - (B) safeguards for protecting the complainant and any staff person from harassment or retaliation;
 - (C) procedures to receive, track and help a client file a complaint;
 - (D) options to be considered in resolving a complaint, including assisted communication between the parties and referral to the State or local government agency responsible for the regulation and oversight of the provider; and
 - (E) criteria and protocols for referring the complaint to the State or local government agency responsible for the regulation and oversight of the provider.

(b) If the LME refers the complaint to the State or local government agency responsible for the regulation and oversight of the provider, the LME shall send a letter to the complainant

informing them of the referral and the contact person at the agency to which the complaint was referred.

(c) The LME shall contact the State or local government agency to which the complaint was referred to determine the actions that agency has taken to resolve the complaint and provide that information to the complainant and the LME's Human Rights Committee within 120 days of the date the LME initially received the complaint.

(d) If the circumstances identified during a complaint give reasonable cause to indicate that a disabled adult may be abused, neglected or exploited and in need of protective services, the facility shall initiate the procedures outlined in G.S. 108A, Article 6.

(e) If the circumstances identified during a complaint give reason to suspect that a child or adolescent may be abused, neglected or exploited and in need of protective services, the facility shall initiate the procedures outlined in G.S. 7B, Article 3.

Authority G.S. 122C-112.1; 143B-139.1.

10A NCAC 27I.0307 ROUTINE MONITORING

(a) The LME shall develop and implement policies and procedures for routine monitoring of Category A and Category B providers.

(1) The LME policies and procedures shall establish:

(A) the frequency and extent of monitoring of Category A and Category B providers based on the following:

- (i) provider's past performance relative to other Category A and B providers;
- (ii) status with other agencies that have oversight responsibilities for that provider;
- (iii) number and severity of critical incidents reported by a provider and trends in the incidents;
- (iv) number and types of complaints received or investigated concerning a provider, the provider's promptness in responding and satisfactory resolution of complaints;
- (v) results of State reviews conducted by DFS or DMH/DD/SAS;
- (vi) concerns about compliance with legal requirements during a provider's provision of service or while the LME is providing service coordination;

(vii) addition of a new service that the provider has not provided in the past; and

(viii) whether the provider is accredited by one of the accreditation agencies accepted by DMH/DD/SAS and the results of that accreditation agency's reviews of the provider.

(B) protocols by which the LME shall refer the routine monitoring of a Category A provider to DFS or a Category B provider to DMH/DD/SAS based on the following factors:

(i) the provider's failure to submit an accepted plan of correction for deficiencies within the timeframe designated in the routine monitoring report;

(ii) the provider's failure to correct cited deficiencies after technical assistance has been provided by the LME; or

(iii) the possibility that continuation of uncorrected deficiencies is likely to be detrimental to the client or to place the client's psychological or physical health or safety in jeopardy.

(2) The LME shall notify DFS prior to conducting routine monitoring for a Category A provider. The DFS may participate with the LME during any phase of the monitoring. The LME shall notify DMH/DD/SAS prior to conducting routine monitoring for a Category B provider. The DMH/DD/SAS may participate with the LME during any phase of the monitoring. The LME, DFS and DMH/DD/SAS shall collaborate as necessary to ensure that there is no duplication of routine monitoring and that redundancy of monitoring occurs only to the extent required to verify that monitoring is adequate to ensure the quality of care to clients and that corrections and improvements have been made.

(3) When an LME has notified another LME pursuant to Rule .0505 of this Subchapter, the notifying LME may request that the LME conduct routine monitoring of their client's provider to assure compliance with legal requirements.

(4) When routine monitoring occurs, the LME shall:

(A) conduct an exit review at the conclusion of the on-site monitoring

- visit, including disclosure of any deficiencies found during the review;
- (B) submit a monitoring report to the provider within 10 working days of the completion of the on-site monitoring visit or review of submitted data. Elements to be included in the routine monitoring report include:
 - (i) legal requirements reviewed;
 - (ii) a rating of "not met," "partially met," or "met or exceed" for each requirement reviewed;
 - (iii) a description of information reviewed to determine the rating for each requirement reviewed; and
 - (iv) recommended action regarding each requirement with a rating of "not met" or "partially met."
- (5) If the routine monitoring report's recommended actions include correction of cited deficiencies in the legal requirements, the provider shall submit to the LME a plan of correction for each identified deficiency within 10 working days of the date the provider initially received the deficiency report from the LME. The plan of correction shall specify the following:
 - (A) analysis or investigation conducted by the provider to determine the cause of the deficiency;
 - (B) conclusions reached about the cause of the deficiency;
 - (C) the measures that will be put in place to correct the deficiency and the timelines for these corrections which shall be no later than 60 days from the receipt of the monitoring report by the provider;
 - (D) the improvements that will be put in place to prevent a re-occurrence of the deficiency and the timelines for their implementation; and
 - (E) the individual or individuals who will monitor the corrective actions.
- (6) When the LME's recommended action includes correction of cited deficiencies, the LME shall:
 - (A) review and respond to the provider's plan of correction with approval or a description of additional information required for approval within 10 working days of the receipt of the provider's proposed plan of correction; and
 - (B) follow-up to ensure correction of cited deficiencies no later than 90

- calendar days from the date the on-site monitoring visit was concluded. The LME may provide technical assistance to a provider with identified deficiencies.
- (7) The LME shall submit a report of routine monitoring activities to DFS and DMH/DD/SAS not less than monthly on a form provided by the Secretary via electronic means. The monthly monitoring report shall include:
 - (A) the names of providers monitored during the reporting period;
 - (B) whether deficiencies were cited;
 - (C) the date the LME conducted a follow-up on the deficiencies; and
 - (D) whether the deficiencies had been corrected at the time of the follow-up.
- (8) The LME shall analyze, not less than quarterly, the results of routine monitoring activities to identify patterns and trends in providers compliance with legal requirements, timeliness of corrections, the effectiveness of monitoring processes and opportunities for improvements.
- (9) If the circumstances identified during routine monitoring give reasonable cause to indicate that a disabled adult may be abused, neglected or exploited and in need of protective services, the LME shall initiate the procedures outlined in G.S. 108A, Article 6.
- (10) If the circumstances identified during routine monitoring give cause to suspect that a child or adolescent may be abused, neglected or exploited and in need of protective services, the LME shall initiate the procedures outlined in G.S. 7B, Article 3.

Authority G.S. 122C-111; 143B-139.1.

10A NCAC 271 .0308 REPORTING REQUIREMENTS
The LME shall report to DMH/DD/SAS and GACPD quarterly on a form provided by the Secretary via electronic means, the following information:

- (1) summary numbers of types of complaints, critical incidents and results from routine monitoring activities;
- (2) trends and patterns identified through analyses of complaints, critical incidents and routine monitoring; and
- (3) use of the analyses for improvement of the service system and planning of future monitoring activities.

Authority G.S. 122C-112.1; 143B-139.1.

Notice is hereby given in accordance with G.S. 150B-21.2 that the Commission for Health Services intends to amend the rule cited as 10A NCAC 43H .0111.

None

Proposed Effective Date: July 1, 2004

Public Hearing:

Date: March 23, 2004

Time: 1:00 p.m.

Location: Room G1A, 1330 St. Mary's St., Raleigh, NC

Reason for Proposed Action: Effective July 1, 2002 the North Carolina Sickle Cell Syndrome Program through its Purchase of Medical Care program (POMC) eliminated coverage for inpatient services due to budget overruns. The result of this change has been that POMC overall program cost is now within budget. Also, this fiscal year's expenditures are less than expected. At the current rate of monthly expenditure, only \$408,000 of the \$677,000 annual budget will be expended by years end. Given these projections, the program is recommending a temporary rule change that will reinstate limited inpatient coverage. Having reviewed historical inpatient data and future cost projections the program is recommending the following rule change: "POMC will provide coverage for one inpatient admission per client per year for a maximum of seven days".

Procedure by which a person can object to the agency on a proposed rule: Objections may be submitted in writing to Chris G. Hoke, JD, Rule-making Coordinator during the public comment period. Additionally, objections may be made verbally and in writing at the public hearing for this Rule.

Written comments may be submitted to: Chris G. Hoke, JD, 1915 Mail Service Center, Raleigh, NC 27699-1915, phone (919) 715-4168 and email chris.hoke@ncmail.net.

Comment period ends: April 30, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)

CHAPTER 43 – PERSONAL HEALTH

SUBCHAPTER 43H - SICKLE CELL SYNDROME: GENETIC COUNSELING: CHILDREN AND YOUTH SECTION

SECTION .0100 - SICKLE CELL SYNDROME PROGRAM

10A NCAC 43H .0111 MEDICAL SERVICES COVERED

~~Covered medical services, which must be determined to be related to sickle cell disease and approved by the Program, include:~~

The following medical services are covered under the N.C. Sickle Cell Syndrome Program if the Program determines that these services are related to sickle cell disease:

- (1) hospital outpatient care including emergency room visits. The total number of days per year for emergency room visits shall not exceed triple the Program average for each for the previous two years;
- (2) physicians' office visits;
- (3) drugs on a formulary established by the program based upon the following factors: the medical needs of sickle cell patients, the efficacy and cost effectiveness of the drugs, the availability of generic or other less costly alternatives, and the need to maximize the benefits to patients utilizing finite program dollars. A copy of this formulary may be obtained free of charge by writing to the N. C. Sickle Cell Syndrome Program, 1330 St. Mary's Street, Raleigh, North Carolina, 27605;
- (4) medical supplies and equipment;
- (5) preventive dentistry including education, examinations, cleaning, and X-rays; remedial dentistry including tooth removal, restoration, and endodontic treatment for pain prevention; and emergency dental care to control bleeding, relieve pain, and treat infection; ~~and~~
- (6) eye care (when the division of services for the blind will not provide ~~coverage~~); coverage; ~~and~~
- (7) inpatient care. The cost of one inpatient admission per client per year for a maximum of seven days per fiscal year.

Authority G.S. 130A-129.

TITLE 11 – DEPARTMENT OF INSURANCE

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Department of Insurance intends to adopt the rules cited as 11 NCAC 11B .0152; 11C .0407 and amend the rules cited as 11 NCAC 11A .0102, .0511; 11H .0102; 14

.0201-.0202, .0416-.0417, .0501, .0503-.0505, .0603, .0605, .0702, .0704.

Proposed Effective Date: July 1, 2004

Public Hearing:

Date: March 16, 2004

Time: 10:00 a.m.

Location: Third Floor Hearing Room, Dobbs Building, 430 N. Salisbury St., Raleigh, NC

Reason for Proposed Action: To comply with statutory changes and make technical corrections.

Procedure by which a person can object to the agency on a proposed rule: The Department of Insurance will accept written objections to these rules until the expiration of the comment period (4-30-04). Objections need to be specific and sent to the attention of the APA Coordinator.

Written comments may be submitted to: Ellen K. Sprenkel, PO Box 26387, Raleigh, NC 27611, phone (919) 733-4529, fax (919) 733-6495 and email esprenke@ncdoi.net.

Comment period ends: April 30, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 11 - FINANCIAL EVALUATION DIVISION

SUBCHAPTER 11A - GENERAL PROVISIONS

SECTION .0100 – DEFINITIONS

11 NCAC 11A .0102 UNSOUND CONDITION
"Unsound Condition", as used in G.S. 58-3-90 and 58-3-100 means that the state of affairs of any insurance company is such that the Commissioner has determined that is continued operations may be hazardous to its policy holders, creditors, or

~~the general public, after the Commissioner has considered any or all of the standards set forth in G.S. 58-30-60(b). An insurer's financial condition is unsound pursuant to G.S. 58-3-100(a)(2) if it meets the definition of "Hazardous financial condition" pursuant to G.S. 58-47-60(9).~~

Authority G.S. 58-2-40; 58-3-100; 58-30-60(b).

SECTION .0500 - CPA AUDITS

11 NCAC 11A .0511 CPA WORKPAPERS

(a) Workpapers are the records kept by the CPA of the procedures followed, the tests performed, the information obtained, and the conclusions reached pertinent to ~~his~~ the CPA's examination of the financial statements of an insurer. Workpapers, accordingly, may include work programs, analyses, memoranda, letters of confirmation and representation, abstracts of company documents and schedules, or commentaries prepared or obtained by the CPA in the course of ~~his~~ the CPA's examination of the financial statements of an insurer and that support his opinion thereof.

(b) Every insurer required to file an Audited Financial Report pursuant to this Section, shall require the CPA (through the insurer) to make available for review by Department examiners, all workpapers prepared, or legible copies thereof, in the conduct of ~~his~~ the CPA's examination. The completed workpapers and any written communications between the CPA and the insurer relating to the audit of the insurer shall be made available for review by Department examiners at the offices of the insurer. The insurer shall require that the CPA retain the audit workpapers for a period of not less than ~~five~~ seven years after the period reported thereon.

(c) In the conduct of any periodic review by the Department examiners, photocopies of pertinent audit workpapers may be made and retained by the Department.

Authority G.S. 58-2-40; 58-2-205.

SUBCHAPTER 11B - SPECIAL PROGRAMS

SECTION .0100 – SECURITIES

11 NCAC 11B .0152 CUSTODY AGREEMENT FOR SECURITIES AND OTHER ASSETS DEPOSITED WITH THE COMMISSIONER

The agreement between the Commissioner and the master trustee shall provide for the deposit of securities and other assets required by the Commissioner, pursuant to G.S. 58 and G.S. 97-185, to be transferred to and held by the master trustee. The securities and other assets held in the respective accounts of the companies shall be pledged and held on behalf of the Commissioner for the protection of the companies' policyholders in accordance with the North Carolina General Statutes. The agreement shall set forth procedures and policies that shall be followed by the master trustee to safeguard the interests of policyholders of the companies in the safekeeping of the securities and other assets received and held on behalf of the Commissioner.

Authority G.S. 58-2-40; 58-5-1.

SUBCHAPTER 11C - ANALYSIS AND EXAMINATIONS

SECTION .0400 – MISCELLANEOUS

11 NCAC 11C .0407 REPORT OF POLICYHOLDERS POSITION – MORTGAGE GUARANTY INSURERS

Each mortgage guaranty insurance company doing business in this State must file a Mortgage Guaranty Insurers Report of Policyholders Position form which is available at the following address:
www.ncdoi.com/Industry/FinancialForms/MortgageGuarantyFormFeb2002.doc.

Authority G.S. 58-2-40; 58-10-120; 58-10-125.

SUBCHAPTER 11H - CONTINUING CARE FACILITIES

11 NCAC 11H .0102 LICENSE - STEPS

~~Continuing Care facilities must~~ An applicant shall apply for licensure in accordance with the following steps:

- (1) For new or development stage facilities:
 - (a) ~~The provider must~~ applicant shall initially submit the following items to the Commissioner for review:
 - (i) ~~The provider/sponsor names, addresses,~~ The applicant's name, address and telephone numbers; number;
 - (ii) A copy of a Non-Binding Reservation Agreement form (NBRA);
 - (iii) Escrow agreement;
 - (iv) Narrative describing the facility, its mode of operation, and its location; and
 - (v) Any advertising materials to be ~~used;~~ and used.
 - (vi) ~~Any additional materials/information or ongoing periodic reporting as required by the Commissioner.~~
 - (b) Upon completion of step 1(a), the ~~provider~~ applicant may:
 - (i) Disseminate materials describing the intent to develop a Continuing Care facility; and
 - (ii) Enter into fully refundable Non-Binding Reservation Agreements (NBRA's) for up to one thousand dollars (\$1,000.00). All funds received ~~must~~ shall be escrowed.
- (2) Start-Up Certificate:
 - (a) In order to obtain a Start-Up Certificate, the applicant or provider

~~must~~ shall submit the following to the Commissioner for review:

- (i) Application for Licensure, as required by G.S. 58-64-5(b);
 - (ii) A Disclosure Statement, as required by G.S. 58-64-20;
 - (iii) A copy of a binding Reservation Agreement or Resident Agreement; and
 - (iv) A market feasibility ~~study;~~ and study.
 - (v) ~~Any additional materials/information or ongoing periodic reporting as required by the Commissioner.~~
- (b) Upon issuance of the Start-Up Certificate, the applicant or provider may:
- (i) Enter into binding Reservation Agreements or Resident Agreements;
 - (ii) Accept entrance fees and entrance fee deposits over one thousand dollars (\$1,000.00). Any funds received shall be escrowed and shall only be released in accordance with G.S. 58-64-35;
 - ~~(ii)~~ (iii) Begin site preparation work; and
 - ~~(iii)~~ (iv) Construct model units for marketing.
- (3) Preliminary Certificate:
- (a) In order to obtain a Preliminary Certificate, the applicant or provider ~~must~~ shall submit the following to the Commissioner for review:
 - (i) An explanation of any significant differences between actual costs and projected costs contained in the Start-Up Certificate submission (not required for existing operational Continuing Care facilities that are expanding);
 - (ii) An updated Disclosure Statement;
 - (iii) Current interim financial statements; and
 - (iv) Confirmation of signed agreements for at least 50 percent of the new units, reserved by a deposit equal to at least 10 percent of the entrance fee or by a non-refundable deposit equal to the periodic fee for at

- (v) ~~Any additional materials/information or ongoing periodic reporting as required by the Commissioner.~~
- (b) Upon issuance of the Preliminary Certificate, the applicant or provider may:
 - (i) Purchase or construct a Continuing Care facility;
 - (ii) Renovate or develop structure(s) not already licensed as a Continuing Care facility; and
 - (iii) Expand existing Continuing Care facilities in excess of 10 percent of the current number of available Independent Living Units (ILU's) and/or available health related units/beds.
- (4) Permanent License:
 - (a) In order to obtain a Permanent License, the applicant or provider ~~must shall~~ submit the following to the Commissioner for review at least 60 days before the facility opening:
 - (i) An updated Application for Licensure;
 - (ii) An updated Disclosure Statement; and
 - (iii) Confirmation of signed agreements for new units required by the ~~continuing care~~ Continuing Care facility to break-even, reserved by a deposit equal to at least 10 percent of the entrance fee or by a non-refundable deposit equal to the periodic fee for at least two months for facilities that have no entrance fee.
 - (b) Upon issuance of the Permanent License and satisfaction of all other legal requirements, the applicant or provider ~~may; can presuming all other legal requirements have been met or completed:~~
 - (i) Open the Continuing Care facility; and
 - (ii) Provide Continuing Care.
- (5) Restricted or Conditional License:
 - (a) Presuming all other licensing requirements are met, the Commissioner may, in lieu of

denying the issuance of a Permanent License, issue a Restricted or Conditional License to an applicant when one or more of the following conditions exist:

- (i) A hazardous financial condition.
- (ii) Occupancy at the facility, or the number of executed agreements for new units at the facility, is below the level at which the facility would break-even.

The provider shall file with the Commissioner either quarterly financial statements or occupancy reports, or both. Such reports shall be due no later than 45 days following the end of each fiscal quarter.

- (a) ~~Where applicable, the Commissioner may provide facilities exhibiting specific conditions, criteria, or hazardous financial conditions, with a Restricted or Conditional License. Reporting data, format, schedules, routines, restrictions, and conditions shall be determined by the Commissioner, and are subject to change by the Commissioner.~~

- (b) Upon issuance of the Restricted or Conditional License, the provider may operate the facility under the conditions or restrictions established by the provider may continue to operate the facility under the conditions or restrictions as determined by the Commissioner until such time as the Commissioner alters the conditions acceptable for continued operations, issues a Permanent License, or takes whatever other action is appropriate. operations or issues a Permanent License.

Authority G.S. 58-2-40; 58-64-5; 58-64-65.

CHAPTER 14 - ADMISSION REQUIREMENTS

SECTION .0200 - FORMATION OF DOMESTIC INSURANCE COMPANY

11 NCAC 14 .0201 INFORMATION REQUIRED DURING PRE-INCORPORATION

Prior to the certification of the articles of incorporation to the Office of the Secretary of State pursuant to G.S. 58-7-35, the following ~~information must~~ documentation shall be submitted to the ~~commissioner~~ Commissioner for ~~his~~ consideration and approval:

- (1) biographical affidavits in the form identified as 11 NCAC 14 .0409 ~~must~~ shall be submitted for each ~~promoter, incorporator, director, trustee, proposed management personnel or other persons similarly situated;~~ key person as defined in G.S. 58-7-37;
- (2) a detailed and complete plan of operation describing the lines of insurance to be written and how the proposed company will perform its various functions;
- (3) an actuarial projection of the anticipated operational results for a five-year period based on the initial capitalization of the proposed company and its plan of operation, which projection ~~must~~ shall be prepared by an actuary that has experience in reserve certifications, pursuant to the Annual Statement instructions, a properly qualified individual shall be in a format similar to the Annual Statement be in sufficient detail for a complete analysis to be performed, and shall be accompanied by a list of the assumptions utilized in making such projection;
- (4) a description of the source of the initial capitalization of the proposed company if other than through a public offering of pre-incorporation subscriptions to the capital stock of the company;
- (5) ~~evidence of full compliance with Chapter 78A of the General Statutes of North Carolina if a public offering of pre-incorporation subscriptions to the capital stock of the proposed company is planned; a signed and dated statement by the proposed company's president or vice president affirming compliance with the requirements of G.S. 78A-17(10) if a public offering of pre-organization subscriptions to capital stock of the proposed company is planned;~~
- (6) ~~evidence that adequate technical expertise, (accounting, actuarial, underwriting, legal, etc.) is either available among the incorporators and proposed initial staff or that the incorporators have retained such necessary expertise for the operation of the company; the names of the persons managing the accounting, actuarial, underwriting, claims, legal, treasury, marketing, information systems, and reinsurance functions of the proposed company. Such persons shall be experienced in their respective disciplines. Evidence of experience shall be a minimum of three years of employment in the respective disciplines if so noted in the biographical affidavit described in 11 NCAC 14 .0409; and such other specific information that the commissioner~~ Commissioner may request that he deems to be pertinent to the organization of the proposed company. all background documentation, including fingerprint cards, for
- (7) each key person as required by and in accordance with G.S. 58-7-37.

Authority G.S. 58-2-40; 58-7-35; 58-7-37; 58-7-40; 58-7-75.

11 NCAC 14 .0202 INFORMATION REQUIRED AFTER ORGANIZATIONAL MEETING

In accordance with the procedures established by G.S. 58-7-40, the following information ~~must~~ shall be submitted to the ~~commissioner~~ Commissioner for approval prior to the issuance of a certificate of authority to a newly organized company:

- (1) a certificate of proceedings of the organizational meeting setting forth a copy of the articles of incorporation with the names of the subscribers thereto; the date of the first meeting and of any adjournments thereof; certified copies of the minutes of the meeting; certified copies of the bylaws; an opening balance sheet of the ~~corporation's~~ Company's books and records and confirmation of the initial capitalization funds in escrow or otherwise, for the company; and
- (2) duly prepared and executed forms furnished by the ~~commissioner~~ Commissioner as follows:
 - (a) check sheet and analysis of application for admission in the form described in 11 NCAC 14 .0414;
 - (b) application for license in the form described in 11 NCAC 14 .0432;
 - (c) ~~petition for admission to do business in North Carolina in the form described in 11 NCAC 14 .0415;~~
 - (d)(c) power of attorney for ~~services~~ service of legal process in the form described in 11 NCAC 14 .0416; and
 - (e)(d) power of attorney to sell securities on deposit in the form described in 11 NCAC 14 .0417.

Authority G.S. 58-2-40; 58-5-30; 58-7-35; 58-7-40; 58-16-30.

SECTION .0400 - DESCRIPTION OF FORMS

11 NCAC 14 .0416 POWER OF ATTORNEY FOR SERVICE OF LEGAL PROCESS

The Power of Attorney for the Service of Legal Process is a form used in the application process to appoint the ~~commissioner~~ Commissioner as an applicant company's true and lawful attorney upon whom processes of law against the company in any action or legal proceeding subject to North Carolina law may be served.

Authority G.S. 58-2-40; 58-16-5(10); 58-16-30.

11 NCAC 14 .0417 POWER OF ATTORNEY FOR SALE OF SECURITIES

The Power of Attorney for Sale of Securities is a form used in the application process authorizing the ~~commissioner~~ Commissioner to sell or transfer securities on deposit with the

Department as may be necessary to pay any legal liability of the applicant company.

Authority G.S. 58-2-40; 58-5-30.

SECTION .0500 - ADMISSION OF A FOREIGN OR ALIEN INSURANCE COMPANY

11 NCAC 14 .0501 APPLICATION FORMS

In addition to any information required pursuant to G.S. 58-16-5, a foreign insurance company applying for admission to do business in North Carolina ~~is required to prepare and shall execute and submit to the Commissioner as appropriate the forms described in 11 NCAC 14 .0409 through .0422. The Commissioner shall accept applications for admission that are filed pursuant to the uniform certificate of authority application process designed and made available by the National Association of Insurance Commissioners.~~

Authority G.S. 58-2-40; 58-16-5.

11 NCAC 14 .0503 AUTHORIZED LINES OF BUSINESS FOR A FOREIGN COMPANY

A foreign insurance company applying for admission to do business in North Carolina ~~can only be licensed for the shall be licensed only for those lines of business it has the authority to transact in its state of domicile or any other state in which it is licensed. domicile.~~

Authority G.S. 58-2-40; 58-16-5(2).

11 NCAC 14 .0504 FOREIGN COMPANY MUST HAVE CONDUCTED SUCCESSFUL BUSINESS

~~In order to be eligible for admission to do business Foreign insurance companies applying for admission to do business in North Carolina Carolina, foreign insurance companies must shall have net operational gains net income for three consecutive years immediately preceding the date of application for admission. Such applicant companies admission and must continue to reflect net gains net income from their operations throughout the admission process.~~

Authority G.S. 58-2-40; 58-16-5(2).

11 NCAC 14 .0505 WAIVERS OF THREE-YEAR NET INCOME REQUIREMENT

(a) The ~~Commissioner shall waive the three-year net operational gain net income requirement for a foreign insurance company applying for admission to do business in North Carolina Carolina, may be waived by the Department if the company meets all other requirements for admission and it is a subsidiary of, or affiliated under a holding company system, as defined in G.S. 58-19-5, with, with a licensed insurance company that company:~~

- (1) ~~that has been licensed in North Carolina for a minimum of ten years;~~
- (2) ~~that has reflected net income three of the most recent five years; been successful in its insurance operations;~~

- (3) ~~that enjoys a satisfactory reputation in its dealings with its North Carolina policyholders policyholders, demonstrated by a volume of consumer complaints that are not material and market conduct examination findings which are not harmful to its policyholders; and~~
- (4) ~~whose management has a substantial degree of management control over the operations of the applicant company. company as defined in G.S. 58-19-5.~~

~~To be eligible for the waiver, the The affiliated company must shall guarantee to maintain the capital and surplus of the applicant company at or above the admission requirements in North Carolina for a minimum of three years or until the applicant company can provide a report on examination that certifies three consecutive years of net gains from operations, net income, whichever last occurs. The forms for making such a guarantee are described in Rules .0421 and .0422 of this Chapter. The affiliated company shall use the forms prescribed in 11 NCAC 14 .0421 and 14 .0422 to make such guaranty. The Any guaranty provided by the affiliated company, that if exercised would place the guarantor in a hazardous financial condition as defined in G.S. 58-47-60, is ineffective in providing eligibility for the waiver. must reflect sufficient financial strength to support such a guarantee. Any applicant company that is granted a waiver of this requirement shall place on deposit with the Commissioner, in addition to any other minimum required deposits for admission, qualified securities in the amount of one hundred thousand dollars (\$100,000) two hundred thousand dollars (\$200,000) of the kind and nature set forth under G.S. 58-5-20.~~

(b) On an individual case basis, a foreign life insurance company ~~may be considered shall be eligible for admission a waiver of the net income requirement if it has a minimum of one year of net operational gains net income for the current or immediately preceding year and can provide a certified financial projection, prepared by an actuary, actuary or an actuarial firm, firm that has experience in actuarial certifications, or a certified financial forecast prepared by an independent certified public accountant, accountant that has experience in audits of insurers, satisfactory to the Commissioner pursuant to the Annual Statement instructions, reflecting continuing net income operational gains for at least the next three years. This financial projection or forecast must shall be in a format similar to the Annual Statement contain adequate details of all income and expense items sufficient for proper evaluation. for evaluation by the Commissioner. All assumptions used in the preparation of such a projection or forecast must shall be included with the filing. Any applicant company that is granted a waiver under this Rule shall place on deposit with the Commissioner, in addition to any other minimum required deposits for admission, eligible securities in the amount of one hundred thousand dollars (\$100,000) two hundred thousand dollars (\$200,000) of the kind and nature set forth under G.S. 58-5-20.~~

(c) A foreign fire, casualty, or fire and casualty insurance company ~~may be considered for a shall be eligible for the waiver of the three-year net income operational gain requirement under the following conditions:~~

- (1) ~~the applicant company must have been in business for at least five years under the same~~

- ~~(2) the applicant company must have reflected net gains from its operations for at least three of the last five years; or must reflect verifiable total statutory capital and surplus in excess of fifty million dollars (\$50,000,000) in its most recent annual statement;~~
- ~~(3) the applicant company must provide certification of the adequacy of its loss and loss adjustment expense reserves, satisfactory to the Commissioner, as they pertain to the most recent annual statement; and~~
- ~~(4) the applicant company must reflect verifiable total statutory capital and surplus in excess of ten million dollars (\$10,000,000) on its most recent annual statement.~~
- (1) the applicant company reflects verifiable total statutory capital and surplus in excess of ten million dollars (\$10,000,000) on its most recent Annual or Quarterly Statement;
- (2) the applicant company has been in business for at least five years under the same ultimate ownership and writing the same or similar lines of business;
- (3) the applicant company reflects net income for at least three of the most recent five years; or reflects verifiable total statutory capital and surplus in excess of twenty-five million dollars (\$25,000,000) in its most recent Annual or Quarterly Statement; and
- (4) the applicant company certifies the adequacy of its loss and loss adjustment expense reserves in accordance with the Annual Statement instructions as they pertain to its most recent annual statement.

Any company that is granted a waiver under this provision shall place on deposit with the Commissioner, in addition to any other minimum required deposits for admission, eligible securities in the amount of five hundred thousand dollars (\$500,000) of the kind and nature set forth under G.S. 58-5-20.

(d) On an individual case basis, a foreign insurance company of any type listed in G.S. 58-7-75 shall be eligible for a waiver of the net income requirement under the following conditions:

- (1) the applicant company is owned by, or will within 12 months be owned by, a North Carolina licensed insurance company without restriction or an insurance company holding company system as defined in G.S. 58, Article 19, that has been or had been in existence for any three of the most recent five years. The North Carolina licensed insurance company must have reflected net income for any three of the most recent five years, or the largest insurer, whether or not licensed in North Carolina, based on its equity within the insurance holding company system must have reflected net income for any three of the most recent five years;

- (2) the applicant company is purchasing an existing block of insurance business and the existing management personnel;
- (3) the applicant company can demonstrate that the block of insurance business being purchased has net income for at least any three of the most recent five years and is projected by an actuary, or forecasted by a certified public accountant, to reflect net income for at least the next three years; and
- (4) the total capital and surplus of the applicant company is at least six times the authorized control level risk based capital pursuant to G.S. 58, Article 12, after the purchase of the block of business.

Any company that is granted a waiver under this provision shall deposit with the Commissioner, in addition to any other minimum required deposit for admission, eligible securities in the amount of two hundred thousand dollars (\$200,000) of the kind and nature set forth under G.S. 58-5-20.

Authority G.S. 58-2-40; 58-5-20; 58-5-40; 58-7-75; 58-16-5(2).

SECTION .0600 - SURPLUS LINES

11 NCAC 14 .0603 FINANCIAL INFORMATION REQUIRED

(a) Each request for surplus lines eligibility shall be accompanied by the following financial information so that verification of compliance with the eligibility requirements can be made:

- (1) annual statements for the preceding two years in the form required under G.S. 58-2-165 for companies licensed in at least one state in the United States;
- (2) annual financial reports for the preceding two years in the English language and in U.S. dollar amounts for alien insurance companies;
- (3) a certified copy of the latest report on examination and CPA report or, if the company is not required to be examined by any jurisdiction, a copy of the latest CPA report and management letter; and
- (4) an actuarial certification of the loss reserves and loss adjustment expense reserves for the most recent year if such certification is available; and available.
- ~~(5) a copy of the NAIC financial ratio (IRIS) results for the most recent year, along with an explanation for any unusual values if such tests are performed;~~

~~(b) An alien insurer must shall file a copy of its United States trust agreement; agreement and must shall also file with and be approved by the Nonadmitted Insurers Information Office International Insurers Department of the NAIC to be considered for eligibility eligible in North Carolina.~~

Authority G.S. 58-2-40; 58-2-165; 58-21-20.

11 NCAC 14 .0605 DELETION FROM ELIGIBLE

COMPANY LIST

- (a) Any eligible company found to ~~no longer be of good repute~~ or no longer ~~satisfying~~ satisfy the eligibility requirements will be deleted from the Department's list if the ~~situation event causing the ineligibility~~ is not corrected within ~~15 days~~. 15 days after notification of the deficiency.
- (b) By written request, any eligible company may voluntarily withdraw from eligibility and be deleted from the Department's list.
- (c) Any insurer that is deleted from the Department's list pursuant to Paragraph (a) or (b) of this Rule and has active policies or policy obligations in this State shall be required to continue to file financial statements with the Department beyond the date the insurer is deleted from the list of eligible companies until all policies are inactive and policy obligations are satisfied.

Authority G.S. 58-2-40; 58-21-5; 58-21-30.

SECTION .0700 - FEDERAL RISK RETENTION ACT ENTITIES

11 NCAC 14 .0702 PURCHASING GROUP FILING REQUIREMENTS

- (a) A purchasing group ~~desiring seeking~~ seeking to do business in North Carolina shall request an application for registration as a purchasing group before soliciting any member ~~to insure, through the group, any liability risk located in North Carolina, shall request an application for registration as a purchasing group, in North Carolina.~~ The purchasing group shall then furnish notice to the Commissioner of its intent to do business in North Carolina on the form described in 11 NCAC 14 .0427.
- (b) A purchasing group ~~desiring seeking~~ seeking to do business in North Carolina ~~must shall~~ purchase insurance from a company licensed to do business in North Carolina or comply with the provisions of the North Carolina Surplus Lines Act.
- (c) Each purchasing group shall specify the method by which, and the person or persons through whom, insurance will be offered to its members whose risks are resident or located in North Carolina.
- (d) A purchasing group ~~desiring seeking~~ seeking to do business in North Carolina by complying with the provisions of the North Carolina Surplus Lines Act ~~must shall~~, before effecting coverage, designate the name and address of the surplus lines licensee.
- (e) All policy forms and rates for use by purchasing groups soliciting in North Carolina with respect to insurance procured from companies licensed in North Carolina ~~must shall~~ be filed with and approved by the Commissioner prior to their use in North Carolina.

Authority G.S. 58-2-40; 58-22-40; 58-22-45; 58-22-70.

11 NCAC 14 .0704 UPDATES AND AMENDMENTS TO FILINGS

- (a) Any risk retention group that has ~~satisfactorily~~ completed registration with the Commissioner shall notify the Commissioner in writing within ~~30~~ 10 days of any changes in its operations that would cause the registration then on file to contain false, inaccurate, or misleading information, including the solicitation or writing of any liability insurance coverage in addition to that for which it has previously notified the

Commissioner, so as to correct such false, inaccurate, or misleading information.

- (b) Any purchasing group that has ~~satisfactorily~~ completed registration with the Commissioner shall notify the Commissioner in writing within ~~30~~ 10 days of any changes in its operations that would cause the registration then on file to contain false, inaccurate, or misleading information, including the solicitation or purchasing of any liability insurance coverage in addition to that for which it has previously notified the Commissioner, so as to correct such false, inaccurate, or misleading information.

- (c) Any risk retention group or purchasing group that has been notified of its ~~satisfactorily~~ completed registration by the Commissioner shall, on or before March 1 of each year, by sworn affidavit of the officer or party qualified and authorized to file an original registration or notice of intent to do business, certify to the Commissioner ~~as to the~~ continued accuracy of the information on file or amended by notice pursuant to Paragraphs (a) or (b) of this ~~Rule, Rule~~ and as to its continued intent to be registered and do business in North Carolina.

Authority G.S. 58-2-40; 58-22-20; 58-22-40(c).

TITLE 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC Wildlife Resources Commission intends to amend the rule cited as 15A NCAC 10B .0202.

Proposed Effective Date: July 1, 2004

Public Hearing:

Date: March 17, 2004

Time: 1:00 p.m. to 3:00 p.m.

Location: Superior Courtroom, Columbus County Courthouse, 100 Courthouse Circle, Whiteville, NC

Reason for Proposed Action: To regulate bear season.

Procedure by which a person can object to the agency on a proposed rule: Notification of rulemaking coordinator, Joan Troy, by email or by letter prior to close of the comment period on May 7, 2004.

Written comments may be submitted to: Joan Troy, 1701 Mail Service Center, Raleigh, NC 27699-1701; email joan.troy@ncwildlife.org.

Comment period ends: May 7, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will

become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)
- None

CHAPTER 10 - WILDLIFE RESOURCES AND WATER SAFETY

SUBCHAPTER 10B - HUNTING AND TRAPPING

SECTION .0200 – HUNTING

15A NCAC 10B .0202 BEAR

(a) Open Seasons for bear shall be from the:

- (1) Monday on or nearest October 15 to the Saturday before Thanksgiving and the third Monday after Thanksgiving to January 1 in and west of the boundary formed by NC 113 from the Virginia State line to the intersection with NC 18 and NC 18 to the South Carolina State line.
- (2) Second Monday in November to the following Saturday and the third Monday after Thanksgiving to the following Wednesday in all of Hertford County and Martin counties; and in the following parts of counties:
Halifax: that part east of US 301.
Northampton: that part east of US 301.
- (3) Second Monday in November to January 1 in all of Bladen, Brunswick, Carteret, Columbus, Duplin, New Hanover, Onslow and Pender counties; and in the following parts of counties:
Cumberland: that part south of NC 24 and east of the Cape Fear River.
Sampson: that part south of NC 24.
- ~~(4) Second Monday in December to January 1 in Brunswick and Columbus counties.~~
- ~~(5)~~(4) Second Monday in November to the following Saturday and the ~~third Monday after Thanksgiving to the fifth Saturday after Thanksgiving~~ second Monday prior to the first Saturday before Christmas through the first Saturday before Christmas in all of Beaufort, Bertie, Camden, Craven, Dare, Gates, Hyde, Jones, Pamlico, Pasquotank, Tyrrell, and Washington counties, and in the following parts of counties:
Chowan: that part north of US 17.

Currituck: except Knotts Island and the Outer Banks.

(b) No Open Season. There is no open season in any area not included in Paragraph (a) of this Rule or in those parts of counties included in the following posted bear sanctuaries:

- Avery, Burke and Caldwell counties--Daniel Boone bear sanctuary
- Beaufort, Bertie and Washington counties--Bachelor Bay bear sanctuary
- Beaufort and Pamlico counties--Gum Swamp bear sanctuary
- Bladen County--Suggs Mill Pond bear sanctuary
- Brunswick County--Green Swamp bear sanctuary
- Buncombe, Haywood, Henderson and Transylvania counties--Pisgah bear sanctuary
- Carteret, Craven and Jones counties--Croatan bear sanctuary
- Clay County--Fires Creek bear sanctuary
- Columbus County--Columbus County bear sanctuary
- Currituck County--North River bear sanctuary
- Dare County--Bombing Range bear sanctuary
- Haywood County--Harmon Den bear sanctuary
- Haywood County--Sherwood bear sanctuary
- Hyde County--Gull Rock bear sanctuary
- Hyde County--Pungo River bear sanctuary
- Jackson County--Panthertown-Bonas Defeat bear sanctuary
- Macon County--Standing Indian bear sanctuary
- Macon County--Wayah bear sanctuary
- Madison County--Rich Mountain bear sanctuary
- McDowell and Yancey counties--Mt. Mitchell bear sanctuary
- Mitchell and Yancey counties--Flat Top bear sanctuary
- Wilkes County--Thurmond Chatham bear sanctuary

(c) Bag limits shall be:

- (1) daily, one;
- (2) possession, one;
- (3) season, one.

(d) Kill Reports. The carcass of each bear shall be tagged and the kill reported as provided by 15A NCAC 10B .0113.

Authority G.S. 113-134; 113-291.2; 113-291.7; 113-305.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS

CHAPTER 37 - BOARD OF NURSING HOME ADMINISTRATORS

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina State Board of Examiners for Nursing Home Administrators intends to adopt the rule cited as 21 NCAC 37G

.0302 and amend the rules cited as 21 NCAC 37D .0202, .0303, .0402, .0404, .0602, .0605, .0703; 37E .0101-.0102; 37G .0102, .0301; 37H .0102.

Proposed Effective Date: July 1, 2004

Public Hearing:

Date: March 24, 2004

Time: 4:00 p.m.

Location: 3700 National Drive, Room 104, Raleigh, NC 27612

Reason for Proposed Action: To clarify requirements of Administrators-in-Training, including curriculum standards; to reflect revisions in the National Exam criteria and Continuing Education programs of study; and to adopt a new rule to address requirements for licensure of candidates who were previously licensed but failed to renew or place such license on inactive status. These changes will assist potential and current licensees with compliance with these criteria for licensure. Additionally, the proposed action would increase the biennial licensure fee, within current statutory limits, to meet the increased financial demands of operations of the Board.

Procedure by which a person can object to the agency on a proposed rule: Any objection, together with the reason for the objection, may be submitted, in writing, until the expiration of the comment period on April 30, 2004, to Jane Baker, 3733 National Drive, Suite 228, Raleigh, NC 27612.

Written comments may be submitted to: Jane Baker, 3733 National Drive, Suite 228, Raleigh, NC 27612, phone (919) 571-4164, fax (919) 571-4166, and email ncbenba@mindspring.com.

Comment period ends: April 30, 2004

Procedure for Subjecting a Proposed Rule to Legislative Review: Any person who objects to the adoption of a permanent rule may submit written comments to the agency. A person may also submit written objections to the Rules Review Commission. If the Rules Review Commission receives written and signed objections in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the 6th business day preceding the end of the month in which a rule is approved. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-733-2721.

Fiscal Impact

- State
- Local
- Substantive (≥\$3,000,000)
- None

SUBCHAPTER 37D - NEW LICENSES

SECTION .0200 - APPLICATION FOR LICENSE

21 NCAC 37D .0202 INITIAL LICENSURE FEE

The applicant shall send to the Board, prior to licensure, an initial licensure fee of four hundred twenty five dollars (\$425.00) ~~three hundred seventy five dollars (\$375.00)~~ when applicant has successfully passed the examinations as required by the Board under Sections .0600 and .0700 of this Chapter.

Authority G.S. 90-280.

SECTION .0300 - EDUCATION, EXPERIENCE AND REQUIRED COURSE

21 NCAC 37D .0303 REQUIRED COURSE

The course prescribed by the Board pursuant to G.S. 90-278(1)c shall be comprised of in-class, field and correspondence components ~~included in the current description of the Basic Nursing Home Administrator Course provided by the School of Public Health at UNC Chapel Hill or its substantial equivalent to be approved by the Board.~~ An applicant with a health care administration degree may request in writing that the Board approve college courses as substantially equivalent to portions of the required course, provided the applicant tests out of portions of the required course with a passing score of at ~~least~~ least 70 percent.

Authority G.S. 90-278(1)c.

SECTION .0400 - ADMINISTRATOR-IN-TRAINING

21 NCAC 37D .0402 APPLICATION TO BECOME ADMINISTRATOR-IN-TRAINING

- (a) The applicant shall submit to the Board an application, which shall contain such information as name, education, employment history, questions pertaining to moral character, and any other information the Board may require to process an application according to these Rules, and an affidavit stating that the applicant, if granted a license, shall obey the laws of the state and the rules of the Board, and shall maintain the honor and dignity of the profession.
- (b) The applicant shall submit a background resume indicating the areas in which he is competent or lacking.
- (c) The applicant shall submit three reference forms as required and defined by Rule .0203 of this Subchapter.
- (d) The applicant shall supply a certified copy of each college transcript indicating the courses completed and hours earned, specifying whether semester or quarter hours. The applicant shall supply documentation of his supervisory experience in a nursing home if he is utilizing the experience substitute for the education requirement as allowed by G.S. 90-278(1)b.
- (e) The applicant shall appear before the Board for a personal interview.
- (f) The preceptor shall submit to the Board three weeks prior to the personal interview:
 - (1) Facility Survey Form;
 - (2) Letter accepting individual as an AIT;
 - (3) An individualized curriculum for the AIT program that provides the AIT with on the job experience in the subject areas as outlined in

Rule .0605 of this Subchapter, including the recommended number of weeks in the program;

(4) The Board shall provide an AIT Curriculum and Rationale Form, which shall propose the number of weeks for each of the subject areas in Rule .0605 of this Subchapter;

(5) Based on the education or experience of the AIT applicant, the preceptor shall be responsible for providing a rationale for any subject area in which the recommended number of weeks for the AIT is less than the number of weeks provided on the Form;

(6) Map to facility or directions.

(4) ~~Map to facility or directions.~~

(g) The owner of the facility or governing board shall submit to the Board three weeks prior to the personal interview, a letter of approval for the AIT applicant to train in their facility.

(h) A fee of one hundred fifty dollars (\$150.00) shall be submitted with the application.

(i) An AIT applicant shall maintain at all times a current residence mailing address with the Board office.

Authority G.S. 90-278; 90-280; 90-285.

21 NCAC 37D .0404 ADMINISTRATOR IN-TRAINING SELECTION OF PRECEPTOR

(a) From an approved list of preceptors, the AIT applicant shall select a preceptor ~~of his choice~~ prior to submitting application to the Board.

(b) It shall be the responsibility of the AIT applicant to contact a preceptor ~~to determine if to ensure that the preceptor shall accept~~ accepts the AIT applicant.

(c) Any change in preceptor shall be approved by the Board.

Authority G.S. 90-278; 90-285.

SECTION .0600 - NATIONAL EXAM

21 NCAC 37D .0602 NATIONAL EXAM APPLICATION

To sit for the National Exam, a person shall submit an exam application electronically to the NAB. In order to release the results of the NAB exam score, the applicant shall pay to the Board a processing fee of fifty dollars (\$50.00) on a form provided by the Board, which application shall be received 30 days prior to the examination date. Applicants shall also submit an initial application for licensure as described in 21 NCAC 37D .0201.

Authority G.S. 90-285; 90-28(a).

21 NCAC 37D .0605 SUBJECT AREAS

The national examination shall include, but need not be limited to, the following subjects:

- (1) Resident Care ~~Management;~~ and Quality of Life;
- (2) ~~Personnel Management;~~ Human Resources;
- (3) ~~Finance; Financial Management;~~

(4) Physical Environment and Atmosphere;
~~Environmental Management;~~

(5) Leadership and Governance ~~and Management.~~

Authority G.S. 90-278; 90-285.

SECTION .0700 - STATE EXAM

21 NCAC 37D .0703 STATE EXAMINATION ADMINISTRATION

(a) The state examination shall be ~~given administered on the same dates as the national examination.~~ dates to be determined and published by the Board. It may also be offered on different dates to reciprocity applicants and to applicants who have passed the national examination but have previously failed the state examination.

(b) An applicant shall pay a fee of seventy-five dollars (\$75.00) each time he takes the state examination.

Authority G.S. 90-280, 90-285.

SUBCHAPTER 37E - RECIPROcity/ENDORSEMENT

SECTION .0100 – APPLICATIONS

21 NCAC 37E .0101 APPLICATION PROCESS

(a) The Board may issue a license to a nursing home administrator who holds a nursing home administrator license issued by the proper authorities of any other state, upon payment of the current licensing fee, successful completion of the state examination, and submission of evidence satisfactory to the Board as to the following:

- (1) such applicant for licensure shall have personal qualifications, education, training and experience at least substantially equivalent to those required in this state;
- (2) such applicant shall be licensed in another state that gives similar recognition and reciprocity/endorsement to nursing home administrator licenses of this state;
- (3) such applicant for license by reciprocity/endorsement holds a valid active license as a nursing home administrator in the state from which he is transferring; and
- (4) such applicant shall appear before the Board for a personal interview.

(b) If the applicant for reciprocity does not submit evidence satisfactory to the Board as required by subparagraphs (a)(1) or (a)(2), of this Rule, the Board may issue a temporary reciprocal license for six months upon one or both of the following conditions:

- (1) Within one month of expiration of the temporary reciprocal license, submission of a statement that the temporary licensee has administered the nursing home in a manner satisfactory to the nursing home owner or representative of the ~~owner, or owner;~~ and/or
- (2) Completion of Continuing Education course(s) that the Board may require as a condition of issuance of a temporary reciprocal license.

(c) If a temporary reciprocal license is issued pursuant to Paragraph (b) of this Rule and the Board receives notice that an applicant's circumstances have changed such that the condition or conditions imposed is no longer applicable, the Board may modify the condition(s) imposed in its discretion. In addition, the Board may, for good cause, extend the temporary reciprocal license for an additional period, up to six months.

Authority G.S. 90-278; 90-280; 90-285; 90-287.

21 NCAC 37E .0102 APPLICATION CONTENTS

An applicant for reciprocity/endorsement shall ~~submit~~, submit the following items which must be received by the Board three weeks prior to the personal interview:

- (1) a completed application;
- (2) background resume;
- (3) certified college transcript(s);
- (4) three reference forms (one of which shall be from an employer) from individuals not related to the applicant who shall certify to the good moral character of the applicant as defined in 21 NCAC 37D .0203;
- (5) licensing questionnaire(s) from every state where the applicant has held a license; and
- (6) a two hundred dollar (\$200) application fee.

Authority G.S. 90-280; 90-285; 90-287.

SUBCHAPTER 37G - RENEWAL, INACTIVE, RESTORATION AND REINSTATEMENT, DUPLICATE

SECTION .0100 - RENEWAL REQUIREMENTS

21 NCAC 37G .0102 RENEWAL FEE

Upon making application for a new certificate of registration a licensee shall pay a biennial licensure fee of four hundred twenty five dollars (\$425.00), ~~three hundred seventy five dollars (\$375.00).~~

Authority G.S. 90-280; 90-285; 90-286.

SECTION .0300 – REINSTATEMENT

21 NCAC 37G .0301 REINSTATEMENT OF LICENSE

Upon re-applying for a license as provided in 21 NCAC 37D .0201-.0204 A license may be reinstated, for good cause, and after a period of two years after revocation by the Board in its discretion a license may be reinstated, for good cause by the Board in its discretion. Good cause means that the applicant is completely rehabilitated with respect to the conduct which was the basis of the discipline. Evidence of such rehabilitation shall ~~include~~ include, but is not limited to, evidence that:

- (1) such person has not engaged in conduct during the discipline period which, if the person had been licensed during such period, would have constituted the basis for discipline under G.S. 90-285.1;
- (2) with respect to any criminal conviction which constituted any part of the previous discipline,

the person has completed the sentence imposed, and is no longer on probation, whether supervised or unsupervised; and
 (3) restitution has been made to any aggrieved party.

Authority G.S. 90-285.

21 NCAC 37G .0302 RESTORATION OF LAPSED LICENSE

(a) A nursing home administrator whose license has lapsed for a period of time less than two years shall submit an application to the Board in accordance with 21 NCAC 37D .0402. The application shall be on a form provided by the Board and shall include:

- (1) documentation of the applicant's completion of 30 hours of continuing education approved by the Board during the preceding 24 months;
- (2) payment of the current license application fee;
and
- (3) successfully completing the state examination.

(b) A previously licensed nursing home administrator whose license has lapsed for a period of time exceeding two years may activate the license by submitting an application and shall comply with all of the requirements for licensure as set out in Rule 37D .0102. The Board may determine in its discretion whether the applicant complies with the then current requirements of licensure.

Authority G.S. 90-285, 90-286.

SUBCHAPTER 37H - CONTINUING EDUCATION

SECTION .0100 - CONTINUING EDUCATION REQUIREMENTS

21 NCAC 37H .0102 CONTINUING EDUCATION PROGRAMS OF STUDY

(a) The Board shall certify and administer courses in continuing education for the professional development of nursing home administrators and to enable persons to meet the requirements of the rules in this Chapter. The licensee shall keep a record of his continuing education hours. Certified courses, including those sponsored by the Board, an accredited university, college or community college, associations, professional societies, or organizations shall:

- (1) contain a minimum of ~~two~~ one classroom ~~hour~~ hours of academic work and not more than eight classroom hours within a 24-hour period; and
- (2) include instruction in the following general subject areas or their equivalents:
 - (A) Resident Care and Quality of Life;
~~Management;~~
 - (B) ~~Personnel Management;~~ Human Resources;
 - (C) ~~Finance;~~ Financial Management;
 - (D) Physical Environment and Atmosphere; ~~Environmental Management;~~

(E) Leadership Governance and Management.

(b) In lieu of certifying each course offered by a provider, the Board may certify the course provider for an annual fee not to exceed two thousand dollars (\$2,000) (so long as the course provider submits a list of courses offered for credit and agrees to comply with the requirements of Paragraph (a) of this Rule).

(c) Certified courses not administered by the Board shall:

(1) be submitted to the Board for approval at least 30 days prior to the presentation of the program;

(2) be accompanied with a processing fee of fifty dollars (\$50.00) to cover the cost of reviewing and maintaining records associated with the continuing education ~~program; and program.~~ The fee schedule is as follows:

(A) Any course submitted for review, up to and including five hours, shall be accompanied by a fee of seventy five dollars (\$75.00);

(B) Courses submitted for review of at least six hours and up to and including nine hours shall be accompanied by a fee of ninety dollars (\$90.00);

(C) Courses submitted for review of 10 hours or more shall be accompanied

by a fee of one hundred dollars (\$100.00).

(3) be approved for a period of one year from the date of initial presentation.

(d) Courses from an accredited university or community college shall meet all requirements as outlined in Paragraphs (a) and (b) of this Rule. A licensee submitting such courses for continuing education credit shall submit a copy of the final grade for said course work. Continuing education credit hours granted by the Board shall be the same as those granted by the institution.

(e) Credit may be earned for participation in teleconferenced course only if there is a third party representative of the course sponsor or the Board present to verify the licensee's attendance throughout the course.

(f) Up to ~~six~~ 10 hours of credit may be earned for participation in correspondence courses, only if,

(1) the correspondence course is approved by the Board or the National Association of Boards of Examiners of Long Term Care Administrators (NAB); and

(2) the approved course planner sends to the Board a verification of the individual's completion of the correspondence course.

(g) The Board shall charge a registration fee covering the cost of continuing education courses it sponsors, not to exceed two hundred fifty dollars (\$250.00).

Authority G.S. 12-3.1(c)(3); 90-278; 90-280; 90-285; 90-286.

Note from the Codifier: The rules published in this Section of the NC Register are temporary rules reviewed and approved by the Rules Review Commission (RRC) and have been delivered to the Codifier of Rules for entry into the North Carolina Administrative Code. A temporary rule expires on the 270th day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270th day.
 This section of the Register may also include, from time to time, a listing of temporary rules that have expired. See G.S. 150B-21.1 and 26 NCAC 02C .0500 for adoption and filing requirements.

TITLE 10A – DEPARTMENT OF HEALTH AND HUMAN SERVICES

Editor's Note: This publication will serve as Notice of Proposed Temporary Rule-making as required by S.L. 2002-160, and S.L. 2003-284, s. 10.8C.

Rulemaking Agency: Medical Care Commission

Rule Citations: 10A NCAC 13F .0509, .1211, .1501; 13G .0509, .1211, .1301

Authority for the rulemaking: S.L. 2002-160 (HB 1777)

Public Hearing:

Date: April 13, 2004

Time: 10:00 a.m.

Location: Dorothea Dix Campus, Council Building

Reason: These temporary rules are being published in the NC Register to meet the requirements of HB 1777 that established specific steps to follow for temporary adoption that differ from the newer APA process.

Comment Procedures: Comments from the public shall be directed to Doug Barrick, Division of Facility Services, 2708 Mail Service Center, Raleigh, NC 27699-2708. The comment period begins March 2, 2004 and ends April 12, 2004.

CHAPTER 13 – NC MEDICAL CARE COMMISSION

SUBCHAPTER 13F - LICENSING OF HOMES FOR THE AGED AND INFIRM

SECTION .0500 - STAFF ORIENTATION, TRAINING, COMPETENCY AND CONTINUING EDUCATION

10A NCAC 13F .0509 FOOD SERVICE ORIENTATION

The staff person in charge of the preparation and serving of food shall complete a food service orientation program established by the Department or an equivalent within 30 days of hire for those staff hired on or after the effective date of this Rule. Registered dietitians are exempt from this orientation. The orientation program is available on the internet website, <http://facility-services.state.nc.us/gcpage.htm>, or it is available at the cost of printing and mailing from the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708.

Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284.

SECTION .1200 – POLICIES, RECORDS AND REPORTS

10A NCAC 13F .1211 WRITTEN POLICIES AND PROCEDURES

(a) The facility shall ensure the development of written policies and procedures, that comply with applicable rules of this Subchapter, on the following:

- (1) ordering, receiving, storage, discontinuation, disposition, administration, including self-administration, and monitoring the resident's reaction to medications, as developed in consultation with a licensed health professional who is authorized to dispense or administer medications;
- (2) use of alternatives to physical restraints and the care of residents who are physically restrained, as developed in consultation with a registered nurse;
- (3) accident, fire safety and emergency procedures;
- (4) infection control;
- (5) refunds;
- (6) missing resident;
- (7) identification and supervision of wandering residents;
- (8) management of physical aggression or assault by a resident;
- (9) handling of resident grievances;
- (10) visitation in the facility by guests; and
- (11) smoking and alcohol use.

(b) In addition to other training and orientation requirements in this Subchapter, all staff shall be trained within 30 days of hire on the policies and procedures listed as Subparagraphs (3), (4), (6), (7), (8), (9), (10) and (11) in Paragraph (a) of this Rule.

(c) Policies and procedures on which staff have been trained shall be available within the facility to staff for their reference.

Authority G.S. 131D –2; 143B-165; S.L. 2002-0160; 2003-0284.

SECTION .1500 – USE OF PHYSICAL RESTRAINTS AND ALTERNATIVES

10A NCAC 13F .1501 USE OF PHYSICAL RESTRAINTS AND ALTERNATIVES

(a) The facility shall assure that a physical restraint, any physical or mechanical device attached to or adjacent to the resident's body that the resident cannot remove easily and which restricts freedom of movement or normal access to one's body, shall be:

- (1) used only in those circumstances in which the resident has medical symptoms that warrant the use of restraints and not for discipline or convenience purposes;
- (2) used only with a written order from a physician except in emergencies, according to Paragraph (e) of this Rule;

- (3) the least restrictive restraint that would provide safety;
- (4) used only after alternatives that would provide safety to the resident and prevent a potential decline in the resident's functioning have been tried and documented in the resident's record.
- (5) used only after an assessment and care planning process has been completed, except in emergencies, according to Paragraph (d) of this Rule;
- (6) applied correctly according to the manufacturer's instructions and the physician's order; and
- (7) used in conjunction with alternatives in an effort to reduce restraint use.

Note: Bed rails are restraints when used to keep a resident from voluntarily getting out of bed as opposed to enhancing mobility of the resident while in bed. Examples of restraint alternatives are: providing restorative care to enhance abilities to stand safely and walk, providing a device that monitors attempts to rise from chair or bed, placing the bed lower to the floor, providing frequent staff monitoring with periodic assistance in toileting and ambulation and offering fluids, providing activities, controlling pain, providing an environment with minimal noise and confusion, and providing supportive devices such as wedge cushions.

(b) The resident or resident's legal representative shall be asked if the resident may be restrained based on an order from the resident's physician. The facility shall inform the resident or legal representative of the reason for the request and the benefits of restraint use and the negative outcomes and alternatives to restraint use. The resident or the resident's legal representative has the right to accept or refuse restraints based on the information provided. Documentation shall consist of a statement signed by the resident or the resident's legal representative indicating the signer has been informed, the signer's acceptance or refusal of restraint use and, if accepted, the type of restraint to be used and the medical indicators for restraint use.

Note: Potential negative outcomes of restraint use include incontinence, decreased range of motion, decreased ability to ambulate, increased risk of pressure ulcers, symptoms of withdrawal or depression and reduced social contact.

(c) In addition to the requirements in Rules 13F .0801, .0802 and .0903 of this Subchapter regarding assessments and care planning, the resident assessment and care planning prior to application of restraints as required in Subparagraph (a)(5) of this Rule shall meet the following requirements:

- (1) The assessment and care planning shall be implemented through a team process with the team consisting of at least a staff supervisor or personal care aide, a registered nurse, the resident and the resident's responsible person or legal representative. If the resident or resident's responsible person or legal representative is unable to participate, there shall be documentation in the resident's record that they were notified and declined the invitation or were unable to attend.

- (2) The assessment shall include consideration of the following:
 - (A) medical symptoms that warrant the use of a restraint;
 - (B) how the medical symptoms affect the resident;
 - (C) when the medical symptoms were first observed;
 - (D) how often the symptoms occur;
 - (E) alternatives that have been provided and the resident's response; and
 - (F) the least restrictive type of physical restraint that would provide safety.
- (3) The care plan shall include at least the following:
 - (A) alternatives and how the alternatives will be used prior to restraint use and in an effort to reduce restraint time once the resident is restrained;
 - (B) the type of restraint to be used; and
 - (C) care to be provided to the resident during the time the resident is restrained.

(d) The following applies to the restraint order as required in Subparagraph (a)(2) of this Rule:

- (1) The order shall indicate:
 - (A) the medical need for the restraint;
 - (B) the type of restraint to be used;
 - (C) the period of time the restraint is to be used; and
 - (D) the time intervals the restraint is to be checked and released, but no longer than every 30 minutes for checks and two hours for releases.
- (2) If the order is obtained from a physician other than the resident's physician, the resident's physician shall be notified of the order within seven days.
- (3) The restraint order shall be updated by the resident's physician at least every three months following the initial order.
- (4) If the resident's physician changes, the physician who is to attend the resident shall update and sign the existing order.
- (5) In emergency situations, the administrator or administrator-in-charge shall make the determination relative to the need for a restraint and its type and duration of use until a physician is contacted. Contact shall be made within 24 hours and documented in the resident's record.
- (6) The restraint order shall be kept in the resident's record.

(e) All instances of the use of physical restraints and alternatives shall be documented in the resident's record and include at least the following:

- (1) restraint alternatives that were provided and the resident's response;
- (2) type of restraint that was used;
- (3) medical symptoms warranting restraint use;

- (4) the time the restraint was applied and the duration of restraint use;
- (5) care that was provided to the resident during restraint use; and
- (6) behavior of the resident during restraint use.

(f) Physical restraints shall be applied only by staff who have received training according to Rule .0506 of this Subchapter and been validated on restraint use according to Rule .0903 of this Subchapter.

Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284.

SUBCHAPTER 13G - LICENSING OF FAMILY CARE HOMES

SECTION .0500 - STAFF ORIENTATION, TRAINING, COMPETENCY AND CONTINUING EDUCATION

10A NCAC 13G .0509 FOOD SERVICE ORIENTATION

The staff person in charge of the preparation and serving of food shall complete a food service orientation program established by the Department or an equivalent within 30 days of hire for those staff hired on or after the effective date of this Rule. The orientation program is available on the internet website, <http://facility-services.state.nc.us/gcpage.htm>, or it is available at the cost of printing and mailing from the Division of Facility Services, Adult Care Licensure Section, 2708 Mail Service Center, Raleigh, NC 27699-2708.

Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284.

SECTION .1200 - POLICIES, RECORDS AND REPORTS

10A NCAC 13G .1211 WRITTEN POLICIES AND PROCEDURES

(a) The facility shall ensure the development of written policies and procedures, that comply with applicable rules of this Subchapter, on the following:

- (1) ordering, receiving, storage, discontinuation, disposition, administration, including self-administration, and monitoring the resident's reaction to medications, as developed in consultation with a licensed health professional who is authorized to dispense or administer medications;
- (2) use of alternatives to physical restraints and the care of residents who are physically restrained, as developed in consultation with a registered nurse;
- (3) accident, fire safety and emergency procedures;
- (4) infection control;
- (5) refunds;
- (6) missing resident;
- (7) identification and supervision of wandering residents;
- (8) management of physical aggression or assault by a resident;
- (9) handling of resident grievances;
- (10) visitation in the facility by guests; and

- (11) smoking and alcohol use.

(b) In addition to other training and orientation requirements in this Subchapter, all staff shall be trained within 30 days of hire on the policies and procedures listed as Subparagraphs (3), (4), (6), (7), (8), (9), (10) and (11) in Paragraph (a) of this Rule.

(c) Policies and procedures on which staff have been trained shall be available within the facility to staff for their reference.

Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284.

SECTION .1300 – USE OF PHYSICAL RESTRAINTS AND ALTERNATIVES

10A NCAC 13G .1301 USE OF PHYSICAL RESTRAINTS AND ALTERNATIVES

(a) The facility shall assure that a physical restraint, any physical or mechanical device attached to or adjacent to the resident's body that the resident cannot remove easily and which restricts freedom of movement or normal access to one's body, shall be:

- (1) used only in those circumstances in which the resident has medical symptoms that warrant the use of restraints and not for discipline or convenience purposes;
- (2) used only with a written order from a physician except in emergencies, according to Paragraph (e) of this Rule;
- (3) the least restrictive restraint that would provide safety;
- (4) used only after alternatives that would provide safety to the resident and prevent a potential decline in the resident's functioning have been tried and documented in the resident's record.
- (5) used only after an assessment and care planning process has been completed, except in emergencies, according to Paragraph (d) of this Rule;
- (6) applied correctly according to the manufacturer's instructions and the physician's order; and
- (7) used in conjunction with alternatives in an effort to reduce restraint use.

Note: Bed rails are restraints when used to keep a resident from voluntarily getting out of bed as opposed to enhancing mobility of the resident while in bed. Examples of restraint alternatives are: providing restorative care to enhance abilities to stand safely and walk, providing a device that monitors attempts to rise from chair or bed, placing the bed lower to the floor, providing frequent staff monitoring with periodic assistance in toileting and ambulation and offering fluids, providing activities, controlling pain, providing an environment with minimal noise and confusion, and providing supportive devices such as wedge cushions.

(b) The resident or resident's legal representative shall be asked if the resident may be restrained based on an order from the resident's physician. The facility shall inform the resident or legal representative of the reason for the request and the benefits of restraint use and the negative outcomes and alternatives to restraint use. The resident or the resident's legal representative has the right to accept or refuse restraints based on the

information provided. Documentation shall consist of a statement signed by the resident or the resident's legal representative indicating the signer has been informed, the signer's acceptance or refusal of restraint use and, if accepted, the type of restraint to be used and the medical indicators for restraint use.

Note: Potential negative outcomes of restraint use include incontinence, decreased range of motion, decreased ability to ambulate, increased risk of pressure ulcers, symptoms of withdrawal or depression and reduced social contact.

(c) In addition to the requirements in Rules 13G .0801, .0802 and .0903 of this Subchapter regarding assessments and care planning, the resident assessment and care planning prior to application of restraints as required in Subparagraph (a)(5) of this Rule shall meet the following requirements:

- (1) The assessment and care planning shall be implemented through a team process with the team consisting of at least a staff supervisor or personal care aide, a registered nurse, the resident and the resident's responsible person or legal representative. If the resident or resident's responsible person or legal representative is unable to participate, there shall be documentation in the resident's record that they were notified and declined the invitation or were unable to attend.
- (2) The assessment shall include consideration of the following:
 - (A) medical symptoms that warrant the use of a restraint;
 - (B) how the medical symptoms affect the resident;
 - (C) when the medical symptoms were first observed;
 - (D) how often the symptoms occur;
 - (E) alternatives that have been provided and the resident's response; and
 - (F) the least restrictive type of physical restraint that would provide safety.
- (3) The care plan shall include at least the following:
 - (A) alternatives and how the alternatives will be used prior to restraint use and in an effort to reduce restraint time once the resident is restrained;
 - (B) the type of restraint to be used; and
 - (C) care to be provided to the resident during the time the resident is restrained.

(d) The following applies to the restraint order as required in Subparagraph (a)(2) of this Rule:

- (1) The order shall indicate:
 - (A) the medical need for the restraint;
 - (B) the type of restraint to be used;
 - (C) the period of time the restraint is to be used; and
 - (D) the time intervals the restraint is to be checked and released, but no longer than every 30 minutes for checks and two hours for releases.

- (2) If the order is obtained from a physician other than the resident's physician, the resident's physician shall be notified of the order within seven days.
- (3) The restraint order shall be updated by the resident's physician at least every three months following the initial order.
- (4) If the resident's physician changes, the physician who is to attend the resident shall update and sign the existing order.
- (5) In emergency situations, the administrator or administrator-in-charge shall make the determination relative to the need for a restraint and its type and duration of use until a physician is contacted. Contact shall be made within 24 hours and documented in the resident's record.
- (6) The restraint order shall be kept in the resident's record.

(e) All instances of the use of physical restraints and alternatives shall be documented in the resident's record and include at least the following:

- (1) restraint alternatives that were provided and the resident's response;
- (2) type of restraint that was used;
- (3) medical symptoms warranting restraint use;
- (4) the time the restraint was applied and the duration of restraint use;
- (5) care that was provided to the resident during restraint use; and
- (6) behavior of the resident during restraint use.

(f) Physical restraints shall be applied only by staff who have received training according to Rule .0506 of this Subchapter and been validated on restraint use according to Rule .0903 of this Subchapter.

Authority G.S. 131D-2; 143B-165; S.L. 2002-0160; 2003-0284.

Rule-making Agency: Division of Facility Services (DFS)

Rule Citation: 10A NCAC 14C .0203

Effective Date: February 16, 2004

Date Approved by the Rules Review Commission: February 5, 2004

Reason for Action: One of the subject matters contained in the 2004 State Medical Facilities Plan (SMFP) is the filing deadline for Certificate of Need (CON) applications. The 2004 SMFP notes that deadline to be 5:30 p.m. This Rule must be amended under temporary action to ensure that its reference to the filing deadline be consistent with the SMFP. The first filing deadline is February 1, 2004.

CHAPTER 14 - DIRECTOR, DIVISION OF FACILITY SERVICES

SUBCHAPTER 14C - CERTIFICATE OF NEED REGULATIONS

SECTION .0200 - APPLICATION AND REVIEW PROCESS

10A NCAC 14C .0203 FILING APPLICATIONS

(a) An application shall not be reviewed by the agency until it is filed in accordance with this Rule.

(b) An original and a copy of the application shall be received by the agency no later than ~~5:00 p.m.~~ 5:30 p.m. on the 15th day of the month preceding the scheduled review period. In instances when the 15th of the month falls on a weekend or holiday, the filing deadline is ~~5:00 p.m.~~ 5:30 p.m. on the next business day. An application shall not be included in a scheduled review if it is not received by the agency by this deadline. Each applicant shall transmit, with the application, a fee to be determined according to the following formula:

- (1) With each application proposing the addition of a sixth bed to an existing or approved five bed intermediate care facility for the mentally retarded, the proponent shall transmit a fee in the amount of two thousand dollars (\$2,000).
- (2) With each application, other than those referenced in Subparagraph (b)(1) of this Rule, proposing no capital expenditure or a capital expenditure of up to, but not including, one million dollars (\$1,000,000), the proponent shall transmit a fee in the amount of three thousand five hundred dollars (\$3,500).
- (3) With each application, other than those referenced in Subparagraph (b)(1) of this Rule, proposing a capital expenditure of one million dollars (\$1,000,000) or greater, the proponent shall transmit a fee in the amount of three thousand five hundred dollars (\$3,500), plus an additional fee equal to .003 of the amount of the proposed capital expenditure in excess of one million dollars (\$1,000,000). The additional fee shall be rounded to the nearest whole dollar. In no case shall the total fee

exceed seventeen thousand five hundred dollars (\$17,500).

(c) After an application is filed, the agency shall determine whether it is complete for review. An application shall not be considered complete if:

- (1) the requisite fee has not been received by the agency; or
- (2) a signed original and copy of the application have not been submitted to the agency on the appropriate application form.

(d) If the agency determines the application is not complete for review, it shall mail notice of such determination to the applicant within five business days after the application is filed and shall specify what is necessary to complete the application. If the agency determines the application is complete, it shall mail notice of such determination to the applicant prior to the beginning of the applicable review period.

(e) Information requested by the agency to complete the application must be received by the agency no later than ~~5:00 p.m.~~ 5:30 p.m. on the last working day before the first day of the scheduled review period. The review of an application shall commence in the next applicable review period that commences after the application has been determined to be complete.

History Note: Authority G.S. 131E-177; 131E-182; Eff. October 1, 1981; Temporary Amendment Eff. July 15, 1983, for a Period of 118 Days, to Expire on November 10, 1983; Amended Eff. November 1, 1990; January 1, 1990; Temporary Amendment Eff. August 11, 1993, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Amended Eff. December 1, 1994; January 4, 1994; Temporary Amendment Eff. August 12, 1994, for a period of 180 days or until the permanent rule becomes effective, whichever is sooner; Temporary Amendment Eff. January 1, 2000; Amended Eff. April 1, 2001; Temporary Amendment Eff. February 16, 2004.

CONTESTED CASE DECISIONS

This Section contains the full text of some of the more significant Administrative Law Judge decisions along with an index to all recent contested cases decisions which are filed under North Carolina's Administrative Procedure Act. Copies of the decisions listed in the index and not published are available upon request for a minimal charge by contacting the Office of Administrative Hearings, (919) 733-2698. Also, the Contested Case Decisions are available on the Internet at the following address: <http://www.ncoah.com/hearings>.

OFFICE OF ADMINISTRATIVE HEARINGS

Chief Administrative Law Judge

JULIAN MANN, III

Senior Administrative Law Judge

FRED G. MORRISON JR.

ADMINISTRATIVE LAW JUDGES

*Sammie Chess Jr.
Beecher R. Gray
Melissa Owens Lassiter*

*James L. Conner, II
Beryl E. Wade
A. B. Elkins II*

<u>AGENCY</u>	<u>CASE NUMBER</u>	<u>ALJ</u>	<u>DATE OF DECISION</u>	<u>PUBLISHED DECISION REGISTER CITATION</u>
<u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u>				
Ice 2 K t/a Sports Dimensions, Inc. v. ABC Commission	02 ABC 0683	Gray	11/25/03	
Carolina Sports Arena LLC T/A NC Sports Arena v ABC Comm.	02 ABC 1491	Conner	09/11/03	
ABC v. Fast Fare Inc, T/A Fast Fare NC 576	02 ABC 1882	Gray	09/22/03	
Ki Young Kim v. Ann H. Johnson, ABC Commission in Raleigh	03 ABC 0177	Mann	06/17/03	
ABC Commission v. Pantana Bob's, Inc. T/A Pantana Bob's	03 ABC 0233	Mann	10/03/03	
C&C Entertainment, Inc. d/b/a Carolina Live	03 ABC 1037	Lassiter	09/30/03	
ABC v. Lake Point Restaurant, Inc. T/A Larkins on the Lake Bay Front Bar and Grill	03 ABC 1246	Hunter	01/01/04	18:17 NCR 1540
<u>AGRICULTURE</u>				
Phoenix Ski Corp. v. Dept. of Ag. & Cons. Svcs. & Dept. of Admin. & Carolina Cable Lift, LLC.	02 DAG 0560	Lewis	06/30/03	18:03 NCR 217
<u>CRIME CONTROL AND PUBLIC SAFETY</u>				
Myrtle J. Price v. Crime Victims Comp. Comm, Dept. of Crime Control & Public Safety, Victims Compensation Services Division	03 CPS 0173	Wade	06/27/03	
Regis A Urik v DOCCPS, Div. of Victim Comp. Services	03 CPS 0707	Gray	10/21/03	
Fredrica Wood-Jones v DOCC&PS, Div of Victim Comp. & Svcs.	03 CPS 0804	Gray	10/06/03	
Michael L Pompey v. Crime Control & Public Safety, Div. of Victim Compensation Services	03 CPS 0828	Gray	09/03/03	
Frances H Abegg v Bryan E Beatty, Sec DCCPS	03 CPS 1359	Gray	01/23/04	
Tricia Diane Gerke v. Victim's Compensation Commission	03 CPS 1413	Gray	10/06/03	
<u>HEALTH AND HUMAN SERVICES</u>				
A list of Child Support Decisions may be obtained by accessing the OAH Website: www.ncoah.com/decisions .				
Yelton's Healthcare v DHHS, Div of Fac. Svcs, Group Care Lic Sec	00 DHR 0249	Gray	01/16/04	
Guilford Co Comm Action Program Inc v. DHHS	00 DHR 0984	Gray	09/08/03	
Mary Edge v DHHR, Div of Child Development	01 DHR 0720	Gray	09/23/03	
Richard Hart & Jeannette Hart, Little People Day Car, ID 3355048	01 DHR 1464	Wade	11/14/03	
v. Div of Child Dev Health & Human Services	01 DHR 1464	Wade	11/14/03	
Sunshine Schools, Inc. ID No. 9255424 v. DHHS, Div. of Child Dev.	02 DHR 0708	Wade	11/24/03	18:14 NCR 1209
Robbie Cummings v. DHHS	02 DHR 0815	Conner	06/09/03	
Lee Co. Dept of Social Services v. DHHS	02 DHR 1021	Elkins	12/01/03	18:14 NCR 1212
Linda Ann Tyson v. Div. of Facility Services, Health Care Personnel Registry Section	02 DHR 1103	Lassiter	05/12/03	
Ricky Roberts for Angela Roberts v. DHHS, Div. of Med. Assistance	02 DHR 1138	Lassiter	04/25/03	18:01 NCR 52
Wanda J. Vanhook v. DHHS, Div. of Med. Assistance	02 DHR 1459	Gray	04/24/03	
Elaine B Shelton v. DHHS, Div. of Facility Services	02 DHR 1489	Conner	05/28/03	
Juli A Murphy, Murphy's Munchkin Land Daycare ID 54000197 v. Div. of Child Development	02 DHR 1555	Lassiter	09/05/03	
Jones Hill Day Care, Ola M Jones v. (CACPP) Child & Adult Care Food Program	02 DHR 1601	Lassiter	05/16/03	
Michelle's Lullaby Day Care, Jerri Howell v. Div. of Child Development	02 DHR 1672	Wade	06/10/03	
June Locklear				
Bibby's Group Home, Billy McEachern v. Mental Health Licensure and	02 DHR 1749	Gray	12/08/03	

CONTESTED CASE DECISIONS

Joanne F Ranta v. DHHS, Div. of Facility Services	02 DHR 1752	Mann	05/15/03	
Gregory Tabron v. DHHS, Div. of Facility Services	02 DHR 1789	Elkins	05/16/03	
Oncology Svcs Corp & Mountainside Holdings LLC v. DHHS, Div of Fac Svcs, Cert of Need Section & Scotland Mem Hospital, Inc.	02 DHR 1983	Wade	08/13/03	18:06 NCR 439
Doretha Leonard v. DHHS, Div. of Medical Assistance	02 DHR 2183	Lassiter	06/13/03	
Jonathan Louis Jefferson, a minor by & through his parents, Cynthia & Louie Jefferson v. DHHS< Div. of Medical Assistance	02 DHR 2186	Lassiter	10/08/03	
Orlando Stephen Murphy v. DHHS, Div. of Fac Svcs, Health Care Personnel Registry Section	02 DHR 2206	Wade	11/04/03	
Tanile Woodberry, By & Through Her Attorney-in-Fact, Linda Monroe v. DHHS, Division of Medical Assistance	02 DHR 2212	Chess	11/06/03	18:15 NCR 1353
Veronica Walker, Ph.D v. DHHS, Div. of Facility Services	02 DHR 2246	Chess	06/20/03	
Gloria Howard v. DHHS	02 DHR 2256	Gray	09/04/03	
Latrese Sherell Harris v. Nurse Aide Registry	02 DHR 2290	Chess	06/16/03	
Wanda S Hudson v. Wake County Public School System	02 DHR 2305	Wade	09/22/03	
Lawyers Glen Retirement Living Ctr, Charlotte Elliotte v DHHS, Div of Facility Svcs, Mecklenburg Co Dept of Social Services	02 DHR 2319	Chess	10/22/03	
James E Hill v. DHHS, Div. of Facility Services	03 DHR 0028	Wade	05/30/03	
Duffie G Hunt v. Medicaid	03 DHR 0085	Conner	06/06/03	
Valencia L Brown v Division of Medical Assistance (DMA)	03 DHR 0099	Chess	11/17/03	
Sarah P Jordan v. DHHS, Div. of Facility Services	03 DHR 0155	Gray	06/18/03	
Martha Banks (ID #72000027) v. Div. of Child Dev., Child Abuse/Neglect Dept., Perquimans Co. DSS	03 DHR 0168	Wade	06/12/03	
Southeastern Reg Med Ctr & Lumberton Radiological Assoc P.A. v DHHS, Div. of Facility Services	03 DHR 0226	Wade	10/31/03	18:12 NCR 1011
Little Angels Child Care Center v Arnette Cowan, Sup of Spec Nut. Prog.	03 DHR 0229	Lassiter	11/24/03	
Aaron Atwater v. DHHS, Div. of Medical Assistance	03 DHR 0262	Chess	08/18/03	
Grace Browning, Gorge D Browning Jr v John Umstead Hospital	03 DHR 0285	Mann	10/03/03	
Vivian P Bailey v. DHHS, Div. of Child Development	03 DHR 0296	Gray	12/18/03	
Nakeisha Shawon Leak v. DHHS, Office of Legal Affairs	03 DHR 0308	Wade	06/25/03	
Krystal Hyatt v. Broughton Hospital	03 DHR 0316	Chess	07/07/03	
Cahterine Williams v. DHHS	03 DHR 0320	Mann	07/17/03	
Rachel Peek,Yancey Co. DSS v. DHHS	03 DHR 0330	Chess	07/24/03	
Penny Yvette McCullers v DHHS, Div. of Facility Services	03 DHR 0336 ⁰	Mann	01/08/04	18:17 NCR 1543
Lisa Mendez v. Health Care Personnel Registry	03 DHR 0351	Gary	06/27/03	
Twan Fields v. DHHS, Div. of Facility Services	03 DHR 0355	Morrison	09/10/03	
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Constance Basnight v. Pasquotank County DSS	03 DHR 0385	Lassiter	05/29/03	
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Edmund Bond Small v. DHHS, Walter B Jones, ADATC	03 DHR 0445	Lassiter	07/21/03	
Janitta Brown v. DHHS, Dorothea Dix Hospital	03 DHR 0461	Lassiter	09/15/03	
Gerry Dwayne Cashwell v. DHHS	03 DHR 0469	Gray	07/28/03	
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Gregory Lewis Berry v. Burke Co. Dept of Social Services	03 DHR 0514	Wade	08/19/03	
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The Presbyterian Hospital v. DHHS, Division of Facility Services and Mooresville Hosp Mgmt Assoc Inc d/b/a Lake Norman Reg Med Ctr	03 DHR 0567	Wade	12/19/03	18:15 NCR 1362
Grace Browning v. John Umstead Hospital	03 DHR 0571	Mann	10/03/03	
Becky Wood, Guardian Rep The Arc/NC Lifeguardianship on behalf of Mary Short (Ward) v. Richard Visingardi, Dir, Div of MH, DD, SAS	03 DHR 0575	Chess	12/22/03	
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Wake Radiology Services, LLC, Wake Radiology Consultants, P.A., Raleigh MR Imaging Center Ltd Partnership & Wake Radiology Diagnostic Imaging, Inc. v. DHHS, Div. of Facility Svcs., CON Sec., Robert J. Fitzgerald, Dir, Lee B Hoffman, Chief of CON Sec. & Mobile Imaging of North Carolina, LLC	03 DHR 0676	Gray	07/07/03	
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Michael Hillis v. Department of Revenue	03 DHR 0935	Conner	07/28/03	
Rose McCallum, Individually & as Owner & Representative of NC Preschool Academy & Tina Octetree, Individually & as Director & Representative Of NC Preschool Academy v. DHHS, Div. of Public Health	03 DHR 0951 ¹¹	Elkins	02/02/04	18:17 NCR 1571
Rose McCallum, Individually & as Owner & Representative of NC Preschool Academy & Tina Octetree, Individually & as Director & Representative Of NC Preschool Academy v. DHHS, Div. of Public Health	03 DHR 0952 ¹¹	Elkins	02/02/04	18:17 NCR 1571
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Nazih Hasan & Emao Hasan, Nes Convenient Mart v DHHS	03 DHR 0985	Lassiter	10/31/03	
Victor J Gray v Dorothea Dix Hospital	03 DHR 1039	Morrison	09/29/03	
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Barbara Hammond for Dennis Hammond v. DHHS	03 DHR 1539	Elkins	12/23/03	
Karoline Hatfield Kranicz v. DHHS, Div. of Facility Services	03 DHR 1584	Gray	01/16/04	
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Christine Gordon v Health Care Personnel Registry	03 DHR 1697	Elkins	12/16/03	
Doris Duff v DHHS, Div. of Facility Services	03 DHR 1720	Lassiter	12/02/03	
Paditra C Dalton v DHHS, Div of Facility Services	03 DHR 1738	Elkins	01/28/04	
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Angela Kay Hudson v. DHHS, Div. of Facility Services	03 DHR 1789	Elkins	12/19/03	
Patricia A Fox, Adm, Community Care of Jackson #1 v. Div. of Facility Services, Adult Care Licensure Section	03 DHR 1856	Conner	12/18/03	
Kimberly D Hamilton v. DHHS, Div of Child Development	03 DHR 1978	Chess	01/07/04	
Juliana Worthy Gladu, Childrens Cottage v State of NC, OAH	03 DHR 2208	Lassiter	01/08/04	
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Alan Bradford Foehner v. Alarm System Licensing Board	03 DOJ 0709	Morrison	08/05/03	

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William Houston King Jr v. Private Protective Services Board	03 DOJ 0899	Morrison	07/11/03	
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Harvey Clinton Blanton v. Sheriffs' Educ. & Trng. Stds. Comm.	02 DOJ 1202	Gray	06/05/03	18:03 NCR 222
Jonathan Mims v. Sheriffs' Education & Training Standards, Comm.	02 DOJ 1263	Gray	06/03/03	18:03 NCR 229
Joshua Steven McCraw v Sheriffs' Educ. & Trng. Stds. Comm.	02 DOJ 1696	Conner	12/02/03	
Joshua Phillip Grant v Sheriffs' Education & Training Standards Comm.	02 DOJ 1787	Wade	10/27/03	
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Fred Hines, Jr v. Criminal Justice Educ. & Trng. Stds. Comm.	03 DOJ 0428	Conner	07/29/03	
Alexander Draft: Registered Agent/Owner of A.D. Police Svcs., Inc. v. DOJ, Company Police Program	03 DOJ 0484	Mann	10/17/03	
Harvey Levale Cook v. Criminal Justice Educ & Trng Stds. Comm.	03 DOJ 0515	Lassiter	07/09/03	
Cynthia Darlene Harris v. Criminal Justice Educ. & Trng. Stds. Comm.	03 DOJ 0516	Lassiter	06/06/03	
Mary Katherine McVey v. Criminal Justice Educ. & Trng. Stds. Comm.	03 DOJ 0517	Wade	08/11/03	
Kenneth Earl Brantley v Sheriffs' Educ & Trng Stds. Comm	03 DOJ 0604	Gray	11/14/03	
Brian Carroll Hatley v Sheriffs' Education & Trng. Stds. Comm.	03 DOJ 0649	Mann	10/02/03	
William Kelly Moore v Criminal Justice Educ & Trng Stds. Comm	03 DOJ 1068	Morrison	11/12/03	
Michael Ray Walker v. Criminal Justice Educ. & Trng. Stds. Comm.	03 DOJ 1138	Lassiter	09/23/03	
Loy S. Lentz Jr v. Sheriffs' Educ. & Trng. Stds. Comm.	03 DOJ 1229	Gray	10/02/03	
William Todd Streeter v. Sheriffs' Educ. & Trng Stds. Comm.	03 DOJ 1243	Chess	12/08/03	
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Robert Lee Way v. Sheriffs' Educ. & Trng Stds. Comm.	03 DOJ 1263	Chess	12/08/03	
Charles D Metters, Jr. v. Criminal Justice Educ. & Trng. Stds. Comm.	03 DOJ 1471	Chess	12/09/03	
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Damon Cunningham v. Dept of Justice, Company Police Program	03 DOJ 2112	Lassiter	01/23/04	
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Rosa & Eddie Brame v. DENR	02 EHR 0319	Wade	06/27/03	
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Nash-Rocky Mt Schools, Mark Strickland v DENR, Div of Wtr Quality	03 EHR 0242 ²	Lassiter	10/30/03	
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Alliance for Legal Action, Inc, Piedmont Quality of Life Coalition (an uninc assoc) Alberta Anderson, Cameron Anderson, Jean Black Richard Black, Walter S Druce, Ron Goga, Gil Happel, Carol Hoppe, Michael Hoppe, Patricia Nussbaum, Christine Peeler, Laura Pollak, Randall Schultz, Roch Smith Jr, Vassilia Smith v. Water Quality Comm, Env Mgmt Comm and Piedmont Triad Airport Authority	03 EHR 0345	Gray	01/08/04	
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JEL Company, Leonard Jackson v. DOI & Diane G Miller, Asst Atty.	03 INS 0811	Mann	08/28/03		
Lula F Bowman, Laura A Bowman v. Teachers' & St. Emp. Comp. Maj. Med. Plan	03 INS 0975	Wade	10/22/03		
Barbara Jean Gribble v Teachers' & St Emp. Comp Major Medical Plan	03 INS 1130	Mann	12/31/03		
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Maranda Sharpe v. Department of Transportation	03 OSP 0412	Chess	06/03/03		
James E. Sharpe v Department of Transportation, Div. 14 (Graham Co.)	03 OSP 0413	Chess	06/03/03		
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Stanley L Ingram & Clifford Wayne Brown v. Dept of Correction	03 OSP 0629 ⁸	Chess	10/20/03
Melinda O Wiggins v. Moore Co Health Department	03 OSP 0632	Morrison	09/17/03
William Harold Maready Jr v. DOC, Pasquotank Correctional Inst.	03 OSP 0644	Conner	08/01/03
Henry Earl Stewart v Department of Transportation	03 OSP 0645	Lassiter	08/26/03
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Carolyn A Little v Eastern Area Treatment Program	03 OSP 1810	Lassiter	01/12/04
Terry T Pigford v Eastern Area Treatment Program	03 OSP 1811	Lassiter	01/12/04
Sandra J Dills v Smokey Mtn Healthcare Assoc	03 OSP 1962	Chess	01/12/04
Christopher Paul Davis v DHHS and Caswell Center	03 OSP 2275	Conner	01/14/03

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Susan Kay Fryar v. UNC Hospitals	03 UNC 0410	Mann	08/07/03
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Keith Bagby Sr & Patricia Bagby v UNC Hospitals	03 UNC 1011	Elkins	11/07/03
D. Parker Lynch v. UNC Hospitals	03 UNC 1124	Wade	11/19/03
Steven R. Wilkerson v. UNC Hospitals	03 UNC 1177	Chess	09/18/03
Yvonne Schreiner v. UNC Hospitals	03 UNC 1512	Morrison	10/31/03

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STATE OF NORTH CAROLINA
COUNTY OF RUTHERFORD

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 ABC 1246

N.C. ALCOHOLIC BEVERAGE CONTROL COMMISSION,
Petitioner,
v.
LAKE POINT RESTAURANT INC.
T/A LARKINS ON THE LAKE BAY FRONT BAR AND GRILL,
Respondent.

DECISION

THIS MATTER was heard before John C. Hunter, Temporary Administrative Law Judge, on October 8, 2003, in Asheville, North Carolina.

APPEARANCES

For Petitioner: Fred A. Gregory, Chief Deputy Counsel
N.C. ABC Commission
4307 Mail Service Center
Raleigh, NC 27699-4307

For Respondent: Mark D. Hammond, President
Lake Point Restaurants, Inc.
P.O. Box 681
Lake Lure, NC 28746

ISSUE

Whether Permittee's employee, Randy Wayne Elliott, sold a malt beverage to Matthew Justin Cox, a person less than 21 years old, on or about November 2, 2002, at 8:40 p.m., in violation of N.C. G.S. 18B-302(a)(1).

WITNESSES

ALE Agent John Pace
Matthew Justin Cox

FINDINGS OF FACT

Based on the evidence presented at the hearing on October 8, 2003, the administrative law judge finds the following facts:

1. That Respondent, Larkins on the Bay Front Bar & Grill, is located at 1020 Memorial Hwy, Lake Lure, NC, and holds the following ABC permits: mixed beverage restaurant, on-premise malt beverage, unfortified and fortified wine permits.
2. That on November 2, 2002, ALE Agent John M. Pace conducted an undercover compliance check in Rutherford County, NC, to detect sales of alcoholic beverages to persons less than 21 years of age.
3. As part of the compliance check, Agent Pace used underage person Matthew Justin Cox. On November 2, 2002, Matthew Cox was 18 years old, date of birth, January 9, 1984 (See Petitioner's Exhibit # 1, birth certificate).
4. Prior to the undercover compliance check, Matthew Cox was age tested pursuant to ALE guidelines and was approved for such use.
5. That at approximately 8:40 p.m., Matthew Cox entered Larkins on the Lake Bay Front Bar and Grill and was instructed by Agent Pace to attempt to purchase an alcoholic beverage.

6. That Matthew Cox approached the bar and ordered a Bud Light malt beverage from bartender Randy Elliott (See Petitioner's Exhibit #2).
7. That permittee's employee, Randy Elliott, retrieved a 355-milliliter bottle of Bud Light from the cooler and requested to see Matthew Cox's identification.
8. That Matthew Cox presented his North Carolina driver's license to Randy Elliott, who then examined the driver's license, carried on some conversation with Matthew Cox, and returned the driver's license to Matthew Cox.
9. Matthew Cox then paid Randy Elliott \$2.50 for the malt beverage. Randy Elliott rung up the purchase and placed the malt beverage in front of Matthew Cox. Matthew Cox then walked away from the bar and left the establishment.
10. That Agent John Pace, who observed the transaction, then informed Randy Elliott of the violation, grabbed the Bud Light and requested Randy Elliott to step outside the establishment. Mr. Elliott was cited for selling a malt beverage to a person under 21 years old.
11. That on November 2, 2002, hours prior to the undercover compliance check with Matthew Cox, ALE Agent John Pace visited Larkins on the Lake Bay Front Bar and Grill and informed the permittee that ALE had received a complaint concerning underage consumption on their premises. Furthermore, permittee was informed that a compliance check would be forthcoming.
12. That a photocopy of Matthew Cox's North Carolina driver's license that was shown to Permittee's employee, Randy Elliott, on November 2, 2002, was received into evidence (See Petitioner's Exhibit #3).
13. That on October 8, 2003, only hours prior to the contested case hearing in Asheville, NC, Matthew Cox went to the NC Department of Motor Vehicles and got a new driver's license. Thus, the original license viewed by the employee was not available at the hearing.
14. That the birth date year on the photocopy of Matthew Cox's driver's license received into evidence is not legible. It is unclear from an inspection of the photocopy whether the birth date year was legible on the original driver's license used in this undercover operation conducted by ALE.
15. That the picture of Matthew Cox on the driver's license photocopy shows "under 21" but that without knowledge of the year of the birth date it would be impossible for a Permittee to tell if, in fact, Mr. Cox was under 21 at the time of the purchase.
16. That according to the testimony of both witnesses for the Petitioner, it was very busy at the bar during the time Mr. Cox purchased the malt beverage.
17. Upon being confronted by ALE Agent Pace concerning the sale to Cox, Permittee's employee stated that he had checked the ID and believed Mr. Cox to be over 21 years of age.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the undersigned finds the following Conclusions of Law:

1. The Office of Administrative Hearings has jurisdiction in this matter and both parties have been properly noticed for this hearing.
2. North Carolina General Statute Section 18B-302(a)(1) provides in pertinent part: It shall be unlawful for any person to sell or give malt beverages ... to anyone less than 21 years old.
3. On November 2, 2002, at approximately 8:40 p.m., Respondent's employee, Randy Elliott, sold a malt beverage, Bud Light, to Matthew Justin Cox, a person less than 21 years old on the licensed premises, in violation of N.C. G.S. 18B-302(a)(1).

4. General Statute 18B-302(d)(1)(2) provides a defense for selling alcoholic beverages to persons less than 21 years old. If the facts showed that Matthew Cox presented identification showing that he was of the required age to purchase alcoholic beverages or other facts that reasonably indicated at the time of sale Matthew Cox was at least the required age, then Respondent would be entitled to said defense.

5. Pursuant to ABC Commission Rule 4 NCAC 02S .0233(b):

It shall be the duty of the permittee and his employees to determine the age of any person consuming or possessing alcoholic beverages on the licensed premises ...

6. The evidence in this hearing indicates that the ALE intentionally sent a minor into the Permittee's premises for the express purpose of attempting to purchase a malt beverage; that the ALE allowed the minor to carry and present an ID that did not clearly indicate his date of birth; that the Permittee's employee asked for and inspected the ID carried by the minor, and that based upon that inspection the employee believed the minor to be over the age of 21 years. Given the condition of the ID as presented at the hearing, and given that the ALE created the possibility of confusion on the central issue of the age of the minor by allowing an ID to be used which did not clearly show the birth date of the minor, the undersigned finds that the Permittee is entitled to the defenses available in General Statute 18B-302(d).

DECISION

Based upon the above Findings of Fact and Conclusions of Law, the undersigned recommends that no action be taken concerning the subject permits.

ORDER

It is hereby ordered that the agency serve a copy of the Final Decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714, in accordance with North Carolina General Statute 150B-36(b).

NOTICE

The agency making the Final Decision in this contested case is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. G.S. 150B-36(a).

The agency is required by G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney on record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the North Carolina Alcoholic Beverage Control Commission.

This the 7th day of January, 2004.

John C. Hunter
Temporary Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 DHR 0336, 0558

PENNY YVETTE McCULLERS,)	
Petitioner,)	
)	
v.)	DECISION
)	
DEPARTMENT OF HEALTH AND HUMAN SERVICES,)	
DIVISION OF FACILITY SERVICES)	
Respondent.)	

These consolidated contested cases were heard before Julian Mann, III, Chief Administrative Law Judge, on August 21, 2003, in Raleigh, North Carolina. The record closed on November 26, 2003 with the filing of the parties' proposed decisions.

APPEARANCES

Petitioner:	David G. Schiller SCHILLER & SCHILLER PLLC Professional Park at Pleasant Valley 5540 Munford Road Suite 101 Raleigh, NC 27612
For Respondent:	Wendy L. Greene Assistant Attorney General North Carolina Department of Justice P.O. Box 629 Raleigh, NC 27602-0629

STIPULATIONS

Stipulations as contained in the "Prehearing Order" entered in the record on August 21, 2003 and other stipulations of record.

EXHIBITS

For Petitioner:	Petitioner's Exhibit "A;" Respondent's Exhibit #3 and # 6
For Respondent:	Respondent's Exhibits #1 - 18

BASED UPON the stipulations and the preponderance of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

- Petitioner Penny Yvette McCullers was previously employed as a Nurse Assistant at Rex Rehabilitation & Nursing Care Center, (Rex), in Raleigh, North Carolina. Rex is a nursing home and therefore subject to N.C. Gen. Stat. §131E-256. (T pp. 9, 12, 54, 143)
- Petitioner's employment at Rex was from 2000 until 2003. She has been a nursing assistant since 1979. Her duties at Rex centered around caring for the residents by taking care of their needs, such as bathing. Petitioner's job description included providing for the safety and comfort of residents in her care. (T pp. 9, 10, 11, 12; Resp. Exh. 1)
- Petitioner has been taught about resident abuse. She understands that abuse can be verbal or physical, and that Nurse Assistants must never abuse a resident, and must report abuse if they witness it. Petitioner knows that slapping and shoving are abusive. She also understands that residents have the right to refuse services. (T pp. 31, 32)

4. On January 9, 2003, Petitioner provided nurse assistant responsibilities at Rex during the 3:00 pm to 11:00 pm shift. JM was one of the residents to whom Petitioner was assigned. Petitioner's duties included preparing JM for supper, taking care of her physical needs, such as keeping JM dry and clean, and providing other basic care. (T p. 16; Resp. Exh. 3)

5. JM is a retired septuagenarian nurse with Parkinson's disease, primarily, who is now confined to a wheelchair and secured in the wheelchair by a safety belt. JM is generally non-combative and capable of verbally expressing her desires. JM has problems finding words because of the Parkinson's disease. During the three years that Petitioner worked with her, JM would occasionally tell Petitioner "stop" or "don't do this" or "wait" when Petitioner was trying to provide her care. When this happened, Petitioner would sometimes continue to provide care. (T. pp. 13, 14, 50, 74, 75, 76)

6. JM uses a mask-like breathing treatment and was using the breathing treatment on or about January 9, 2003. (T. pp. 17, 19) J.M. was sitting in her wheelchair in front of her bed. (T. p. 17)

7. On January 9, 2003 at 7:00 pm (or according to Resp. Exh. 12, p.4, 1800 hrs.-1830 hrs.) Petitioner entered JM's room to prepare her to go to bed. On this occasion, Petitioner, with nearly three years of continuous service had prepared JM for bed at least a hundred times. JM was being administered a breathing treatment; her face was covered with a mask and the treatment included some kind of liquid. She was in her wheelchair, which was in front of JM's bed, and was secured in the wheelchair by her safety belt. Petitioner began to change JM's clothes to get her ready for bed. (T pp. 17 – 20, 106; Resp. Exhs. 2, 3)

8. Petitioner removed JM's breathing treatment and changed her top while she was still in the wheelchair. While Petitioner changed her top, JM told her "wait a minute," "stop" and "go." Petitioner continued to provide JM care. (T. pp. 20, 21, 22)

9. Petitioner then transferred JM from her wheelchair to her bed. Petitioner used what is referred to as a pivot move, whereby Petitioner put her hands under JM's shoulders to stand her up, and then shifted JM so that she was sitting on the bed. While she was being transferred, JM again told Petitioner to "stop" and "wait." (T. pp. 22, 23)

10. From the seated position on the bed, Petitioner turned JM's feet around and made her lie down. Petitioner then changed JM's pants. To remove the pants Petitioner rolled JM from side to side. While she was doing so JM told Petitioner "stop," and "wait." Petitioner told JM what she was doing for her. Petitioner asked JM if JM wanted her to come back, to which JM replied "no." Petitioner continued to provide care but Petitioner believed that JM's mental condition "comes and goes" and Petitioner's words were not directives. (T pp. 24, 25, 50)

11. Petitioner testified that after JM was changed and in bed, she decided that JM's sheets should be changed because a grits-type food was on the linens in JM's bed. JM eats all of her meals in Rex's Diner's Club with other residents. To change the sheets, Petitioner had to roll JM from side to side. As she was being rolled from side to side, JM said "stop" and "go," and "hold on." Petitioner continued to change the sheets, straighten up the room, and then left to care for another resident. Petitioner was performing these duties for a period of time between 20 to 30 minutes. (T. pp. 25 – 28; 45, 46)

12. Thirty to forty-five minutes later after leaving JM's room, Petitioner was called away from her work with another patient to meet with a David Conyers, Security Officer and Tina Silliboy-Young, her supervisor for that shift. Petitioner was told that an allegation that she had slapped JM had been raised. Petitioner denied the allegation, saying that "[t]he lady haven't given me a reason to slap her." "I did not abuse JM. I did not slap JM." Petitioner specifically denied the allegations under oath in the same manner at the hearing. No criminal charges have been filed against Petitioner in this incidence or any other. (T. pp. 29, 30, 46; Resp. Exh. 3)

13. Joan Kalu was a Nurse Assistant at Rex. Ms. Kalu's duties, like those of Petitioner, included providing general care for residents, assisting nurses when needed, provide for the safety of residents, and acting as an advocate for the residents. (T pp. 53 - 55)

14. On January 9, 2003, Ms. Kalu worked the second shift at Rex. Ms. Kalu was assigned to work the bottom of the "F" Hall that day. JM was not one of her assigned residents, but she had worked with her three or four times before that day. One of Ms. Kalu's assigned residents resided in room 67-B, which is next to JM's room. (T pp. 55 - 58)

15. After dinner that evening, as Ms. Kalu prepared the resident in 67-B for bed she heard a bump against the wall between room 67 and JM's room. Ms. Kalu paused, then continued to take care of her resident, who required a special lift to move from chair to bed because she was totally unable to support her weight. About one minute later, Ms. Kalu heard another bump, followed by a short high-pitched scream that made her stop her work. Ms. Kalu initially thought the scream had come from a resident across the hall who has a habit of screaming, but then realized that could not be the case because the scream had come from the other side of the mutual wall. Ms. Kalu recognized the voice of the scream as that of JM. (T pp. 58 - 61; Resp. Exhs. 4, 5)

16. Ms. Kalu did not immediately go into JM's room because to do so would have required that she leave her assigned patient in an unsafe condition. When she left her resident's room she did not check on JM because she was holding soiled linens that had to be disposed of and JM's door was closed. (T pp. 61, 62; Resp. Exhs. 4, 5)

17. Tina Silliboy-Young was the Nurse Supervisor working second shift at Rex. She supervised both Petitioner and Ms. Kalu. Some time after the incident Ms. Kalu told Ms. Silliboy-Young about the noises she heard from JM's room on January 9, 2003. (T pp. 62, 73, 76)

18. Susan Harden was the Director of Nursing Services at Rex. After speaking to Ms. Silliboy-Young about what she had heard that evening, Ms. Kalu also told Ms. Harden. (T pp. 64, 142)

19. Ms. Silliboy-Young worked the second shift at Rex on September 9, 2003. She was called to JM's room by Pat Hoskins, the Licensed Practical Nurse assigned to care for JM. When Ms. Silliboy-Young arrived at JM's room she saw JM laying in her bed. JM was upset and shaken, and had a raised area on the right side of her forehead. There was fresh blood on her forehead, JM's hair was wet on the right side, and JM's water pitcher was empty. There was also a raised purple area on JM's left hand. Ms. Silliboy-Young also noticed that JM's roommate, HC, had erected a barrier by putting her wheelchair, bedside table, walker, and bedside chair in front of her bed. (T pp.76, 77, 78, 79, 93, 104)

20. Ms. Silliboy-Young asked JM if she was O.K. JM's response was "no." JM told her that "he was rough to me and pushed me up against the wall." JM also said that when she tried to push "him" away from her and "he" hit her with a water pitcher. Ms. Silliboy-Young spent five to ten minutes trying to calm JM down. Petitioner was the only Nurse Assistant assigned to take for JM during the second shift of January 9, 2003. No males were assigned to care for JM. (T pp. 92, 93, 99, 100, 148; Resp. Exh. 9)

21. Ms. Silliboy-Young believes that a person of competent mental faculties who was put to bed for a hundred times over three years would know the sex of the person who performed those duties. (T. p. 108)

22. After completing her assessment of JM, Ms. Silliboy-Young left the room, informed Pat Hoskins that Petitioner must not be allowed to re-enter the room, informed Susan Harden of the incident, and then contacted Rex Hospital Protective Services. (T pp. 92, 93)

23. David Conyers was a Communications Officer at Rex Hospital, who also worked there as a Security Officer. On January 9, 2003, Mr. Conyers and a colleague went to Rex to investigate the allegations against Petitioner. When Mr. Conyers arrived at JM's room he noted that she was upset, had a cut above her eye, and that her hair was wet. Like Ms. Silliboy-Young, Mr. Conyers noted that JM's roommate had erected a barricade around her. With Ms. Silliboy-Young in the room interpreting JM's speech, Mr. Conyers interviewed JM, who told him the same thing she had previously communicated to Ms. Silliboy-Young. In addition to interviewing JM, Mr. Conyers took a picture of the raised bruised area on JM's forehead. (T pp. 94 - 96, 121, 122, 125, 127; Resp. Exhs. 11, 12)

24. Ms. Silliboy-Young, Pat Hoskins, and Mr. Conyers then had a meeting with Petitioner. At the meeting Petitioner denied that anything out of the ordinary had occurred. Petitioner was asked to leave Rex and calmly complied. (T pp. 98-100, 124, 125; Resp. Exhs.11, 12)

25. Ms. Young is familiar with JM's condition. (T. p. 73) J.M. has Von Willebrand's Disease, progressive illnesses, and has some dementia. She has some communication deficits. (T. p. 73) She has airway resistance problems. JM is confined to a wheelchair for general weakness. JM is forgetful at times and needs redirection. (T. p. 75) JM's short-term memory "probably doesn't stay very long. That's the case with most dementia patients." (T. p. 75)

26. J.M. never identified Petitioner by name. (T. p. 166) JM never identified Petitioner to Susan Harden, the Director of Nursing Services at Rex. (T. p. 166)

27. J. M. has Parkinson's. (T. p. 144) JM has fallen in the past. (T. p. 155)

28. Susan Harden, Director of Nursing Services at Rex, conducted the facility investigation into the allegation against Petitioner. On the morning of January 10, 2003, Ms. Harden spoke to JM about the incident with Petitioner. JM informed her that she had been hit with a water pitcher, and explained that she thought that no one should be treated "that way." Ms. Harden noted the red scrapped area over JM's eye. JM told Ms. Harden that "he just threw me against the wall and hit me." When asked who "he" was, JM told Ms. Harden that "he" was the one who took care of her last night. (T pp. 146 - 148)

29. In addition to interviewing JM, Ms. Harden interviewed, among others, Tina Silliboy-Young, JM's roommate, Pat Hoskins, and Petitioner. She then notified the Nurse Aide Registry of the allegation against Petitioner. Ms. Harden noted that JM's

account of the incident was consistent and credible, and that JM had in fact been injured. She substantiated the allegation against Petitioner. (T pp. 148 - 154; Resp. Exhs. 13, 15, 16)

30. Sarah Flowers was a nurse investigator with the Nurse Aide Registry/ Health Care Personnel Registry. Ms. Flowers is charged with investigating allegations against health care personnel in Chatham and Wake Counties. Accordingly, she received and investigated the allegation that Petitioner had abused a resident at Rex. (T pp. 169 - 172)

31. Ms. Flowers interviewed Tiny Silliboy-Young, Susan Harden, Joan Kalu, David Conyers, Pat Hoskins, JM's roommate, JM, and Petitioner. Ms. Flowers interviewed JM 26 days after the incident. She found that JM's statements to her were consistent with what JM had told Ms. Silliboy-Young and Ms. Harden. Ms. Flowers found that JM was able to speak clearly, credibly, and maintain eye contact. JM insisted that what had happened to her was not right. Ms. Flowers also reviewed Petitioner's personnel record, and the medical records of JM and her roommate. (T pp. 172, 173, 174)

32. Ms. Flowers testified that abuse is willful infliction of injury, unreasonable confinement, intimidation, or threats resulting in harm, pain or mental anguish to the resident. She substantiated the allegation of abuse against Petitioner because Petitioner's willful actions inflicted injury upon JM. (T pp. 178, 179, 181; Resp. Exh. 17)

33. Petitioner was notified by letter that a finding of abuse would be listed against her name on the Health Care Personnel Registry. Attached to the letter was the Entry of Finding, which is the exact substantiated finding as it will appear on the Health Care Personnel Registry. (T pp. 182 - 185; Resp. Exh. 18)

Based upon the foregoing stipulations and Findings of Fact, the undersigned Chief Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapters 131E and 150B of the North Carolina General Statutes.

2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.

3. Respondent has the burden of proof to establish as factual its investigative allegations of abuse by the preponderance of the evidence. G.S. 150B-29(a).

4. As a nurse assistant working in a nursing home, Petitioner is subject to the provisions of N.C. Gen. Stat. §§ 131E-256. The allegations made against Petitioner were made in good faith.

5. "Abuse" is defined as "the willful infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, pain or mental anguish." 10 N.C.A.C. 3H.2001(1). All patients in residential care, such as JM, have the absolute right to be free from abuse perpetuated at the hands of caregivers. However, those accused have the right that the evidence to establish abuse must be proven by the preponderance of the evidence.

6. Respondent failed to carry its burden of proof, by the preponderance of the evidence, that Petitioner abused resident JM by throwing the resident against the wall and hitting the resident on the head with a water pitcher causing a reddened area to the resident's face, a scratch to the forehead, and a bruise to the hand.

7. JM did not clearly identify Petitioner by name, gender, photograph, or in-person identification as the individual who committed the alleged acts of abuse. The out of court statements attributed to JM tend to be incoherent, unclear and inconclusive. The evidence that tends to point to Petitioner as the assailant is attributed to residential patients who were not present in court, and whose cognitive mental conditions were not clearly substantiated at the time of the alleged incident. The combination of the declarant's lack of clarity and cognitive mental acuity reduces the weight that is accorded to this evidence by the trier of fact. This evidence, as well as the circumstantial evidence, does not overcome nor sufficiently negate, by the preponderance of the evidence, Petitioner's in-court statement, as the only eyewitness who testified, that categorically denied the Respondent's allegations and corroborated Petitioner's earlier statements denying the accusations which were recorded within 45 minutes of the alleged event. The evidence presented to the contrary raises no more than a permissible inference that Petitioner engaged in the alleged conduct and is insufficient to carry Respondent's burden of proof. *Pittman v. N.C. Department of Health & Human Services*, 357 N.C. 241, 580 S.E. 2nd 692 (2003).

8. The conclusion that Respondent did not carry its burden of proof indicates only that Respondent failed to prove by the preponderance of the evidence that Petitioner committed the alleged acts.

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

DECISION

The Respondent's decision to list an allegation of abuse or place a finding of abuse at Petitioner's name on the Health Care Personnel Registry is REVERSED, as Respondent did not carry its burden of proof by the preponderance of the evidence to permit a finding that Petitioner abused JM.

ORDER

It is hereby ordered that the agency serve a copy of the FINAL DECISION on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with N.C. Gen. Stat. § 150B-36(b).

NOTICE

The decision of the Administrative Law Judge in this contested case will be reviewed by the agency making the final decision according to the standards found in G. S. 150B-36(b)(b1) and (b2). The agency making the final decision is required to give each party an opportunity to file exception to the decision of the Administrative Law Judge and to present written argument to those in the agency who will make the final decision. G.S. 150B-36(a).

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Resources, Division of Facility Services.

This the 8th day of January, 2004.

Julian Mann, III
Chief Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF GREENE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 DHR 0499

TOTAL RENAL CARE OF NORTH CAROLINA, LLC)	
Petitioner,)	
)	
v.)	RECOMMENDED DECISION
)	
NORTH CAROLINA DEPARTMENT OF HEALTH AND)	
HUMAN SERVICES, DIVISION OF FACILITY SERVICES,)	
CERTIFICATE OF NEED SECTION,)	
Respondent,)	
BIO-MEDICAL APPLICATIONS OF NORTH)	
CAROLINA, INC.)	
Respondent-Intervenor.)	

Pursuant to N.C. Gen. Stat. § 131E-188(a) and § 150B-23 through 37, a contested case hearing was held in this matter on November 17-21 and December 18, 2003, in Raleigh, North Carolina before Administrative Law Judge James Conner II.

The parties to this contested case are Petitioner Total Renal Care of North Carolina, LLC (hereinafter called "TRC"); the Respondent North Carolina Department of Human Resources, Division of Facility Services, Certificate of Need Section (hereinafter called "Agency" or "CON"); and Respondent-Intervenor Bio-Medical Applications of North Carolina, Inc., d/b/a BMA of Greene County (hereinafter called "BMA"). In this case TRC has appealed from CON's decision to disapprove its application and approve the BMA Application for a new dialysis facility in Greene County. BMA has intervened to assert that the Agency erred by not disapproving the TRC Application for reasons beyond those identified as non-conforming in the Agency Decision.

APPEARANCES

William R. Shenton
Thomas R. West
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Raleigh, North Carolina

For Petitioner TRC

June S. Ferrell

For the Respondent CON Section

Jane Oliver
Assistant Attorneys General
North Carolina Department Of Justice
Raleigh, North Carolina

Gary S. Qualls

For Respondent-Intervenor BMA

Colleen M. Crowley
Kennedy Covington Lobdell & Hickman, LLP
Morrisville, North Carolina

and

James B. Trachtman
Harris & Winfield, LLP
Raleigh, North Carolina

I. APPLICABLE LAW

The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. §150B-1 et seq.

The substantive statutory law applicable to this contested case hearing is the North Carolina Certificate of Need Law, N.C. Gen. Stat. § 131E-175 et seq.

The administrative regulations applicable to this contested case hearing are the North Carolina Certificate of Need Program Administrative Regulations, 10 NCAC 3R .0300 and .2200 as promulgated; and the Office of Administrative Hearings Regulations 26 NCAC 3.0001 *et seq.*

II. BURDEN OF PROOF

As Petitioner, TRC has the burden of proof by the greater weight of the evidence.

III. ISSUES

The parties set forth the following issues for resolution in this contested case in the Prehearing Order:

Petitioner TRC's List of Issues

A. Whether the Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, or acted arbitrarily or capriciously, in determining that the TRC Application did not conform with Review Criterion 4. N.C. Gen. Stat. § 131E-183(a)(4).

B. Whether the Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, or acted arbitrarily or capriciously, in determining that the BMA Application did conform with Review Criteria 3, 4, 5, and 12. N.C. Gen. Stat. § 131E-183(a)(3),(4),(5), and (12).

C. Whether the Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, or acted arbitrarily or capriciously, in determining that the BMA Application conformed with the CON Section's special review criteria for dialysis facilities codified at 10 NCAC 3R .2200.

D. Whether the Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, or acted arbitrarily or capriciously, in the following respects relating to its comparative review of the BMA and TRC Applications:

- The criteria and issues used by the Agency for the comparative analysis,
- The procedure used by the Agency for conducting its comparative review of the BMA and TRC Applications,
- The Agency's determinations concerning the purported superiority of the BMA Application with respect to staffing salaries and continuity of care, and
- The Agency's failure to determine that the TRC Application was comparatively superior to the BMA Application.

E. Whether the Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, or acted arbitrarily or capriciously, in determining that the BMA Application should be approved with the conditions stated in the Agency findings, and that the TRC Application should be denied.

Respondent CON Section's List of Issues

Whether Respondent exceeded its authority and jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule and substantially prejudiced TRC's rights when it approved the BMA Application and disapproved the TRC Application.

Respondent-Intervenor BMA's List of Issues

1. The Agency complied with the review standards in N.C. Gen. Stat. § 150B-23(a) by correctly finding BMA's Application conforming or conditionally conforming with all applicable review criteria in N.C. Gen. Stat. § 131E-183(a) and 10 NCAC 3R, Section .2200.

2. The Agency complied with the review standards in N.C. Gen. Stat. § 150B-23(a) by correctly finding BMA's Application comparatively superior to TRC's Application.

3. The Agency complied with the review standards in N.C. Gen. Stat. § 150B-23(a) by correctly finding TRC's Application non-conforming with the review criterion in N.C. Gen. Stat. § 131E-183(a)(4).

4. The Agency violated the review standards in N.C. Gen. Stat. § 150B-23(a) by failing to find TRC's Application also non-conforming with the following review criteria as additional bases for the Agency's denial of TRC's Application:

- (a) N.C. Gen. Stat. § 131E-183(a)(4) because TRC's Application failed to show how its proposal was the most effective alternative in that:
 - (1) TRC failed to adequately respond to Question 9 in Section III of the Application form; and
 - (2) TRC failed to include the related lessor as a co-applicant;
- (b) N.C. Gen. Stat. § 131E-183(a)(5) because TRC's Application failed to include the costs to be incurred by a related lessor;
- (c) N.C. Gen. Stat. § 131E-183(a)(3) because TRC's Application failed to adequately address this standard; and
- (d) the regulatory review criteria at 10 NCAC 3R.2217(a) and (c) because TRC's Application failed to adequately demonstrate compliance with this standard.

5. The Agency violated the review standards in N.C. Gen. Stat. § 150B-23(a) by failing to also cite to the non-conformities cited in Paragraph 4 above as additional bases upon which to find BMA's Application comparatively superior to TRC's Application.

IV. RECORD OF THE CASE

At the hearing, the following testimony was received:

<u>Volume Number</u>	<u>Witness</u>	<u>Affiliation</u>	<u>Pages</u>
Volume I – November 17	Lovett, Michael	Greene County	67-127
	Beville, Louise	CON Section	133-254
	Frisone, Martha	CON Section	256-274
Volume II – November 18	Smith, Craig	CON Section	309-407
	Hoffman, Lee	CON Section	412-463
	Robinson, Samuel	BMA	466-500
	McCammon, Samuel	BMA	502-590
Volume III – November 19	Martin, Betty	TRC	672-726
	Russ, Hollie	TRC	729-772
	Hyland, Bill	TRC	776-857
Volume IV – November 20	Hyland, Bill	TRC	904-1002
	Beville, Louise	CON Section	1006-1109
	Smith, Craig	CON Section	1110-1164
Volume V – November 21	Robinson, Samuel	BMA	1197-1365
Volume VI – December 18	Moore, Vickie	Neil Realty	
	Hill, Bebe	Hillco, Ltd.	

In addition, the following exhibits were admitted into evidence:

Common Exhibits

- A. Agency File
- B. BMA Application
- C. TRC Application

TRC Exhibits

Maps

1. Map of Greene County
2. Map of Snow Hill
3. Excerpt of State Highway map of Eastern North Carolina
4. Composite map of Greene, Pitt, Lenoir, Wayne, and Wilson Counties-poster board

Agency Decisions

6. Decision by CON Section in Rockingham County Review
Project ID No. G-6731-02 (March 27, 2003)
7. Decision by CON Section in Rockingham County
Project ID No. G-6824-02 (July 18, 2003)
8. Decision by CON Section in Caswell County Review
Project ID Nos. G-5487-96 and G-5501-96 (April 28, 1997)
9. Decision by CON Section in Duplin County
Project ID Nos. P-6155-99 and P-6185-99 (April 27, 2000)
10. Decision by CON Section in Johnston County Review
Project ID Nos. J-5782-97, J-5777-97, and J-5784-97 (April 21, 1998)
11. Decision by CON Section in Robeson County Review
Project ID Nos. N-5745-97, N-5756-97, and N-5778-97 (April 21, 1998)

Depositions

15. Frisone deposition (excerpts)
16. Hoffman deposition in its entirety
18. Nelms deposition (excerpts)

Other Exhibits

20. July 2002 North Carolina Semiannual Dialysis Report
21. BMA's patient list information
22. BMA's project questionnaire
24. BMA's Sample Lease Agreement [From Robinson Deposition]
26. Clinical Effects of Chemical Contaminants [From Wood Deposition]

BMA Exhibits

1. BMA's Project Questionnaire
4. 10 NCAC 3R.2200
5. Excerpts from 2002 SMFP regarding dialysis

6. Materials from Bill Hyland's working file
7. Confidential Documents from TRC
14. Agency Findings dated April 26, 2001 for TRC Reidsville (Project ID #G-6310-00)
15. Excerpts from TRC Reidsville's CON Application filed Nov. 15, 2002
22. Greene County Commissioners Meeting Minutes dated May 5, 2003
23. Chart illustrating Hillco, Neil Realty and TRC relationships (*illustrative purposes only*)
24. Neil Realty Co. Officers, Directors, and Minutes
25. Neil Realty Co. list of stockholders (encoded)
26. Key to code (partial)
27. Neil Realty Co. summary of stockholders
28. Hillco, Ltd. Officers, Directors, and Minutes
29. Hillco, Ltd. list of stockholders (encoded)
30. Hillco, Ltd. Summary of stockholders

V. FINDINGS OF FACT

After examination of the evidence presented at the hearing, the presentations of counsel, and the findings of fact and conclusions of the law proposed by the parties, the undersigned Administrative Law Judge makes the following Findings of Fact:

A. Parties, Procedural Points and Other Undisputed Information

1. All the parties are properly before the Office of Administrative Hearings (OAH), and OAH has jurisdiction of the parties and of the subject matter.
2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.
3. Petitioner TRC is a North Carolina limited liability company which operates dialysis facilities in North Carolina.
4. BMA is a North Carolina corporation which operates dialysis facilities in North Carolina.
5. The Respondent CON Section is the agency within the Department of Health and Human Services which carries out the Department's responsibility to review and monitor new institutional health services under the Certificate of Need Law, codified at N.C. Gen. Stat. Chapter 131E, Article 9.

B. Dialysis Generally

6. Dialysis is a process which is used to replace the function of the human kidney in filtering the concentration of certain compounds and excess water from the blood stream.
7. Among the methods of dialysis is hemodialysis, in which a patient's blood is drawn out of the body through a vascular line and directed into a dialysis machine. A membrane in the dialysis machine is used to draw off these compounds and excess fluid through osmosis. By the process of osmosis, the targeted substances and excess water are drawn across the membrane into the dialysate solution.
8. The dialysate solution that is used in this process is mixed from purified water and two other chemicals, commonly referred to as "Bicarbonate" and "Acid."

9. Hemodialysis patients typically go to a dialysis facility three times per week, where the facility uses a dialysis machine, usually called a “station,” to provide the dialysis treatment. Since they receive these treatments at the facility, they are commonly called “in-center” patients.

10. Dialysis machines typically are powered by electricity which powers a pump to draw the patient’s blood into the machine. In the machine it is drawn past or over the membrane so that the process of osmosis can take place.

C. Certificate of Need Regulations of Dialysis

11. Dialysis centers or facilities are considered to be kidney disease treatment centers. Thus, they fall within the definition of “health service facility” in the CON statute. New dialysis centers cannot be developed and dialysis services offered in them unless it is pursuant to a Certificate of Need. (Vol. II, *Smith*, pp. 328-329).

12. In North Carolina, the planning methodology for utilization of dialysis stations and projecting the need for additional stations assumes that each dialysis station has the capacity to operate two separate shifts each day for six days each week. As a result, each dialysis station is presumed to be able to provide twelve dialysis treatments weekly, in the morning and afternoon six days per week, Monday through Saturday. Since dialysis patients typically require hemodialysis three times each week, a single dialysis machine or station is assumed to be able to provide dialysis to four patients each week.

13. As part of the process of developing need projections under the Certificate of Need Law, each year planners employed by the State compile two editions of the Semi-Annual Dialysis Report (“SDR”). The SDR is developed as part of the process of developing the State Medical Facilities Plan (“SMFP”). Under Review Criterion 1, the need projections in the SDR are considered by State health planners to be determinative of the need for dialysis facilities in the same way that the need projections for other services in the SMFP are determined to be. (Vol. II, *Smith*, pp. 319-321).

14. Each SDR presents data in two different tables. One table lists all of the facilities in North Carolina by county and the other table projects the need for additional dialysis stations based upon the most current data available from the Southeastern Kidney Council about the numbers of hemodialysis patients in each county and projections of the number of future hemodialysis patients, based on the trend in those data from each county. The SDR methodology requires that there must be a need for at least ten stations in a county, based on 3.2 patients per station, which would represent 80% of the assumed 4.0 patient capacity, before a need for a new facility is established. Petitioner’s Exhibit No. 20 has the county growth rate in it. (Vol. III, *Hyland*, pp. 796-799).

15. The SDR published in July 2002 identified a need for ten dialysis stations in Greene County, based on an annual county growth rate of 1.065. Thus, the State health planning process determined a need for ten dialysis stations in Greene County to serve residents of Greene County. (Vol. II, *Smith*, pp. 321-323) [Petitioner’s Exhibit No. 20].

D. Greene County Applications

16. Pursuant to the need for 10 dialysis stations in Greene County that was documented in the July, 2003 SDR, three different companies applied to establish new dialysis facilities in which these new stations would be located. BMA and TRC were two of the applicants.

17. The BMA Application proposed to establish a new dialysis facility in a new building to be constructed in Snow Hill, and it identified a capital cost of \$550,914.00.

18. The TRC Application proposed a new facility that would be operated by TRC, and located in a building to be leased either from Hillco, Ltd., (primary site) or Fast Break Convenience Stores (secondary site). TRC projected a capital cost of \$776,338.00.

19. Mr. Robinson was the person responsible for putting the BMA Application together. He has worked for Fresenius Medical Care since approximately July of 2000. (Vol. V, *Robinson*, pp. 1197-98).

20. Mr. Robinson was aware that the July 2003 SDR showed a need for ten stations to meet the needs of patients who require hemodialysis and live in Greene County. (Vol. V, *Robinson*, p. 1217).

21. Mr. Hyland is Director of Healthcare Planning with DaVita, with responsibility for four different states. In North Carolina, he is responsible for developing the certificate of need applications by DaVita’s affiliate, Total Renal Care of North Carolina, LLC. (Vol. III, *Hyland*, pp. 776-778).

22. DaVita's system for planning for acquisitions, mergers and development involves using a standard model which it uses for both states that have certificate of need programs that control dialysis facilities as well as those that do not have certificate of need programs. (Vol. III, *Hyland*, pp. 778-780).

23. Mr. Hyland was accepted as an expert in planning the need for dialysis services in North Carolina and in compiling and submitting certificate of need applications. Mr. Hyland also was accepted as an expert in the certificate of need process from the perspective of an applicant. (Vol. III, *Hyland*, pp. 809, 816-818).

E. CON Review and Decision

24. Ms. Louise Beville testified that she was the project analyst with the CON Section who performed most of the analysis of the Greene County applications. She was the only person at the CON Section who was primarily responsible for reviewing the Greene County applications. She developed findings based on her review of the applications, and those findings were reviewed by Mr. Craig Smith, the Assistant Chief of the CON Section. (Vol. I, *Beville*, 134, 139-141).

25. To determine conformity with the applicable review criteria, the CON Section reviews an application in its entirety and does not focus on any specific portion of the application to the exclusion of others which might be relevant or pertinent. (Vol. IV, *Beville*, pp. 1108-09).

26. At the public hearing, CON analysts listen to the comments of those making presentations. Generally, the project analyst listens to the tape that is made of public comments if she has any questions about issues that have come up in the review. A tape was made of the Greene County public hearing, but the project analyst did not recall listening to the tape. (Vol. I, *Beville*, 136, 139).

27. Mr. Hyland appeared at the public hearing on the Greene County applications, which was held in Snow Hill on November 14, 2002. During his remarks at the public hearing he confirmed that there was no hidden ownership by Hillco in TRC and that Neil Realty Co. is the organization that owns the fifteen percent interest in TRC, not Hillco. Mr. Hyland also clarified that Hillco is not the lessor of certain other dialysis facilities as was indicated in competitive comments submitted by BMA. Ms. Beville, the project analyst at CON, was present for all of Mr. Hyland's comments. (Vol. III, *Hyland*, pp. 818-824).

28. At the conclusion of a review of an application, the CON Section issues findings in order to explain to applicants and other interested parties the basis for the agency's determinations that an applicant is conforming or nonconforming.

29. On February 26, 2003, the CON Section issued its findings approving the BMA Application and disapproving the TRC Application. The CON findings on the Greene County applications are found on pages 227 to 257 of the Agency File (Vol. I, *Beville*, 142-44) [Common Exhibit A, 227-257].

30. The CON Findings include findings concerning the conformity of each application with review criteria in the Certificate of Need Law, as well as criteria in rules that the Agency has adopted. In addition, the Findings include a section comparing the applications.

31. The CON Section determined that the TRC Application conformed with all pertinent review criteria, including all those that have been identified by BMA as being at issue, with the exception of Review Criterion 4, codified at N.C. Gen. Stat. § 131E-183(a)(4). The sole basis for the agency's finding of nonconformity with Criterion 4 was that the lessor of TRC's proposed primary site, Hillco, Ltd., was a 15 per cent owner of TRC, and would therefore have a 15 per cent interest in the operation of the proposed facility. (Vol. I, *Beville*, 144-4).

32. The reference to the nonconformity of the TRC Application on page 245 of the findings is a typographical error. The Agency found that the TRC Application conformed with all of CON's special criteria. (Vol. IV, *Beville*, p. 1026).

33. The CON Section determined that the BMA Application conformed with all criteria except for one rule concerning acute care hospital agreements, and the Agency approved BMA with a condition on this criterion.

34. The CON Section has adopted rules that are designed specifically for the review of dialysis applications. (Vol. I, *Beville*, 166-68). The analyst did not use these rules for the comparative analysis of the BMA and TRC applications, though she did use other general principles that had been adopted as rules in the State Medical Facilities Plan. (Vol. I, *Beville*, 176-79).

35. The Certificate of Need Law requires the agency to develop rules on how it conducts its reviews of applications. (Vol. IV, *Smith*, p. 1147).

36. The CON Section has not adopted rules that define how it should conduct the review of competing applications to establish a new dialysis facility. (Vol. I, *Beville*, 167-68).

37. The CON Section usually imposes a standard condition that requires an approved applicant to materially comply with the representations made in its certificate of need application. (Vol. IV, *Beville*, pp. 1059-60).

Review Criteria at Issue

F. Review Criterion 3

38. Applicants for a certificate of need must address N.C. Gen. Stat. §131E-183(a)(3) (hereinafter called "Criterion 3"). Criterion 3 provides that:

The applicant shall identify the population to be served by the proposed project, and shall demonstrate the need that this population has for the services proposed, and the extent to which all residents of the area, and, in particular, low income persons, racial and ethnic minorities, women, handicapped persons, the elderly, and other underserved groups are likely to have access to the services proposed.

39. The Agency found the TRC Application conformed with Review Criterion 3 because it identified a population to be served based on population data in Greene County. (Vol. IV, *Smith*, p. 1115)

40. The BMA and TRC Applications were submitted in response to a county need identified in the SDR. [Petitioner's Exhibit 20]

41. In his comments submitted to the CON Section (agency file pages 176-177), Mr. Robinson defended the need for the facility that BMA proposed by indicating that "the need for services is established by the SMFP and SDR." The SDR established this need based on the projection of Greene County patients who would need hemodialysis, and this need was based exclusively on a projected demand for dialysis services by residents of Greene County only. (Vol. V, *Robinson*, pp. 1338-1341).

42. The TRC application included a zip code analysis that Mr. Hyland compiled showing the residences of the Greene County dialysis patients and this is included as Exhibit No. 8 beginning on page 206 of the application. It shows that twenty-six of the thirty-one hemodialysis patients who lived in Greene County as of December 31, 2001 resided in the Snow Hill zip code and as a result of this, Mr. Hyland concluded that the best location for the dialysis facility in Greene County would be in Snow Hill since that is where the dialysis patients reside, it is also the population base of the county, and the location where other services are located. Therefore, in Mr. Hyland's opinion Snow Hill was the best location for the Greene County dialysis facility. (Vol. III, *Hyland*, pp. 845-848).

43. Mr. Robinson agreed that the TRC Application included an Exhibit No. 8, found on page 206 of the application, which reported the dialysis patients in Greene County by zip code and showed that 26 of those patients lived in the Snow Hill zip code, 2 lived in the Walstonburg zip code, and 3 lived in the Hookerton zip code. (Vol. V, *Robinson*, pp. 1341-42).

44. When a dialysis facility is built in Greene County, it should be built in the county seat, Snow Hill for at least the following reasons: all of the physicians offices in Greene County are in Snow Hill; the congregate nutrition center for people over the age of 60 is located there; the Greene County Health Department, Senior Center, Department of Social Services and mental health agency are all located in Snow Hill; and the community college is located there. Greene County is a relatively sparsely populated county, but the highest density of population is in Snow Hill. (Vol. I, *Lovett*, 109-111, 121) [TRC Ex. 1,2,Ex.C, pp. 22, 52]

45. In developing its application, TRC assumed that there was a deficit of dialysis stations in Greene County. They also assumed the projected annual growth rate of 1.065 that was documented in the July 2002 SDR as the most recent growth rate for the numbers of Greene County dialysis patients who need hemodialysis. (Vol. III, *Hyland*, pp. 789-790).

46. The TRC application expressly states its expectation that all Greene County hemodialysis patients would transfer to the new TRC facility in Snow Hill. (Vol. III, *Hyland*, pp. 795-796) [Common Exhibit C, p. 23]

47. TRC projected that all of the patients who reside in Greene County and need hemodialysis would be seen at the TRC Greene County facility starting from day one of its operation. DaVita's experience, and that of other organizations in bringing a new dialysis facility into a county, led Mr. Hyland to believe that patients would come to the new facility because it would be closer to their homes. (Vol. III, *Hyland*, p. 791).

48. The only alternative available to TRC to meet the need for an additional dialysis facility in Greene County that was documented in the July 2002 SDR was to establish a dialysis facility in Greene County. (Vol. III, *Hyland*, pp. 847-848).

49. Mr. Robinson agrees that in the circumstances presented to TRC, with the controls on the development of dialysis facilities under the State health planning methodology, the only means available to TRC to meet the need identified in the July 2002 SDR was to establish a new facility in Greene County. (Vol. V, *Robinson*, p. 1349).

50. TRC obtained information from Dr. Richard Merrill concerning the Greene County dialysis patients for whom he was providing services. (Vol. III, *Hyland*, p. 853).

51. Beginning in 1998, Dr. Richard Merrill began advocating for a special need determination in the State Medical Facilities Plan for dialysis stations to be developed in Greene County. Dr. Merrill asked the government of Greene County to assist him in that effort, and in 1998, the County Manager of Greene County directed the Director of the Greene County Transportation Department, Mike Lovett, to represent the County in the effort to obtain the special need determination. (Vol. I, *Lovett*, 68,88-89, 122)

52. The Agency also concluded the BMA Application conformed with Review Criterion 3. However, BMA based its patient projections, in part, on providing dialysis services to residents of Pitt County and Wilson County, counties that were not the area targeted in the July 2002 SDR as being in need of services, while TRC proposed to serve exclusively Greene County residents. [Common Exhibit B, p. 27]

53. BMA also submitted patient letters from patients who did not live in Greene County. (Vol. II, *Robinson*, pp. 567-69)

G. 10 NCAC 3R .2217

54. Regulatory criterion 10 NCAC 3R .2217 was among the criteria applied in the review of BMA and TRC's applications to develop a dialysis center in Greene County. The analysis of that criterion is found beginning at page 252 of the Agency Findings. (Vol. II, *Hoffman*, pp. 417, 420).

55. Subsection (a) of Rule .2217 requires that an applicant proposing to establish a new in-station dialysis facility must document the need for at least ten stations based on utilization of 3.2 patients per station per week as of the first day of operation of the facility. The Agency concluded that TRC complied with this criterion. (Vol. II, *Hoffman*, p. 428).

56. Subsection (b) of Rule .2217 only applies to expansions of existing dialysis facilities and so it does not apply to either the TRC or the BMA Applications.

57. Section (c) of Rule .2217 requires that an applicant provide all assumptions including the specific methodology by which patient utilization is projected. The Agency determined that TRC conformed with this requirement by virtue of the assumptions stated by TRC on page 27 of its application (Vol. II, *Hoffman*, pp. 424) [Ex. C, p.27, Ex. A, p.253].

58. Rule .2217(a) supplements other need-related criteria in the CON Law and is interpreted by the CON Section to mean that an applicant seeking to establish a new dialysis facility must demonstrate that there are at least 3.2 patients who are projected to need the proposed service as of the first day of operation of the facility proposed. (Vol. I, *Beville*, 214-215)

59. The Agency's analysis of regulatory criterion .2217 relates to the review of Statutory Criterion 3 because in order to conform to statutory review criterion 3, the applicant would have to demonstrate that there were 32 patients who needed the service and that they were originally proposing to serve 32 patients. (Vol. II, *Hoffman*, p. 429)

60. The Project Analyst consulted with the Assistant Chief of the CON Section concerning the issue of whether the TRC Application conformed with one need-related rule that was among those adopted by the CON Section for the review of dialysis applications. The rule requires an applicant to show that a need for the ten stations exists as of the first day of operation of the proposed new facility. (Vol. I, *Beville*, pp. 212, 214)

61. The Certificate of Need Rule .2217 asks an applicant to show that there is a need for the proposed facility, based on a need for dialysis on the part of 3.2 patients per station at the time the facility is projected to begin operating. In essence, the CON Section believes that this requires an applicant to show the agency that need exists as of the first day of operation. The applicant must project 3.2 patients per station per week who need dialysis as of the first day of operation. (Vol. I, *Beville*, 214-215)

62. The Project Analyst agrees that the use of the word "document" in Rule .2217 is relative to documenting the need for ten stations. TRC's projected opening date was January 4 of 2004, so one would look to see whether the applicant had documented a need for 10 stations, at 3.2 patients per station, as of that date. (Vol. I, *Beville*, 219, 224-25).

63. The principles for dialysis services that are adopted as part of the 2003 State Medical Facilities Plan (SMFP) reference projecting a *need* for at least ten stations or 32 patients as of the first day of operation. (Vol. V, *Robinson*, p. 1246).

64. The Agency concluded that TRC's application conformed with the subsections of Rule .2217 which apply to the review of the applications. (Vol. II, *Hoffman*, pp. 421). [Common Exhibit A, p. 252]

65. Specifically, CON determined that TRC had referred to the determination in the July 2002 Semi-Annual Dialysis Report ("SDR") that as of December 31, 2001 there were 31 in-center dialysis patients residing in Greene County and that there is a five-year growth trend in the number of in-center patients of 6.5% per year. TRC acknowledged this growth trend in its application and then projected for its operating year one, which was projected to begin on January 4, 2004, that there would be 34 in-center patients residing in Greene County. Then TRC projected that of those 34 in-center patients, 32 would dialyze at the TRC facility for a per-station utilization rate of 3.2. (Vol. II, *Hoffman*, pp.424-427; Vol. II, *Smith*, pp. 369-376).

66. The Chief and the Assistant Chief of the CON Section discussed the Agency's analysis of Rule .2217 and agreed that TRC complied with Rule .2217. They concluded that TRC had reasonably projected that at the beginning of its operating year one on January 4, 2004 the facility would be serving 32 in-center patients. (Vol. II, *Hoffman*, pp. 428; Vol. II, *Smith*, pp. 377-378).

67. The TRC Application indicated that at the time that it projected to open, on or about January 4, 2004, it projected serving all of the patients living in Greene County who would need hemodialysis. [Common Exhibit C, page 57]

68. In her findings (see page 231 of agency file), Ms. Beville quotes the TRC Application indicating that the projected number of patients is based on the 5-year growth rate from the SDR. TRC presented this 5-year growth rate as a way to project the future need for dialysis in Greene County. (Vol. I, *Beville*, 221)

69. The TRC application addressed and complied with Rule .2217:

- Sub-part (b) of this Rule is not applicable because TRC did not apply for an expansion of a facility.
- TRC's application conformed with sub-part (c) of Rule .2217 because it clearly and explicitly stated the assumption that all of the patients in Greene County would come to the TRC facility in Snow Hill once it was constructed.
- TRC conformed with sub-part (a) of Rule .2217 because the application referenced the need established for a ten-station facility in Greene County based on the data in the July 2002 SDR. This SDR showed thirty-one hemodialysis patients who resided in Greene County as of December 31, 2001 and also documented an annual growth rate of 6 1/2 percent in the number of hemodialysis patients in Greene County. Since the opening date of the TRC facility was projected to be January 4, 2004, the number of Greene County hemodialysis patients at that point clearly would exceed thirty-two and so TRC had documented a need for a ten-station facility as of its projected date of opening.

(Vol. III, *Hyland*, pp. 810-814).

H. Review Criterion 4

70. Applicants for a certificate of need must address N.C. Gen. Stat. §131E-183(a)(4) (hereinafter called "Criterion 4"). Criterion 4 provides that:

Where alternative methods of meeting the needs of the proposed project exist, the applicant shall demonstrate that the least costly or most effective alternative has been proposed.

71. One of the reasons Mr. Robinson believed that the TRC Application should be found nonconforming with Review Criterion number 4 is that TRC failed to explicitly describe alternatives to applying for a certificate of need; but BMA actually indicated that its alternatives were to apply or not to apply. The pertinent question in the certificate of need application form indicates that an applicant should identify alternatives to meeting the needs identified in the application. (Vol. V, *Robinson*, pp. 1234-39). [Common Exhibit C, p. 23]

72. The Agency found TRC's application non-conforming to Statutory Review Criterion 4 (N.C. Gen. Stat. § 183(a)(4)). The deficiency the Agency found was that Hillco, Ltd. should have obtained a CON because the Agency perceived that Hillco, Ltd. owns 15% of Total Renal Care of NC, LLC ("TRC"). The deficiency perceived by the Agency did not involve the ownership by any individual person in TRC, Hillco, Ltd., Neil Realty Co., or any other corporation involved in the TRC application. (Vol. II, *Smith*, pp. 335). (Vol. II, *Hoffman*, p. 430).

73. Mr. Smith confirmed that the CON Section's finding of nonconformity under Criterion 4 was based on a conclusion that Hillco owned 15% of TRC, and based on information presented to him at his deposition, Mr. Smith conceded that the agency erred in making this finding. (Vol. IV, *Smith*, pp. 1154-56)

74. The provisions of N.C. Gen. Stat. § 131E-178 define all the circumstances in which a person must obtain a certificate of need. So if a person is undertaking an activity that does not fall within the scope of that statute, that person does not need to obtain a Certificate of Need. (Vol. II, *Smith*, pp. 326-327).

75. No administrative rule has been promulgated to guide the Agency in determining the circumstances under which a lessor of space in which a dialysis facility is proposed to be located must be a co-applicant. The Agency relies on the Certificate of Need Law. (Vol. II, *Hoffman*, pp. 433; Vol. II, *Smith*, pp. 331).

76. The Agency is guided in analyzing whether persons must obtain certificates of need by the definitions in N.C. Gen. Stat. § 131E-176 and by N.C. Gen. Stat. § 131E-178. Key terms are "develop" defined at N.C. Gen. Stat. § 131E-176(7) and "offer" at N.C. Gen. Stat. § 131E – 176(18). "Person" is defined at N.C. Gen. Stat. § 131E-176(19).

77. In Section I.12 of the application form for dialysis services, the Agency asks applicants to list the names of persons having a financial interest of 5% or more in the facility. If the facility is leased, the Agency asks that applicants provide the same information for persons having an interest of 5% or more in the company leasing the facility. The Agency cuts off this inquiry regarding ownership at 5% because it believes that ownership of shares below that level is not sufficiently important to provide information in the Certificate of Need Application. (Vol. II, *Hoffman*, pp. 463-464).

78. The CON Section reached its determination about Hillco's ownership of TRC in 2002, based on a review of documents in the agency archives that date from 1997. The analyst simply assumed that this information from 1997 was still correct, did not attempt to verify this information by consulting the website of the North Carolina Secretary of State, and did not find anything else in the application that would contradict this information about Hillco's ownership interest in TRC. (Vol. I, *Beville*, 147, 149-51)

79. The Agency considers the North Carolina Secretary of State as an authoritative source of information concerning corporations that do business in North Carolina. (Vol. II, *Hoffman*, pp. 443 Vol II, *Smith*, p. 399)

80. In fact, Hillco does not own a 15 percent interest in TRC; that interest is owned by Neil Realty Co. as described in the TRC application. There was no evidence that Hillco owns any part of Neil Realty Co. There is substantial overlap between the officers and directors of Hillco, Ltd. and Neil Realty Co., with all four groups being composed heavily of members of the Hill family. (I. Exh. 24 & 28)

81. The CON Section does not have any special expertise in regard to the formalities of corporate organization, and its determinations on these questions are not entitled to any administrative agency deference. (Vol. I, *Beville*, 151).

82. Ms. Hoffman believes there is some kind of relationship between Neil Realty Co. and Hillco, Ltd., but she does not know what the relationship is and cannot define it. (Vol. II, *Hoffman*, pp. 445,452).

83. The senior management of DaVita closely parallels the senior management of TRC. No one named Hill is among that management staff in either corporation. No one who is in senior management at DaVita or TRC has been an owner or officer of any company operated by the Hill family in Ms. Hoffman's experience. The Agency has no basis to believe that Neil Realty Co. has operating control over TRC. (Vol. II, *Hoffman*, pp. 457- 458).

84. It is clear to the CON Section that TRC is the entity that will offer dialysis services in Greene County if it receives the CON. Thus, no entity other than TRC needs a Certificate of Need to offer the service. (Vol. II, *Hoffman*, pp. 460).

85. Ms. Beville agrees with Ms. Hoffman that it was appropriate for TRC to identify itself as the entity that would offer the service described in its application, and it was clear to Ms. Beville that what TRC proposed in its application was that it would offer the service proposed. (Vol. IV, *Beville*, p. 1088).

86. TRC proposed its project in such a way that neither the owner of the Hillco building (primary site) nor the owner of the Fast Break Convenience Store building (secondary site) would have any relationship or interest in the operation of the dialysis facility or would make any contribution to the capital costs to be incurred by TRC to develop the facility. (Vol. III, *Hyland*, p. 838).

87. N.C. Gen. Stat. § 131E-178(c) requires a person who is going to incur an obligation for a capital expenditure which is a new institutional health service to obtain a CON. Mr. Smith understood from TRC's application that it was the "person" incurring all of the capital expenditures to develop the new dialysis facility or center it applied to develop in Greene County. Mr. Smith also understood from TRC's application that no individual who is a shareholder of TRC was going to incur any of those capital expenditures. (Vol. II, *Smith*, pp. 360-365).

88. At the hearing, no party introduced any credible evidence that Hillco planned to be involved in any way in offering the service proposed in the TRC Application. Therefore, both BMA and the CON Section failed to present any credible evidence to indicate that Hillco would "offer" the service proposed by TRC, as that term is defined in the Certificate of Need Law at N.C. Gen. Stat. § 131E-176(18).

89. At the hearing, no party introduced any credible evidence that Hillco planned to undertake any activities or incur any financial obligations that related to the project proposed in TRC's Application. Therefore, BMA and the CON Section failed to present any credible evidence to indicate that Hillco would develop any part of the service proposed by TRC, under the provisions of the Certificate of Need Law at N.C. Gen. Stat. § 131E-176(7).

90. Because Hillco, Ltd. does not own 15% of TRC, the basis for the Agency's finding that Hillco has a financial interest in the operation of TRC's proposed dialysis facility is not present for the reasons cited by the Agency in its findings. In that case, TRC's application would be conforming with every review criterion. In contrast, BMA's application would not have been conforming with every review criterion without a condition because of its failure to submit an executed acute care agreement. (Vol. II, *Smith*, pp. 397-398).

91. When he consulted information on the Secretary of State's web site, Mr. Robinson noticed that Hillco, Neil Realty Co., and TRC each was listed with a separate corporate identification number:

- Hillco 0101997
- Neil Realty 0191310
- TRC 0438652 (Vol. V, *Robinson*, pp. 1269-1271).

92. The CON Section could not reach a determination about whether BMA's lessor would have to be a co-applicant for the same reason cited with regard to the findings on the TRC application because the BMA application did not identify any potential lessor of the BMA facility at the sites identified in the application. Instead, BMA simply indicated that after award of the certificate of need, it would put the construction of its project out to bid to find a lessor [Common Exhibit B, p. 3]

93. TRC was unable to subpoena any entity that might become BMA's lessor, because no specific information about BMA's lessor was included in the BMA application.

94. BMA has not selected its lessor, and there is no lessor, or representative of the prospective lessor, who is available to testify as to the lessor's plans regarding the Greene County project.

95. TRC presented the most reliable evidence available on the role that BMA planned for its lessor in the development of the BMA Greene County facility by presenting live testimony at the hearing from BMA's Project Manager, Mr. Sam McCammon, and deposition testimony from its Regional Vice-President, Mr. Nelms. Both those witnesses confirmed that BMA's lessor would be involved in constructing dialysis-specific features in the building, to meet BMA's specifications; and that the lessor also would be expected to pay for the costs of these features.

96. Evidence from Mr. McCammon and Mr. Nelms establishes that BMA planned to have its lessor, once the lessor was selected, undertake activities to construct and install features in the building that BMA wished to have in order to operate a dialysis facility; and that the lessor would incur financial obligations in connection with these activities.

97. In its application, BMA included a specimen Turnkey Lease Agreement, to describe some of the relationship with its lessor. By including this exhibit in the BMA Application, Mr. Robinson intended to indicate that BMA would be developing this project as a turnkey project. [Common Exhibit B, pp. 340-53]

98. Ms. Beville understood that there was an existing building owned by the landlord at both the primary and secondary site identified by TRC. She also understood that BMA had selected sites that were all raw undeveloped land and a building would have to be constructed on each of BMA sites which would be constructed according to the turnkey procedure. (Vol. I *Beville*, 240)

99. When she reviewed the BMA Application, the Project Analyst understood that BMA has detailed specifications for its dialysis facilities which it supplies to its lessors. She understood as she analyzed the BMA Application that it was proposing its project as a "turnkey" project, which she understood to entail having the BMA landlord construct the building and install features in the building that meet BMA's specifications and which BMA needs to have present in the building in order to conduct dialysis. These features include BMA's specifications for plumbing and wiring used to support the functioning of the dialysis machines. (Vol. I *Beville*, pp. 155-166; Vol. IV, *Beville*, pp. 1075-77).

100. The CON Section knows that plumbing and wiring features are specifically related to the offering of dialysis services. By developing the standard conditions on approvals for dialysis facilities which control the amount of plumbing and wiring to be installed in a dialysis facility, the CON Section has developed a policy which links those plumbing and wiring features to the provision of dialysis services. (Vol. IV, *Smith*, pp. 1144-45, 1157-58).

101. The plumbing and wiring that BMA's landlord would install to BMA's specifications is the same plumbing and wiring features that the CON Section attempts to control and limit in new dialysis facilities by imposing a standard condition that limits the number of these plumbing and wiring infrastructure outlets to limit the capacity of dialysis facilities. This plumbing and wiring is part of the infrastructure that would be installed by BMA's landlord. (Vol. IV, *Beville*, pp. 1077-79).

102. The project analyst understood that BMA did not identify its landlord but simply indicated that if its application were approved and once the certificate of need was issued, the development of the building for the BMA facility would be placed out to competitive bid, and that this bid would include BMA's technical specifications as described above. She also understood that the competitive bid process for BMA's landlord as outlined in the BMA Application meant that any prospective landlords responding would be bidding for the construction of the dialysis facility that BMA had proposed in its application. (Vol. IV, *Beville*, pp. 1079-81).

103. The project analyst and the Chief of the CON Section, Ms. Lee B. Hoffman, agree that any person who constructs or establishes a dialysis facility or undertakes an activity to construct or establish a dialysis facility must obtain a certificate of need. (Vol. IV, *Beville*, pp. 1086-87).

104. The definition of the term "develop" in the Certificate of Need Law includes either undertaking activities that will result in offering a new institutional health service or incurring a financial obligation in relation to offering such a service. (Vol. IV, *Beville*, pp. 108-89).

105. Mr. Sam McCammon is the Project Manager for Fresenius Medical Care, a parent company to BMA, and he oversees the development of new dialysis facilities for BMA. He is involved in the selection of the sites for new facilities, and then after a certificate of need is issued, he is involved in the bidding of plans and is responsible for overseeing the construction from the perspective of BMA. (Vol. II, *McCammon*, pp. 467-469).

106. The turnkey concept as it is used for the development of BMA facilities is a situation where a lessor agrees to construct a facility to BMA specifications. Exhibit 21 in the BMA Application in Greene County is such a turnkey lease situation. (Vol. II, *McCammon*, pp. 476-77).

107. Although the Exhibit A that is referenced in the turnkey lease agreement in the BMA Application is not included in that exhibit, Petitioner's Exhibit 24 does have such an Exhibit A and the General Information section of Exhibit A describes the turnkey arrangements. In particular, the exhibit indicates that "Tenant specifications are intended to allow landlord's completed project to function as a dialysis facility upon Tenant's addition of office furniture, dialysis machines, and supplies, and water treatment, all of which will be Tenant's responsibility to purchase and install." Under BMA's turnkey lease arrangements, the landlord is responsible for the construction and placement of all aspects of the building that are needed in order to have the building function as a dialysis facility, except for office furniture, dialysis machines and supplies, and the purchase and installation of water treatment equipment. (Vol. II, *McCammon*, pp. 478-80).

108. Under the turnkey lease arrangements that BMA commonly employs, a landlord must always follow the specifications in Exhibit A, and when a landlord is building a new building on a vacant lot, the last five pages of Exhibit A also provide guidance to the landlord concerning the design of the shell construction of the building. In either case, whether a landlord is constructing a new building or arranging for the upfit of space to meet BMA's specifications, the landlord pays for the construction of all of the features of the building that are detailed for it in the BMA technical specifications. (Vol. II, *McCammon*, pp. 484-488).

109. In addition to specifications that relate to the shell building, the BMA specifications include specifications for plumbing, electrical circuits, wall covering, ceilings, lights, and floor coverings. (Vol. II, *McCammon*, pp. 488-89).

110. The BMA plumbing specifications are found in section 12 of the specifications shown in Petitioner's Exhibit 24. These include so-called "process piping," the plumbing that takes water from the water treatment equipment out to the individual dialysis stations and to other areas in the facility. This process piping needs to be manufactured and installed according to BMA specifications to ensure that the water in these lines stays pure and free of any minerals that might leach out that would harm patients. The plumbing specifications define a particular type of PVC pipe and the design of a loop system to ensure continuous circulation of this water supply. (Vol. II, *McCammon*, pp. 489-92).

111. The BMA technical specifications also provide for other plumbing loops to be constructed into the facility which carry other components of the dialysate mix. Thus, there are three separate plumbing circuits which are designed and built to loop through the dialysis facility, tying into each of the individual dialysis stations. (Vol. II, *McCammon*, pp. 493-94).

112. The landlord in the turnkey lease arrangement is expected to comply with all of these plumbing specifications in its construction efforts; and the landlord pays for all of that construction except for the raw material piping or tubing that is used for the secondary loops for the bicarbonate and acid. Although this tubing is supplied by BMA, the landlord still is expected to undertake the installation and to incur the expense for installing that tubing in the building. (Vol. II, *McCammon*, pp. 494-496).

113. A BMA landlord under the turnkey lease arrangement also is expected to install electrical circuitry following BMA technical specifications before it delivers the building to BMA, and the lessor is expected to pay for all of those electrical features. Each dialysis machine has a dedicated circuit to make sure that circuit overloads will not result in tripping circuit breakers and stopping multiple dialysis machines from pumping patient blood during a dialysis treatment. (Vol. II, *McCammon*, pp. 496-499).

114. Mr. Robinson agrees that BMA has its landlords make arrangements and incur expenses to build a building that includes the technical specifications that BMA's Project Manager, Mr. McCammon, testified about. That is how the BMA project in Greene County was proposed to be developed, and that is what BMA intended to do when it applied for a certificate of need for the facility in Greene County. Once BMA chose a landlord, its landlord would be responsible to build a building that would incorporate the technical specifications that Mr. McCammon testified about. (Vol. V, *Robinson*, pp. 1333-34).

115. Pursuant to N.C. Gen. Stat. § 131E-178(a), the Agency could make the determination that a lessor had developed a dialysis facility if the lessor had installed dialysis stations, the chairs and hemodialyzers, a water treatment system, a nurses's station and the plumbing and wiring through the walls. Specifically, the Agency agrees that it could determine that a lessor had "developed" a dialysis facility if the lessor had installed: plumbing that delivers dialysate from a central distribution station to the locations of individual dialysis machines; drains located to be able to carry off waste from individual dialysis machines; and wiring to carry power to individual locations to power dialysis machines. The Agency agrees that these features would indicate the lessor has developed a dialysis facility if they are installed by the lessor (Vol. II, *Smith*, pp. 352-356).

116. Mr. Robinson asked the Chief of the CON Section, Ms. Hoffman, about whether a lessor that did not have a relationship with an applicant would need to be a co-applicant; but he did not ask Ms. Hoffman about any other ways in which a lessor might be required to be a co-applicant. (Vol. V, *Robinson*, pp. 1284-86, 1327-28).

117. Mr. Robinson agrees that if a lessor had capital costs that were undertaken in order to develop the dialysis facility in this case, that lessor would have to be a co-applicant, would have to have its capital costs shown in Section VIII of the application, and then the CON Section would need to discuss and analyze those costs in the agency findings under review criterion 5. (Vol. V, *Robinson*, pp. 1329-30).

118. A "project" as defined in the Certificate of Need Law refers to the entire development process of a dialysis facility. (Vol. V, *Robinson*, p. 1331).

119. Mr. Smith agrees with Ms. Hoffman, the Chief of the Certificate of Need Section, that any person building a dialysis facility or undertaking an activity to construct a dialysis facility must obtain a certificate of need, and would have to be named a co-applicant in the application. In his testimony concerning BMA's competitive bid approach to choosing a landlord, Mr. Smith's testimony that it would be all right for BMA to take the approach of letting bids for the construction of its facility to prospective landlords after the award of a certificate of need, Mr. Smith assumed that the landlord chosen to build the building would not be building a dialysis facility. If Mr. Smith's assumption was wrong, he concedes that his conclusion about the propriety of BMA proceeding with the competitive bidding approach to choose a landlord would be wrong. (Vol. IV, *Smith*, p. 1150).

120. As the holder of a certificate of need awarded for this project, BMA would have to materially comply with representations in its application. Otherwise, the CON Section could withdraw its certificate of need. When the CON Section

receives an application which does not identify a lessor as a co-applicant, the agency will hold the applicant to the representation that no certificate of need would be required for its lessor. (Vol. IV, *Smith*, pp. 1137-1138).

121. Lacking a co-applicant is not something that can be addressed in an agency decision through a condition. (Vol. IV, *Beville*, pp. 1020-21; 1081-82).

I. Review Criterion 5

122. Applicants for a certificate of need must address N.C. Gen. Stat. §131E-183(a)(5) (hereinafter called "Criterion 5"). Criterion 5 provides that:

Financial and operational projections for the project shall demonstrate the availability of funds for capital and operating needs as well as the immediate and long-term financial feasibility of the proposal, based upon reasonable projections of the costs of and charges for providing health services by the person proposing the service.

123. The CON Section asks applicants to document capital costs and the availability of financing because applicants have to demonstrate that they have reasonably projected how much the project is going to cost and where the money is going to come from and that funds are available. These considerations relate to Review Criterion 5. (Vol. I, *Beville*, 236)

124. The purpose of Section VIII of the application is for an applicant to set forth all of the capital costs necessary to develop the project. (Vol. II, *Smith*, pp. 395-396).

125. Ms. Beville determined that TRC had provided documentation of the availability of the funds needed for capital and operating needs for its project through the letter from the Vice President and Controller of DaVita which appears on page 337 of the TRC Application. Ms. Beville determined that this letter shows the commitment of sufficient funds to undertake the capital and operating needs for the project and combined with the financial information of DaVita that begins on page 338 that this demonstrate the availability of funding for the project. (Vol. IV, *Beville*, pp. 1089-92).

126. Section VIII of the TRC application includes the chart on page 39 which conveys the cost that TRC would incur to up-fit the shell space. The TRC application did not propose to locate its facility in a new building. (Vol. III, *Hyland*, pp. 824-825).

127. Mr. Hyland obtained the construction cost figure of three hundred twenty-five thousand dollars (\$325,000.00) that is shown in the TRC application from the project manager, Mr. Dale. (Vol. III, *Hyland*, pp. 827-828).

128. TRC included an Exhibit No. 18 in its application which is found on pages 335-336 of the TRC application and which provides a detailed list of equipment costs that would be incurred and he did this to show the analyst all of the key items of equipment that would be purchased and placed in the building in order to provide dialysis services. (Vol. III, *Hyland*, pp. 828-829).

129. The TRC application also documented the sources of funding that would be needed for these capital costs as well as start-up expenses. This funding was documented in a letter from DaVita to Total Renal Care of North Carolina, Inc. which is the owner of eighty-five percent of TRC and this letter is found as Exhibit No. 19 on page 337 of the TRC application. (Vol. III, *Hyland*, pp. 829-831).

130. TRC provided information in Section VIII as well as in a detailed equipment list that was presented in Exhibit 18 in its application and Ms. Beville indicated that this level of detail for the equipment list is unusual based on other applications that Ms. Beville has reviewed. (Vol. I, *Beville*, 237-238).

131. Ms. Beville understood as she reviewed the application that Total Renal Care of North Carolina, Inc. owns 85% of TRC. (Vol. IV, *Beville*, p. 1092).

132. There was no reliance by TRC for the funding of the Greene County facility from any owner of Neil Realty Co. nor any member of the Hill family. (Vol. III, *Hyland*, pp. 837-838)

133. Ms. Beville understood that all of the funds for capital and operating needs would be coming from DaVita, the parent company, and would flow through Total Renal Care of North Carolina, Inc. to TRC. She did not understand that any of the funds needed for capital or operating needs for the project would come from a member of the Hill family. She saw nothing in the TRC Application that led her to believe that any entity besides TRC would be undertaking any activities to develop the project. (Vol. IV, *Beville*, pp. 1092-96).

134. TRC also accounted for the start-up and initial operating costs that would be incurred in beginning to operate the facility. (Vol. III, *Hyland*, pp. 832-833).

135. The CON Section found TRC to be conforming with Criterion 5 based on the documentation of costs and the sources of funding that were detailed in the TRC application. (Vol. III, *Hyland*, pp. 833-835).

136. Ms. Beville determined that TRC had appropriately budgeted all the capital costs that would be involved in developing the dialysis facility and had documented in its application how those developmental costs would be financed. Ms. Beville understood that the costs documented in Section VIII and in Exhibit 18 of the TRC Application constituted all the costs that TRC projected to incur to outfit either of its two selected sites. (Vol. I, *Beville*, 238-239)

137. Water treatment equipment is an essential feature of a dialysis facility because some of the elements that are found in municipal water can be lethal to dialysis patients. Petitioner's Exhibit 26 is an industry standard document that shows some of the complications for dialysis patients that can occur with various chemicals that are commonly present in untreated water. (Vol. II, *McCammon*, pp. 473-74; 500-01).

138. Ms. Beville understood that the installation of water treatment equipment in the BMA project was an activity that BMA would be assuming responsibility for carrying out but BMA did not identify a water treatment equipment cost specifically in the chart in Section VIII of its application even though there is a specific line item in the chart found on page 44 of the BMA Application for the insertion of water treatment equipment costs. (Vol. I *Beville*, 240-242)

139. Neither the Assistant Chief of the CON Section, nor the project analyst has ever seen an application for a new dialysis facility that failed to account for the water treatment equipment costs. The analyst recalls that the range of costs of water treatment equipment in other dialysis reviews that she has conducted ranged from \$40,000 to \$55,000. (Vol. II, *Smith*, p. 396) (Vol. I, *Beville*, pp. 252-53)

140. Although the cost of the water treatment equipment for the BMA project could have been included among the leasehold improvement costs identified in the chart in Section VIII of the BMA Application, based on the information in the BMA Application, the CON Section could not determine this to a certainty. (Vol. IV, *Smith*, pp. 1141-43, 1146).

141. All of the costs in the chart shown in Section VIII of the BMA Application are costs that would be incurred by BMA and none of these costs would be incurred by BMA's lessor. (Vol. V, *Robinson*, p. 1350).

J. Review Criterion 12

142. Applicants for a certificate of need must address N.C. Gen. Stat. §131E-183(a)(12) (hereinafter called "Criterion 12"). Criterion 12 provides that:

Applicants involving construction shall demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction project will not unduly increase the costs of providing health services by the person proposing the construction project or the costs and charges to the public of providing health services by other persons, and the applicable energy saving features have been incorporated into the construction plans.

143. Mr. Robinson, BMA's representative, agrees that if a landlord was undertaking activities that constitute the development of a dialysis facility without being a co-applicant, then the absence of the landlord as a co-applicant would result in a determination that the applicant was nonconforming under Review Criterion 12. (Vol. V, *Robinson*, pp. 1335-36).

144. BMA proposed a larger building but with a smaller treatment area than TRC's. Based on the standard "material compliance" condition that the CON Section attaches to its decisions, the agency would expect BMA to construct a facility of about 6,350 square feet as proposed. Likewise, if TRC were approved, the CON Section would expect it to construct a facility of about 5,000 square feet as it had proposed. (Vol. IV, *Beville*, p. 1060-63).

145. In Greene County, Mr. McCammon was instructed to find a site that would accommodate a building large enough for 10 to 16 dialysis stations. He was told to look for a site in Snow Hill, but not directed to look for sites in any particular part of the town of Snow Hill. (Vol. II, *McCammon*, pp. 474-75).

146. BMA's internal planning documents for the Greene County facility indicate that it planned to build a dialysis facility that was large enough to accommodate 15 stations, not just the 10 stations that it had applied for. (Vol. I, *Beville*, 244-245)

147. In one other instance involving a BMA project in Morganton, North Carolina, Mr. Smith found that the BMA project had been constructed with twice the plumbing and wiring capacity that had been approved in the certificate of need issued for the project. (Vol. IV, *Smith*, p. 1145).

148. If an applicant attempted to build enough space in a facility for ten additional stations over and above those approved in a certificate of need, the CON Section would not allow that to happen. (Vol. IV, *Smith*, pp. 1160-62).

K. 10 NCAC 3R.2213(b)

149. Applicants for a certificate of need for dialysis stations also must address certain regulatory criteria adopted by the Agency in 10 N.C. Admin. Code 3R.2213(b). These include agreements for acute care services, documentation of water supply and standing electric power source and backup; documentation of the availability of a site; and general documentation of staffing and fire safety requirements.

150. At the time of this review, applicants for a certificate of need for dialysis stations were required to address 10 N.C. Admin. Code 3R.2213(b)(1), which required an applicant to provide:

A signed written agreement with an acute care hospital specifies the relationship with the dialysis facility and describes the services that the hospital will provide to patients of the dialysis facility. The agreement must comply with 42 C.F.R. Section 405.2100.

151. Applicants for a certificate of need for dialysis stations at the time of this review also were required to address 10 N.C. Admin. Code 3R.2213(b)(3) which provided that the applicant should supply documentation showing that the water supply complies with 42 C.F.R. Section 405.2100.

152. If an application does not have an acute care agreement, that is something that can be conditioned in the Agency findings. (Vol. IV, *Beville*, pp. 1020-21).

153. Applicants for a certificate of need for dialysis stations at the time of this review also were required to address 10 N.C. Admin. Code 3R.2213(b)(4), which provided that the applicant should furnish "*Documentation of standing service from a power company and back-up capabilities.*"

154. In Exhibit 7 to its application, TRC provided specific documentation of standing power service at its primary site at 1025 Kingold Boulevard, as well as at its secondary site located at 201 Carolina Drive. (Vol. I, *Beville*, 231-232)

155. With regard to the documentation of the availability of power in the BMA Application, Ms. Beville found BMA conforming based on a letter from Mr. Robinson of BMA that was written to the power company. (Vol. IV, *Beville*, pp. 1044-45, 1068-70).

156. Ms. Beville agrees that the TRC documentation of the availability of standing service from a power company was more specific than the documentation that BMA provided in its application. (Vol. IV, *Beville*, pp. 1071-72).

157. Applicants for a certificate of need for dialysis stations at the time of this review also were required to address 10 N.C. Admin. Code 3R.2213(b)(5), which provided that the applicant should furnish information about the location of the site on which services would be operated and demonstrate that a primary and secondary site are available for acquisition.

158. The TRC Application in Exhibit 22 provided specific documentation of the availability of both the primary and secondary site on letterhead from the owner of each site. The TRC Application in Exhibit 23 provided specific documentation of the zoning of each site. (Vol. I, *Beville*, 234-235)

159. The CON Project Analyst agrees that sometimes the zoning characteristics of a site will not permit the development of the facility proposed and that results in a delay. Therefore, it is important for an applicant to show that its proposed facility will work within the existing zoning parameters. (Vol. I *Beville*, 235)

160. The CON Section's application form for dialysis facilities requests that applicants provide a letter from a realtor or the owner of the property that documents that a site is available for acquisition. Ms. Beville believed that BMA had represented that it gave site criteria to Carolantic Realty and that Carolantic had confirmed the availability of each of the sites listed in the Carolantic facts included as an exhibit in the BMA application. (Vol. IV, *Beville*, pp. 1064-68).

161. Ms. Beville reviewed the Carolantic information about the BMA sites and concluded that BMA had identified a primary and secondary site. (Vol. IV, *Beville*, pp. 1045-46).

162. Ms. Beville agrees that the documentation of the availability of water and sewer service in the TRC Application was more specific than the documentation provided in BMA's application. (Vol. IV, *Beville*, p. 1075).

163. Mr. Robinson believes that since other existing BMA facilities have acute care backup power arrangements in place and having such arrangements is a requirement for the operation of dialysis facilities under the Medicare Conditions of Participation, the CON Section would have no reason to believe that BMA as the operator of a dialysis facility would not be able to get such an agreement. (Vol. V, *Robinson*, pp. 1227-28).

164. The documentation of the existence of a supply of water at BMA's sites was a statement that the realtor was told to look for sites at which water was available and BMA's own internal policy concerning the adoption of water quality standards. (Vol. V, *Robinson*, pp. 1293-94).

165. Mr. Robinson agrees that the only documentation other than information from the realtor about the existence of a power supply at any of these sites is in Mr. Robinson's letter to Carolina Power & Light. (Vol. V, *Robinson*, pp. 1294-95).

166. The handwritten notes found on page 358 of the BMA Application are in Mr. Robinson's handwriting. (Vol. V, *Robinson*, p. 1363).

167. Mr. Hyland obtained letters from the owners of the primary and secondary sites, Hillco, and Fast Break Convenience Stores that establish that each site is available and that these owners would be willing to lease the properties to TRC for the development of a dialysis facility. (Vol. III, *Hyland*, p. 842).

168. Mr. Hyland also obtained letters that are found in Exhibit No. 23 in the TRC application from the land use planner for Greene County documenting the zoning and also confirming that neither site is in a flood plain or flood zone. (Vol. III, *Hyland*, pp. 842-843).

169. Mr. Hyland investigated the availability electric power and also a water supply to both the primary and secondary sites selected by TRC. In Exhibit No. 7, he included a letter from the Carolina Power and Light Company documenting the availability of standing power service at both locations and he also included an Exhibit No. 6 which is information from the Town of Snow Hill documenting the availability of a water supply to both sites. (Vol. III, *Hyland*, pp. 848-849).

L. Comparative Analysis

170. The analyst had no rule to guide her on how to conduct a comparative analysis on the issue of continuity of care. (Vol. I, *Beville*, 179).

171. When the analyst began her comparative review of the applications she concluded that continuity of care would be an important issue, principally because of statements made by one of the applicants, BMA, about its prior service to dialysis patients in Greene County. To conduct a comparative review, she searched for earlier decisions in dialysis cases in which continuity of care was used as a factor in the analysis and she located a set of findings from 1996 in which continuity of care was used. There had been several intervening competitive reviews of dialysis applications since 1996 in which continuity of care was not used as a factor in a comparative analysis of other competing applications. (Vol. I, *Beville*, 190-98).

172. The Agency found BMA's application comparatively superior to TRC's application on the basis of direct care staff salaries, patient charges and continuity of care. The Agency has no administrative rules to guide it in accomplishing a comparative analysis other than the policies set forth in the SMFP. The criteria set forth above are not criteria set forth in the SMFP. (Vol. II, *Smith*, pp. 383).

173. In the comparative analysis, all parties agree that the Agency can consider anything from the statutory or regulatory criteria if one applicant addressed the criteria more effectively than the other. (Vol. IV, *Beville*, p. 1016); (Vol. V, *Robinson*, pp. 1258-59; (Vol. V, *Robinson*, p. 1354).

174. The issue of staff salaries was important to the project analyst because she believed that higher staff salaries would have a tendency to reduce staff turnover and thereby enhance continuity of care. (Vol. I, *Beville*, 174; Vol. IV, *Beville*, 1028-29).

175. BMA obtained its salary figures from the BMA Area Administrator and so these salaries reflect the typical salaries paid to BMA employees. (Vol. V, *Robinson*, pp. 1303-05).

176. The project analyst made a mistake in computing the Direct Care staff salaries. TRC actually has higher staff salaries and would be comparatively superior to BMA in the staffing categories that the analyst used for comparison purposes. (Vol. I, *Beville*, pp. 174-76 Vol. II, *Smith*, pp. 384-95).

177. The Agency used the charges that BMA and TRC would make to private insurance companies as a basis of comparison, and on the basis of those charges found BMA's application superior because its projected charges to private insurers is lower than TRC's projected charges. The Agency has used this unpromulgated standard only once before, in 1997, but did not use it as a comparative criterion in competitive reviews in which BMA and TRC were involved the next year, 1998. (Vol. II, *Smith*, pp. 386-387). [TRC Exhibits 8,10,and 11].

178. Among the comparative factors listed in the Agency Findings, the question of charges was the most difficult for the analyst to assess. The Project Analyst indicated that there was "no clear winner" in this category because patient charges are frequently adjusted by healthcare providers. (Vol. I, *Beville*, pp. 172-73)

179. The analyst found BMA's Application superior to the others in terms of continuity of care because the Eastern Nephrology physician group was treating dialysis patients from Greene County at other BMA facilities and they were also conducting a clinic in Snow Hill. (Vol. I, *Beville*, p. 179).

180. Eastern Nephrology Associates is a group of nephrologists with offices in Greenville, Jacksonville, Kinston and New Bern. Nephrologists associated with Eastern Nephrology have privileges in TRC's facilities in Edgecombe (Tarboro), Martin (Williamston), and Onslow (Jacksonville) counties. (Vol. III, *Martin*, pp. 682-685; *see also* Vol. V, *Robinson*, p. 1356).

181. Nephrologists associated with Eastern Nephrology have never been denied privileges at a TRC facility Martin supervises. (Vol. III, *Martin*, pp. 685).

182. BMA conceded that nothing in the BMA Application or in the agency file indicates that the Eastern Nephrology Associates physicians opposed the concept of a TRC facility in Greene County; and that there was no indication in the BMA Application or in the agency file that the Eastern Nephrology physicians would not treat patients at a TRC facility if one were established in Snow Hill. (Vol. V, *Robinson*, p. 1357).

183. The Project Analyst knows of nothing to prevent any physician from continuing to provide clinic services or to supervise dialysis in a Snow Hill facility, regardless of whether BMA or TRC was approved to develop the facility. (Vol. I, *Beville*, 227).

184. Dr. Richard Merrill, the physician whom TRC had selected to be its medical director, had been conducting clinics in Greene County for several years, had been treating Greene County dialysis patients, and had advocated for the establishment of a Greene County dialysis facility. [The Application, Common Exhibit C, p. 28; Agency File, Common Exhibit A, pp. 119-130].

185. Ms. Beville knew that Dr. Merrill had been conducting a clinic in Greene County twice a month for five years. She agrees that it would be important for the sake of continuity of care for the patients to whom he was providing services to continue to have access to his services. (Vol. I, *Beville*, 226-27).

186. The letters that appear on pages 149-162 of the Agency File, Common Exhibit A, were letters of support for the TRC application that were submitted on behalf of dialysis patients. Dr. Merrill brought those letters with him to the public hearing. (Vol. III, *Hyland*, pp. 854).

187. Dr. Merrill had been trying for several years to establish a new dialysis facility in Greene County and after the July 2002 SDR was published, TRC and Dr. Merrill reached an understanding that TRC would submit an application and that Dr. Merrill would serve as the TRC facility's medical director. A letter of intent documenting this relationship with Dr. Merrill is included as Exhibit No. 14 in the TRC application at page 221. (Vol. III, *Hyland*, pp. 856-857).

188. Betty Martin is the regional director of DaVita's thirteen dialysis centers in southeastern North Carolina. Martin has served in that role since November 1, 2000. Among those centers are DaVita's facilities in Warsaw and Burgaw. Sampson, Duplin and Greene Counties are located within the region Martin supervises. If TRC receives a CON to develop a dialysis center in Greene County, it will be among the facilities Martin supervises. Martin is a licensed practical nurse and has been involved in hemodialysis since
(Vol. III, 1975.

Martin, pp. 671-644, 677,687).

189. During the time *Martin* has supervised TRC's facilities in southeastern North Carolina, no Eastern Nephrology doctor has lodged a complaint with her about their ability to practice at any of the TRC facilities she supervises. (Vol. III, *Martin*, pp. 685-686).

190. Hollie Russ has been the facility administrator of TRC's facility in Duplin County (Warsaw) since the facility opened in September 2003. (Vol. III, *Martin*, pp. 688).

191. Russ is a registered nurse. From 1998 to September 2003, she was the facility administrator of TRC's facility in Pender County (Burgaw). Prior to being the facility administrator, Russ served first as a nurse and then as the head nurse at the Burgaw facility from 1993 to 1998. (Vol. III, *Russ*, pp. 731-733).

192. TRC has in place procedures which facilitate the transfer of patients from one facility to another. These procedures were applied in September 2003 when fourteen or fifteen patients transferred from a BMA facility in Sampson County (Clinton) to TRC's new facility in Duplin County (Warsaw). In addition to the patients transferring from the BMA Sampson facility in September, during that same month five patients transferred to the new TRC Duplin facility from a facility in Wayne County (Mt. Olive) operated by Gambro, two patients transferred from Gambro's Wayne County facility in Goldsboro and three patients transferred from TRC's Wayne County facility in Goldsboro. (Vol. III, *Martin*, pp.689; *Russ*, pp.736 -737).

193. All of the TRC facilities *Martin* supervises in southeastern North Carolina use machines manufactured by BMA's parent company Fresenius. (Vol. III, *Martin*, p. 723).

194. The project analyst does not know of any unique features of the provision of dialysis that are identified in the BMA Application, and does not know otherwise of any specific differences in the physical environments of the BMA and TRC dialysis facilities. (Vol. I, *Beville*, pp. 198-200; pp. 1105-07).

195. When patients transfer from a center where they have been dialyzing to a new center, they have to get used to a new environment. Patients get used to the chair they dialyze in and where that chair is physically located in the center. Patients have to get used to a new team of folks taking care of them. However, this adjustment would be the same for any patients transferring their care to a new facility in Greene County regardless of whether BMA or TRC operated it (Vol. III, *Martin*, pp. 726), though the forms used and general arrangement of things might be more similar if a patient was staying with the same dialysis company when moving from one location to another. (Vol. IV, *Beville*, p. 1035).

196. The TRC application also includes a number of exhibits that document contacts by Mr. Hyland or others with the organizations that would provide various supporting services to the TRC facility and he included this documentation to show that TRC had made contact and that these service providers were ready to provide supporting services for a TRC facility. (Vol. III, *Hyland*, pp. 840-841).

197. "Disruption in service" as that phrase is used by the Agency in the comparative analysis is not defined by statute or rule. The only witnesses who testified in the hearing of this contested case who have experience in working at a dialysis facility testified that they consider "disruption in service" to occur when a dialysis patient transfers from one facility to another and is required to dialyze on a different day or shift because dialysis patients base their lives around when and what day they go to dialysis. (Vol. III, *Russ*, pp. 761-762) There was no disruption in service when patients recently transferred from a dialysis facility owned by BMA in Clinton to a new facility owned by TRC in Warsaw. All of the evidence in this case is to the effect that Duplin County patients who transferred were able to dialyze on the same day and on the same shift that they had been dialyzing on in Sampson County, were able to be attended by the same doctor they had been followed by in Sampson County, dialyze on equipment manufactured by the same company that manufactured the equipment they had dialyzed on in Sampson County and that their medical records were transferred to the new facility before the first day they dialyzed at the new facility. There is no evidence in this case that there will be a disruption in service if TRC receives the CON to develop the new dialysis facility in Greene County. To the contrary, all of the evidence is that BMA and TRC have a working relationship that will prevent disruption in service, and that patients will be able to be followed by the doctor they are currently being followed by. (Vol. III, *Russ*, pp. 743-76).

VI. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the undersigned further enters the following Conclusions of Law.

1. To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such findings of fact shall be deemed incorporated herein by reference as Conclusions of Law.

2. Petitioner is an affected person entitled to this contested case hearing by authority of G. S. § 131E-188(a) and (c).
3. Petitioner is a person aggrieved by the Agency decision to approve the BMA Application with conditions by authority of G. S. § 150B-2(6).
4. By its admission, the Agency erred in its determination that the TRC Application did not conform with Review Criterion 4, based upon a misinterpretation of ownership information about TRC.
5. Hillco, Ltd. is a corporation as is Neil Realty Co. Each of these two corporations and the Petitioner, TRC, is a distinct legal person as defined in N.C. Gen. Stat. § 131E-176(19).
6. No evidence was presented at the hearing to indicate that any person other than TRC itself would be involved in any action that would constitute the offering of the service proposed under N. C. Gen. Stat. 131E-176 (18).
7. TRC is the only “person,” as that term is defined in N. C. Gen. Stat. 131E-176 (18) which is proposed or projected to “offer” the service proposed in the TRC Application.
8. TRC is the only “person,” as that term is defined in N. C. Gen. Stat. 131E-176 (19) which will require a certificate of need to “offer” the service proposed in the TRC Application.
9. No evidence was presented at the hearing that would indicate that any party, other than TRC itself, was projected or proposed to carry out any of the activities or incur any of the capital expenditures, that would be associated with developing and establishing the service proposed in TRC’s Application.
10. TRC is the only “person” as that term is defined in N. C. Gen. Stat. 131E-176 (19) which is proposed or projected to “develop” the service proposed in the TRC Application.
11. TRC is the only “person,” as that term is defined in N. C. Gen. Stat. 131E-176 (19) which will require a certificate of need to “develop” the service proposed in the TRC Application.
12. A certificate of need issued to TRC for the activities described in its application will authorize only TRC to carry on all the activities described in the TRC Application.
13. A certificate of need issued to TRC for the activities described in its application will convey full authority to TRC to develop, establish, and operate the service proposed in the Application; and it will not be necessary for any other person to receive a certificate of need to establish, develop and operate the service proposed in the TRC Application.
14. It is clear from the record that there is no evidence that TRC’s proposed lessor of its primary site, Hillco, Ltd. will be involved in any fashion in offering the service proposed by TRC.
15. Likewise, there is no evidence in the record that TRC’s proposed lessor of its primary site, Hillco, Ltd. will be undertaking any activities that would lead to the offering of the service.
16. It also is clear from the record that TRC documented in its application that no funding for the expenses of developing its proposed project would come from Hillco, Ltd. or any member of the Hill family. TRC documented its sources of funding from the parent company DaVita and the CON Section determined that this evidence of funding was sufficient to document the availability and commitment of all funding needed for the Operating Needs of the project when the Agency reviewed the TRC Application under Review Criterion 5.
17. It is clear from this record that Hillco, Ltd. will not be offering or developing any part of the new institutional health service proposed by TRC in this application and accordingly, Hillco as a distinct corporate person, does not need to obtain a certificate of need. N.C. Gen. Stat. § 131E-178(a).
18. The evidence supports the Agency’s determination that the TRC Application did conform with Review Criterion 3 as well as the rule codified at 10 NCAC 3R.2217(a) and (c); because TRC did adequately identify a population that it projected to serve, based upon reasonable assumptions flowing from the Health Planning Data available and the location of dialysis patients within Greene County, because TRC did adequately state the assumptions that underlay its projections, and because TRC did project a sufficient patient need to conform with Rule 10 NCAC 3R .2217(a).

19. The evidence supports the Agency's determination that the TRC Application did conform with Review Criterion 1 and with all pertinent Health Planning Policies adopted as part of the State Medical Facilities Plan planning process.

20. The evidence shows that BMA was counting on its lessor to install a number of dialysis specific specifications and to undertake activities that would be necessary for BMA to provide dialysis in Greene County. Moreover, the record also is clear that BMA was counting on its lessor to incur the related expenses for these activities. Therefore, BMA's lessor would be engaged in the development of the new institutional health service that BMA proposed and must be required to be a co-applicant.

21. Absence of a co-applicant is not a defect in a CON Application that can be addressed by a condition. Therefore, it is impossible for the Agency to conditionally approve the BMA Application.

22. Since the BMA Application does not provide information about the costs to be incurred by the prospective landlord for the dialysis specific features, and also fails to document the sources of funding for these expenditures by the landlord, the BMA Application does not conform with Review Criterion 5.

23. For the same reasons, the BMA Application does not conform with Review Criterion 12.

24. The Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, and acted arbitrarily or capriciously, in determining that the TRC Application did not conform with Review Criterion 4. N.C. Gen. Stat. § 131E-183(a)(4).

25. The Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, and acted arbitrarily or capriciously, in determining that the BMA Application conformed with Review Criteria 4, 5, and 12. N.C. Gen. Stat. § 131E-183(a)(4), (5), and (12).

26. The Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, and failed to act as required by law or rule in determining that the BMA Application conformed with the CON Section's special review criteria for dialysis facilities codified at 10 NCAC 3R .2213(b).

27. The Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, and acted arbitrarily or capriciously, in the following respects relating to its comparative review of the BMA and TRC Applications:

- The criteria and issues used by the Agency for the comparative analysis,
- The procedure used by the Agency for conducting its comparative review of the BMA and TRC Applications,
- The Agency's determinations concerning the purported superiority of the BMA Application with respect to staffing salaries and continuity of care, and
- The Agency's failure to determine that the TRC Application was comparatively superior to the BMA Application.

28. The Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, and acted arbitrarily or capriciously, in determining that the BMA Application should be approved with the conditions stated in the Agency findings, and that the TRC Application should be denied.

29. The Certificate of Need Section correctly concluded that TRC's Application conformed with all statutory and regulatory review criteria to which it found TRC conforming and did not violate the review standards in N.C. Gen. Stat. § 150B-23(a) by not citing to the non-conformities alleged in paragraph 4 of BMA's Issues for Hearing.

30. The TRC Application conformed to all statutory and regulatory review criteria. The BMA Application failed to conform to criteria set forth at N.C. Gen. Stat. § 131E-184(a), (4), (5) and (12) as well as the special review criterion for dialysis facilities codified at 10 NCAC .2213(b).

31. The Certificate of Need Section substantially prejudiced TRC's rights and acted erroneously, exceeded its authority or jurisdiction, failed to use proper procedure, failed to act as required by law or rule, and acted arbitrarily or capriciously, in determining the BMA Application was comparatively superior.

32. TRC should be awarded the Certificate of Need at issue in this contested case hearing.

RECOMMENDED DECISION

It is hereby recommended that the Director of the Division of Facility Services, Department of Human Resources, reverse the decision of the Agency to disapprove the TRC Application and approve the BMA Application. It is further recommended that the Director approve the TRC Application, with a condition requiring it to submit a signed acute care agreement; and disapprove BMA's Application for a certificate of need.

ORDER

It is hereby ordered that the agency serve a copy of the Final Decision on the Office of Administrative Hearings, P.O. Drawer 27447, Raleigh, NC 27611-7447, in accordance with North Carolina General Statute § 150B-36(b).

NOTICE

The Agency that will make the Final Decision in this contested case is the North Carolina Department of Human Resources.

The Agency making the Final Decision in this contested case is required to give each party an opportunity to file exceptions to this Recommended Decision and to present written arguments to those in the Agency who will make the final decision. G.S. 150B-36(a).

The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of its Final Decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

This the 23rd day of December, 2003.

James L. Conner, II
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 DHR 0951/0952

ROSE McCALLUM, Individually and as Owner and
 Representative of NC PRESCHOOL ACADEMY,
 and
 TINA OCTETREE, Individually and as Director and
 Representative of NC PRESCHOOL ACADEMY,
 Petitioners,
 vs.
 N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES
 DIVISION OF PUBLIC HEALTH,
 Respondent.

DECISION

THIS MATTER came on for hearing on October 28-29, 2003 before Administrative Law Judge Augustus B. Elkins II in Raleigh, North Carolina.

APPEARANCES

For Petitioners: John A. Obiol
 HUGGARD, OBIOL & BLAKE, PLLC
 124 St. Mary's Street
 Raleigh, North Carolina 27605

For Respondent: Elizabeth Oxley
 Assistant Attorney General
 NC DEPARTMENT OF JUSTICE
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STATUTES AND RULES

North Carolina Statute §150B, *et seq.*
 7 Code of Federal Regulations §226, *et seq.*
 Richard B. Russell National School Lunch Act (42 U.S.C. 1766 *et seq.*)

EXHIBITS

Petitioner's Exhibits: 1-11
 Stipulation: 1
 Respondent's Exhibits: 1-8, 10-36, 38-39
 Deposition of Ms. Arnette Cowan taken September 5, 2003.

ISSUES

- 1) Is it improper to terminate Petitioner NC Preschool Academy's agreement to participate in the Child and Adult Care Food Program (CACFP)?
- 2) Is it improper to disqualify Petitioner NC Preschool Academy from future Child and Adult Care Food Program (CACFP) participation effective June 16, 2003?
- 3) Is it improper to disqualify Petitioners, Rose McCallum and Tina Octetree from future Child and Adult Care Food Program (CACFP) participation, effective June 16, 2003?

4) Did the Respondent unlawfully deny payment to Petitioners for participation in the (CACFP) Program during November and December 2002?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From official documents in the file, sworn testimony of the witnesses, and other competent and admissible evidence, it is found as follows:

FINDINGS OF FACT

1) N.C. Preschool Academy is an independent nonresidential day care institution that provides day care to infants and toddlers. Petitioner, Rose McCallum is the owner of N.C. Preschool Academy. Petitioner Tina Octetree is the director of the Petitioner N.C. Preschool Academy.

2) The Child and Adult Care Food Program (“CACFP”) is a federal program that is funded by the U.S. Department of Agriculture (USDA), and administered in North Carolina by the Respondent North Carolina Department of Health and Human Services (“NCDHHS”), Division of Public Health, Women’s and Children’s Health Section. The CACFP provides subsidies to eligible institutions in the form of monetary reimbursement for meals served to participants. As an “institution,” NC Preschool Academy agreed to assume appropriate administrative and financial responsibility for program operations at its facility as set forth by various regulations. 7 C.F.R. §226.15(c). (Respondent’s Ex. 2.)

3) Petitioner N.C. Preschool Academy is a State licensed facility that has been operating in East Raleigh for more than seven years. The daycare is licensed to serve 51 children on two shifts. (T p. 371). The enrollment of the N.C. Preschool Academy is almost exclusively low income and minority children. (T p. 372). Under the State of North Carolina certification process, N.C. Preschool Academy has a four star rating out of a possible five stars from the state daycare accreditation system. (T p. 371).

4) The N.C. Preschool Academy was recommended to the Child Nutrition Program by a consultant from the Wake County Smart Start Program with whom the daycare was also involved. (T pp. 372-373). After initially attending training and following the application process, the N.C. Preschool Academy qualified for participation in the (CACFP) Program beginning in October 2001. (T p. 373). The Petitioners successfully complied with all the requirements during their first year of participation in the program. (T p. 374).

5) The CACFP is governed by 7 C.F.R. §226, et. seq., which was amended effective June 27, 2002. 67 Fed. Reg. 43448 (2002), codified at 7 C.F.R. §226 et. seq.

6) 7 C.F.R. §226.6(m)(4) requires state agencies annually to review 33.3 per cent of all institutions. Further, 7 C.F.R. §226.6(m)(1)(i) requires that state agencies review independent centers and sponsoring organizations of fewer than one hundred facilities at least once every three years.

7) Petitioners attended an initial training session for CACFP participation on October 25, 2001, in Raleigh, NC, and, in 2002, received notice of other opportunities to receive training. They did not attend training sessions provided on the list in 2002. (Respondent’s Exhibits 5, 6, 7, T. pp. 108, 109, 110). The Petitioners did attend training for a workshop to process claim reimbursements online, which they sometimes utilized. (T p. 374). The Petitioners also attended training for the annual renewal for participation in the Program in 2002 (T p. 375) and potential Sponsor Training (T p.108).

8) Upon entry into the Program, Petitioners were provided with a Child and Nutrition Care Consultant, Miranda Nixon, with whom they developed a very good relationship. (T p. 373). From August, 2002 to March, 2003, there was a vacancy in the NCDHHS regional consultant position assigned to Petitioners. (Respondent’s Exhibit 12) Petitioners did have access to NCDHHS consultants by telephone or by written communication for the purpose of asking questions about compliance with CACFP. Petitioners did not contact consultant Cassandra Harris, who started in the position in March, 2003 for technical assistance purposes. (T. p. 105)

9) The Petitioners completed and submitted the renewal forms for continued participation in the Program on September 13, 2002, prior to the October deadline for the submission. (T pp. 375-377, Petitioner’s Exhibit 1, Respondent’s Exhibit 2).

10) Initially, Petitioners did not receive a response to the application submitted and so they followed up by telephone with Respondent Agency. (T pp. 375-377). When Petitioners did not initially receive any response to their application, Petitioners

spoke several times regarding the application with an individual at the Child Nutrition Program and was told by Respondent Agency that they were still working on the application. (T p.377).

11) After three or four calls the Petitioner Tina Octetree called in mid-December 2002 and was told by Respondent Agency that they did not have the application and Petitioners would need to resubmit the application. (T p. 378). The Petitioner resubmitted the original application still dated September 13, 2002 in mid-December. (T p. 378).

12) Petitioners timely submitted claims for reimbursement for November and December 2002. They were never paid for their participation during this time period. (T p. 379, Petitioner's Exhibit 1 pp. 12-15).

13) When Petitioners inquired about the status of their payment for reimbursement during these months they were told at that time that they had not been approved for renewal and would not be receiving payment for the months of November and December 2002. (T p. 380).

14) The Petitioners were approved for renewal in February of 2003 and had submitted the application and reimbursement requests in a timely manner. (T p. 380, Petitioner's Exhibit 1, p.16).

15) The Petitioner never received notification in writing of any kind regarding disapproval for these two months. (T p. 381). The Petitioners have never received payment for the months of November and December 2002. (T p. 379). Arnette Cowan, Unit Supervisor of the Special Nutrition Unit, testified that it would not be proper procedure under the statute to not receive written notice from the controller's office if they were denied reimbursement. (T pp. 297-299).

16) On March 6, 2003, Petitioners were sent a letter from Arnette Cowan indicating that there would be a review for their participating institution and they should prepare by collecting records and information for the institution for the period July 2002 through the present. (Petitioner's Exhibit 2, Respondent's Exhibit 13). Usually the administrative reviews are conducted by the regional consultant but in this case, the review was conducted by Arnette Cowan. (T p. 281). However as stated above, for the time period from August 12, 2002 until March 24, 2003, preceding the review, the Child Nutrition Consultant position for the Petitioners, formerly Miranda Nixon, had been vacant. (T pp. 116-117, T pp. 279-280, Respondent's Exhibit 12).

17) On March 26 and 27, 2003, Arnette Cowan, conducted an announced review of the Petitioners' administration of the CACFP. The purpose of the review was to determine the center's compliance with program regulations and to provide technical assistance to Petitioners. At the time of the review, the following program violations were noted:

- Misclassification of the income eligibility applications
- Claiming more children than were in attendance, and claiming meals on days when the center was not open
- Failure to maintain adequate records
- Serving meals that did not meet the meal pattern requirements
- Failure to offer the benefits of CACFP to enrolled infants.

18) During the review, Ms. Cowan provided technical assistance regarding the areas of serious deficiency. (Respondent's 14, 15). and Petitioners began to immediately correct many of the problems. (T p. 383).

19) On March 31, 2003, NCDHHS sent Petitioners a Notice of Serious Deficiency. The Notice stated the areas of noncompliance and corrective actions that had to be implemented to bring the NC Preschool Academy into compliance with CACFP regulations. The Notice of Serious Deficiencies noted a number of deficiencies and set forth recommendations and requirements for correction and set forth certain time limits for their completion. (Petitioners' Exhibit 3, Respondent's Exhibit 29). Petitioners received the Notice of Serious Deficiency on April 4, 2003. (Respondent's Exhibit 29).

20) On April 2, 2003 at the request of Petitioner Tina Octetree, Arnette Cowan returned to the facility for the purpose of reverifying the Income eligibility applications. (T p. 220). Petitioners received technical training regarding classification of income eligibility applications and recordkeeping including maintenance of receipts from Arnette Cowan during her visit to Petitioners on April 2. (Respondent's Exhibits 14, 15, 30, T. p. 149, 150) This visit revealed that NC Preschool Academy had not corrected all program violations. (Respondent's Exhibit 30).

21) Specifically, Ms. Cowan found the following misclassifications: a. For the three income eligibility applications designated as Respondent's Exhibits 30(a),(b) and (c), Cowan re-classified the three applications from free to reduced on the basis that the income was too high to qualify for free meals; b. For the income eligibility application designated as Respondent's Exhibit 30(d), Cowan re-classified the application from free to reduced on the basis that the income reported was too high to qualify for free status; c. For the income eligibility application designated as Respondent's Exhibit 30(e), Cowan re-classified the application from free to reduced on the basis that the income reported was too high to qualify for free status.

22) Further at the April 2, 2003 visit, Ms. Cowan found that there were three children whose names were listed on the attendance report but for whom there were no income eligibility applications and, therefore, the children's names should have been listed on the worksheet for affidavit of enrollment as having "denied" status. (Respondent's Exhibit 30) Petitioners should have classified eight participants as having denied status rather than five participants.

23) On April 7, 2003, within the time frames recommended by Respondent, Petitioners responded to Ms. Cowan concerning their deficiencies and setting forth Petitioners' plans for future compliance. (Petitioners' Exhibit 4, Respondent's Exhibit 31, pp. 2-3). At the same time, April 7, 2003, Petitioners sent a letter disputing and appealing Ms. Cowan's determination that twenty-five (25) of the CACFP Applications were denied. (Respondent's Exhibit 31, p. 1).

24) On May 7, 2003, Ms Cowan returned to the Petitioner's facility and indicated that Petitioners were still deficient. (T p. 234, Respondent's Exhibit 32). She found that NC Preschool Academy's violations consisted of a failure to maintain adequate records and failure to develop a plan to accurately classify income eligibility applications. Ms. Cowan concluded, using the milk reconciliation sheet, that Petitioners' were 59 per cent short of milk that they were required to have served for the month of April, 2003, and recorded as having served on their meal production records. (Respondent's Exhibits 32, 33, 34, 36, T. pp. 234-236, 244-246).

25) On May 12, 2003, Petitioners were sent a Notice of Proposed Termination and Proposed Disqualification. (Petitioners' Exhibit 6, Respondent's Exhibit 38).

26) The Notice of May 12, 2003, in part, proposed the following to the Petitioners:

- 1) To terminate NC Preschool Academy's agreement to participate in the CACFP effective June 16, 2003;
- 2) To disqualify NC Preschool Academy from future CACFP participation effective June 16, 2003; and
- 3) To disqualify Rose McCallum and Tina Octetree from future CACFP participation, effective June 16, 2003.

(Petitioners' Exhibit 6, Respondent's Exhibit 38).

27) The serious deficiencies remaining after corrective action was taken outlined in the Respondent's letter of May 12, 2003, Answers to Interrogatories and testimony of Arnette Cowan was that:

"N.C. Preschool Academy, Rose McCallum and Tina Octetree did not maintain receipts to document the amount of milk documented as served at meals claimed for reimbursement. Also, the plan for ensuring that income eligibility applications would be classified accurately was not specific."

(Petitioners' Exhibit 11, T pp. 288-289).

28) Petitioners testified that they did not want to be disqualified from the CACFP Program for a seven year period and still desired to make any necessary corrections as they had attempted and believed they had previously complied. (T pp. 384-385).

29) The Petitioners and their employee cook, Ray McIntyre had enrolled in a Food Buying Seminar and all other training recommended by the Respondent Agency in their initial notice dated March 31, 2003. (T p. 385, Petitioners' Exhibit 5).

30) The Petitioners were determined seriously deficient as of May 7, 2003 prior to the training being recommended and offered by the Respondent Agency set for May 8 and July 17, 2003. (Petitioners' Exhibit 5, Respondent's Exhibit 32).

31) The Petitioners also began keeping their milk receipts as required by the initial Notice dated March 31, 2003. (T pp. 385-386).

32) As of the May 7, 2003, return visit by Mr. Cowan, Petitioners could not understand why they were not in compliance with the milk requirement. (T p. 390). On May 8, 2003, the Petitioners and the Petitioners' employee cook attended the Food Buying Seminar and discovered why there were inadequate receipts to support the amount of milk claimed for reimbursement.

33) The Petitioners learned that they were making several errors regarding the amount of milk served, including the following:

- 1) They were using the incorrect size cup and were not measuring the proper amount of milk served (T.P. 392-394); and

- 2) They learned that the amount listed as being served by the cook was not accurate because the cook was listing the amount of milk served to each classroom at each meal, but the amount of milk being returned was not being accounted for on the daily meal production records (T.P. 394-397); and
- 3) They learned that under the Respondent Agency's Rules, they must serve the full serving of milk even to those children who refuse the milk or desire a different beverage (T.P. 397-400). They learned the agency desired that the milk nonetheless be served to children known not to drink milk and be thrown away.

34) Petitioners maintained receipts and all underlying records for the amount of milk served and were not attempting to mislead anyone. (T pp. 402-403). It was those records that were actually used to conduct the audit. (T p.403).

35) Petitioners are now serving the correct amount of milk. (T p.394). The Petitioners were denied payment and paid back over \$6,400 for not serving the correct amount of milk for the months of January and February 2003. (T pp. 404-405, Petitioners' Exhibit 7, p. 9). Petitioners conceded that they were not asking for any re-payments from NCDHHS for funds already withheld from Petitioners claims due to Petitioners' prior incorrect claims for reimbursement. (T. pp. 217-218).

36) Respondent also found Petitioner seriously deficient in that the Child Food Program Eligibility Application Review Plan was not specific. (T p.271, Deposition of Arnette Cowan, p.49).

37) A sufficient summary plan to meet the corrective action as outlined in both testimony and in Respondent's answers to interrogatories included the following:

The plan for income eligibility applications should have indicated what information would be reviewed: Names of all household members, income received by each household member, identified by source of income; signature of an adult household member; and the social security number of the adult household member who signs the application or an indication that he/she does not possess a social security number.

For a child who is a member of a food stamp household or FDIPR household or AFSC assistance unit: Names and appropriate food stamp, FDIPR or AFDC case number(s) for the child(ren); and the signature of an adult member of the household.

(Petitioners' Exhibit 11, T p.325-328).

38) Petitioners had formulated and submitted a summary plan for eligibility applications within the time allowed. (Petitioners' Exhibit 4, T pp. 261-263).

39) Respondents wanted Petitioners to have the plan address each item on the form rather than state that Petitioners make certain that the parent had listed all the information and have a second person review the form. (Deposition of Arnette Cowan, pp. 47-49, T pp.325-328).

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following

CONCLUSIONS OF LAW

1) The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this case. The Respondent has the burden of proof by a greater weight of the evidence. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

2) 7 Code of Federal Regulations §226.1, general purpose and scope sets forth the following: This part announces the regulations under which the Secretary of Agriculture will carry out the Child and Adult Care Food Program. Section 17 of the National School Lunch Act, as amended, authorizes assistance to States through grants -in-aid and other means to initiate, maintain, and expand nonprofit food service programs for children or adult participants in nonresidential institutions which provide care. The Program is intended to enable such institutions to integrate a nutritious food service with organized care services for enrolled participants. Payments will be made to State agencies or FNS Regional Offices to enable them to reimburse institutions for food service to enrolled participants.

3) Section 17 of the Richard B. Russell National School Lunch Act 42 U.S.C. 1766(d) 5(B) sets forth the following:

- 1) **17-31 TERMINATION OR SUSPENSION OF PARTICIPATING ORGANIZATIONS. —**
(A) IN GENERAL — The Secretary shall establish procedures for the termination of participation by institutions and family or group day care homes under the program.
(B) STANDARDS. — Procedures established pursuant to subparagraph (A) shall include standards for terminating the participation of an institution or family or group day care home that —
(i) engages in unlawful practices, falsifies information provided to the State agency, or conceals a criminal background; or
(ii) substantially fails to fulfill the terms of its agreement with the State agency. (Emphasis Added).

4) N.C. Preschool Academy is a participating institution as set out in 7 C.F.R. 226 *et seq.* and as noticed in Respondent's letter of March 6, 2003. (Petitioners' Exhibit 2, Respondent's Exhibit 13).

5) The first of two remaining deficiencies after corrective action was taken cited by Respondent Agency for its proposed actions against the Petitioners' is under 7 C.F.R. §216.6(c)(3)(ii)F, Failure to Maintain adequate records.

The required corrective action was "Within 24 hours of receipt of this notice, begin maintaining copies of invoices and receipts to document all allowable operational cost, including milk purchases, claimed by N.C. Preschool Academy, as required by 7 C.F.R. §226.10(c) and §226.15(e)(7)(i). This corrective action must be implemented fully and maintained permanently. An unannounced visit will be made to ensure that NC Preschool Academy has corrected this program violation."

(Petitioners' Exhibit 3, Respondent's Exhibit 29)

6) Petitioners maintained the records and receipts for the milk purchased as required under the corrective action. Petitioners did not have sufficient receipts to substantiate the amount of milk claimed for reimbursement because of errors made by the Petitioners in the serving of the milk.

7) The second of the two remaining deficiencies after corrective action was taken cited by the Respondent agency for its proposed action against the Petitioners is under 7 C.F.R. §226.6(c)(3)(ii)(Q). Failure to perform any of the other financial and administrative responsibilities required by 7 C.F.R. §226.

The required corrective action was "Within seven days of receipt of this letter, develop procedures for ensuring the income eligibility applications are classified accurately. These procedures should include the person responsible for classifying the income eligibility applications, the person responsible for conducting a second party review of the income eligibility applications, and information that will be reviewed and an assurance that the income eligibility applications will be classified accurately. This corrective action must be implemented fully and maintained permanently."

8) Within the time allowed, Petitioners submitted a plan which Petitioners felt conformed to the corrective action. Respondent Agency felt the submitted plan was not specific enough to conform to its corrective action. The more specific plan simply required that the Petitioner address each item on the Income Eligibility Application.

9) Arnette Cowan testified that she had discretion for formulating reasonable time frames for corrective action (T pp.257-258).

10) 226 C.F.R.(C)(4) provides that the State Agency may in general allow up to 90 days for corrective action. (See also T. pp.255-256).

11) The Respondent Agency is required under 7 C.F.R. 226.6(a) to "provide sufficient consultative, technical and managerial personnel to administer the Program, provide sufficient training and technical assistance to institutions and monitor performance to facilitate expansion and effective operation of the Program.

12) Program expansion is a goal of the CACFP. (T p.309, 7 C.F.R. 226.6(g)).

13) For the period of August 12, 2002 until March 24, 2003, prior to their review the Petitioners, their geographic Child Nutrition Consultant position was vacant. That position is required to provide the technical assistance to the institution to perform more efficiently in the Program. The prior consultant, Miranda Nixon, had a good relationship with the Petitioners and in compliance with the statute, had made special efforts to have Petitioners institution approved by the CACFP. (T pp.309-310).

14) The formulation of a more specific plan by the Petitioners would not have required any legally significant extension of time by the Respondent Agency (See, for example, T pp.326-328) and specific time frames have not been reduced to writing (T p.355).

15) The Respondent has failed in its burden of proof and the Undersigned finds that there is insufficient evidence to support the Respondent Agency's Proposed Termination of Petitioners' involvement in the CACFP in that there is insufficient evidence of serious deficiencies so as to meet the standard under the Russell National School Lunch Act that the participating institutions **substantially** failed to fulfill the terms of its agreement with the State Agency. (Emphasis added).

16) The Russell National School Lunch Act under state disbursement to Institutions (F) 1(A) requires in relevant part that:

... "All valid claims from such institutions shall be paid within forty-five days of receipt by the State. The State shall notify the institution within fifteen days of receipt of a claim if the claim as submitted is not valid because it is incomplete or incorrect."

17) In this present case the Undersigned finds that the Respondent has not met the legal requirements encompassed by their having the burden of proof. There is insufficient evidence to show why Petitioners' claims for reimbursement during November and December 2002 were not paid as required by statute.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

The Respondent has failed to carry its burden of proof by a greater weight of the evidence that its proposal that Petitioners be terminated from participation in the CACFP and placed on the USDA national disqualification list is warranted in this case. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side. Respondent's evidence does not overbear in some degree the weight of the Petitioner and the conclusion cited above.

On the basis of the weight of the evidence, the Undersigned concludes that The Respondent Agency's proposed terminations of Petitioners involvement in the CACFP as outlined in the Notice of May 12, 2003 is unwarranted both in law and in equity. The Undersigned finds that it is appropriate that Petitioners be allowed to continue to participate in the program and renew as governed by 7 C.F.R. 226.6 *et seq.* Further, the Undersigned finds that it is appropriate that Respondent Agency provide reimbursement to the Petitioners as required under the Russell National School Lunch Act and 7 C.F.R. 226.6 *et seq.* for the months of November and December 2002.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions and to present written arguments regarding this Decision issued by the Undersigned in accordance with N. C. Gen. Stat. § 150B-36.

In accordance with N.C. Gen. Stat. § 150B-36 the agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

The agency shall adopt the decision of the Administrative Law Judge unless the agency demonstrates that the decision of the Administrative Law Judge is clearly contrary to the preponderance of the admissible evidence in the official record. The agency that will make the final decision in this case is the North Carolina Department of Health and Human Services.

This the 30th day of January, 2004.

Augustus B. Elkins II
Administrative Law Judge

**STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG**

**IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 DST 0933**

J W WALTON)	
Petitioner,)	
)	
v.)	DECISION
)	
DEPARTMENT OF STATE TREASURER,)	
RETIREMENT SYSTEMS DIVISION,)	
Respondent.)	

This contested case was heard before Beecher R. Gray, administrative law judge, on November 03, 2003 in Charlotte, North Carolina. On December 11, 2003, the undersigned entered an order requiring the parties to confer and, to the extent possible, submit a written stipulation regarding a fact question. Both parties filed timely proposed decisions, written arguments, or briefs. Following a telephone conference call on January 15, 2004, the parties filed a stipulation of facts on January 28, 2004, set forth below in the findings of stipulated facts.

APPEARANCES

For Petitioner:	Humphrey S. Cummings, Attorney at Law
For Respondent:	Robert M. Curran, Assistant Attorney General.

ISSUES

Whether the payment of \$60,000 from Petitioner's employer to the Petitioner, pursuant to an "Agreement to Terminate Employment and Release All Claims," is "compensation" for purposes of calculating the Petitioner's retirement benefits under the Local Governmental Employees' Retirement System.

STATUTES AND RULES IN ISSUE

N.C. Gen. Stat. § 128-21(5) and 128-21(7a).

WITNESSES

For Petitioner:	Petitioner Stanley Watkins
For Respondent:	J. Marshall Barnes, III Pamela A. Syfert

Based upon careful consideration of the testimony and evidence presented at the hearing, and the arguments and stipulations of the parties, the undersigned makes the following:

FINDINGS OF FACT

Stipulated Facts

1. The parties received notice of hearing by certified mail more than fifteen (15) days prior to the hearing and each stipulated on the record that notice was proper.

2. By letter dated April 28, 2003, Mr. Marshall Barnes, Deputy State Treasurer, on behalf of Respondent, issued an advisory opinion to Petitioner's employer, the City of Charlotte, wherein he concluded that the \$60,000 payment to Petitioner "is not compensation for retirement purposes".

3. Therefore, no retirement contribution was withheld from the \$60,000 sum in issue in this case.

4. The City of Charlotte, as Petitioner's employer, made no matching retirement contribution to the N. C. Local Government Retirement Fund.

5. Nonetheless, regular and customary payroll deductions consisting of Medicare contribution, FICA contribution, and federal and state income tax withholdings were deducted from the \$60,000 payment made to Petitioner by the City of Charlotte.

Adjudicated Facts

6. Petitioner began employment with the City of Charlotte on October 24, 1977 as a part time employee. He became a full time employee in May, 1979. Petitioner was a member of the North Carolina Local Governmental Employees' Retirement System until his retirement with 29.1244 years of service, effective May 1, 2003. Petitioner had a good work record with good performance appraisals during his tenure with the City of Charlotte.

7. Prior to his retirement, sometime in 2002, Petitioner was informed that his position was going to be eliminated, and that he would be laid off prior to October 1, 2002. Following discussions between Petitioner and City officials, on or about July 26, 2002, the two parties entered into an agreement entitled "Agreement to Terminate Employment and Release All Claims." This Agreement was admitted into evidence as Petitioner's Exhibit number two (2) and provides as follows:

**AGREEMENT TO TERMINATE EMPLOYMENT
AND RELEASE ALL CLAIMS**

This agreement entered into this the 26 day of July, 2002, between the City of Charlotte, North Carolina ("the City"), a municipal corporation, and James W. Walton ("Walton"), a resident of Mecklenburg County, NC.

In consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. Walton shall terminate his employment with the City by retirement or otherwise at Walton's choosing, on or before April 30, 2003. From the effective date of this agreement until the termination of Walton's employment the City shall compensate Walton at his current rate of pay.
2. During the remainder of his employment with the City, Walton shall perform such work assignments as he receives from the City Manger and shall perform the assignments at a satisfactory or higher performance level, under the performance valuation system or systems that the City might implement from time -to-time. Walton's failure to perform his work assignments at a satisfactory level shall entitle the City to terminate Walton's employment prior to April 30, 2003.
3. In consideration for Walton's performance of his obligations, the City shall pay the following sums to Walton:
 - a. The sum of \$60,000, to be paid within 10 days after the termination of Walton's employment. *Provided, however, Walton shall not receive this \$60,000 payment if the City terminates his employment prior to April 30, 2002, because of his failure to perform satisfactorily the job duties assigned to him.*
 - b. *Compensation at Walton's present base salary for Walton's earned but unused vacation leave at the time of the termination of his employment.*
 - c. *Compensation at Walton's present base salary for up to a maximum of 43.5 days of sick leave accrued to Walton at the time of the termination of his employment. Walton may elect to receive compensation for unused sick leave as specified in the previous sentence or to use such sick leave for retirement credits in the North Carolina Local Government Employees' Retirement System.*

d. All sums paid to Walton pursuant to this paragraph 3 shall be for services that Walton has rendered or will render to the City, and, as such, they will be subject to all statutory withholding requirements.

4. Additionally, The City shall pay a maximum of \$2,000 for legal services obtained by Walton for the sole purpose of review of and advice concerning this agreement. The City shall make payment directly to the attorney who provides the services, within 30 days after the attorney submits his or her invoice to the City Attorney and Walton verifies to the City Attorney, in writing, that the invoice accurately reflects services provided and agreed-upon compensation.

5. If Walton terminates his employment with the City by retirement within the time specified in paragraph 1, Walton shall be eligible for retiree group health benefits provided by the City under its employee health insurance plan at the time of Walton's retirement.

6. The City shall purchase on Walton's behalf service credit in the North Carolina Local Government Employees' Retirement System in the amount of .7912 years, for Walton's part-time employment with the City from October 24, 1977, to May 9, 1979. Or, at Walton's election, in lieu of purchasing the service credit in the retirement system, the City will pay to Walton the sum equal to the amount that would be necessary to purchase the service credit at the time established by the next paragraph.

The City shall process the request to purchase the service credit, or make payment to Walton at his election, on the 30th day after this agreement becomes effective. Walton shall inform the City of his election prior to the 30th day after this agreement becomes effective, and his failure to do so will result in loss of this election to receive payment in lieu of service credit purchase.

7. For the remainder of Walton's employment with the City, the City will provide to Walton office space, computer, telephone, and a part-time secretary and will reassign Walton to the City Manager's Office. The location of the office and the precise computer to be provided shall be within the city's discretion.

8. The City will respond to all requests for references for Walton by providing to the requesting party the information from Walton's personnel file that state law specifies is public information. The City shall not provide any additional information concerning Walton without a signed document from Walton authorizing the release of the information.

9. Walton hereby releases and discharges the City and all of its officers, employees, and other agents from all causes of action, claims, demands, and damages, whether arising under state or federal law, statutory or non-statutory, including, but not limited to, claims under the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family Medical Leave Act, Title VII of the 1964 Civil Rights Act, 42 USC 1981, and Section 504 of the Rehabilitation Act that may presently exist, as well as claims, causes, or demands that subsequently mature, arising from Walton's employment with the City. This release does not include any unlawful release or waiver of claims under Workers' Compensation law, unemployment insurance compensation law, or of a right to file a claim with the Equal Employment Opportunity Commission; provided, this release is a release of any right to benefit or recovery on account of the filing of a charge with the Equal Employment Opportunity Commission.

10. Walton and the City agree with each other not to institute any lawsuit in any state or federal court against the other for any claim, demand, or cause of action arising from Walton's employment with the City.

11. On July 1, 2002, Walton received a copy of this agreement and advice to consult with an attorney prior to signing this agreement and has had 21 days from receipt of this agreement within which to consider its terms.

12. For a period of seven calendar days following Walton's signing of this agreement, Walton shall have the right to revoke this agreement, and this agreement shall not become effective or enforceable until the revocation period has ended.

13. The City and Walton agree that neither will release the contents of this agreement to any person without the written consent of the other, except that either party may release information concerning this agreement when required to do so.

14. This agreement does not constitute an admission by the City of liability for any claim or cause of action or an admission by Walton of any negligence or malfeasance in the performance of his employment with the City.

15. *In the event that any monies due under this agreement are not paid for any reason, then the release referred to in Paragraph 9 shall be null and void and of no effect.*

16. This agreement contains the entire understanding between the parties regarding the subject matter of this agreement.

CITY OF CHARLOTTE

By: /s/

Pamela A. Syfert

City Manager

/s/

James W. Walton

8. By the terms of this agreement, Petitioner agreed to terminate his employment, "by retirement or otherwise," on or before April 30, 2003. During this period, Petitioner agreed to satisfactorily "perform such work assignments as he receives from the City Manager" and he would be paid "at his current rate of pay." In consideration, the City agreed to pay Petitioner: (a) the sum of \$60,000 within 10 days after termination of employment; (b) compensation at Petitioner's base rate of salary for any unused vacation leave, and for up to 43.5 days of sick leave, standing to Petitioner's credit at the time of termination; and (c) \$2,000 for legal services obtained by Petitioner concerning said agreement. Paragraph 3 (d) of the agreement further provided that "all sums paid to Walton pursuant to [the agreement] shall be for **services that Walton has rendered or will render to the City**, and, as such, they will be subject to all statutory withholding requirements." (emphasis added).

9. Paragraph 3 (a) of the Agreement provides that Petitioner will receive \$60,000 within 10 days of retirement if, and only if, he has not been terminated by the City of Charlotte for failure to *satisfactorily perform his job duties assigned*. (emphasis in original). The first sentence of paragraph 3 of the Agreement states that [I]n consideration for Walton's **performance of his obligations, the City shall pay the following sums to Walton**. (emphasis added).

10. Petitioner retired, effective May 1, 2003. Subsequent to his retirement, Respondent requested a copy of the Agreement between the City and Petitioner, and based upon a review of the Agreement Respondent determined that the \$60,000 payment would not be included as "compensation" in the computation of Petitioner's retirement benefit.

11. The Agreement was signed by the City Manager, Pamela Syfert, on behalf of the City. City Manager Syfert testified that she was authorized as City Manager to negotiate lump-sum payments to employees in amounts up to \$100,000 for purposes of severance payments or for early retirement. Manager Syfert testified that she did not have the authority to approve performance-based lump-sum compensation payments to employees. Manager Syfert further testified that the \$60,000 payment to Petitioner was not, in her opinion, for performance of his duties, but was paid in exchange for the Petitioner taking early retirement.

12. "Compensation" upon which contributions are to be made to the Retirement System is defined in G.S. § 128-21(7a) as:

all salaries and wages prior to any reduction pursuant to sections 125, 401(k), 403(b), 414(h)(2), and 457 of the Internal Revenue Code, not including any terminal payments for unused sick leave, derived from public funds which are earned by a member of the Retirement System for **service** as an employee in the unit of the Retirement System for which he is performing full-time work. "Compensation" shall not include any payment, as determined by the Board of Trustees, for the reimbursement of expenses or payments for housing or any other allowances whether or not classified as salary and wages. (emphasis supplied).

13. Black's Law Dictionary defines salary as [a] reward or recompense for **services** performed. Black's Law Dictionary 1200 (5th ed. 1979) (emphasis supplied). Petitioner believed, at the time of execution of the agreement, that the \$60,000 sum he was to

be paid upon retirement was for services he had or would render to the City following execution of the agreement. Paragraph 3 of the document contains that explicit declaration. Petitioner's reason for seeking this payment for services was to increase his final average compensation under the North Carolina Local Government Retirement System. The City attempts to show, by direct testimony at this hearing that it did not intend for the document to be construed as paying Petitioner for services rendered or to be rendered, but rather as severance pay in return for Petitioner's leaving the City's employment upon an agreed date. The City was the drafter of the agreement. Ambiguities in this document should be construed against the drafter.

Based upon the above Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The parties properly are before the Office of Administrative Hearings.
2. Construing the Agreement by its plain written terms and considering its terms in view of the definition of salary contained in Black's Law Dictionary and within the definition of compensation as defined in Chapter 128, Article 3, entitled RETIREMENT SYSTEM FOR COUNTIES, CITIES AND TOWNS, of the General Statutes of North Carolina, I find that the \$60,000 sum paid, or to be paid to Petitioner under the terms of his Agreement dated July 26, 2002 by and between himself and the City of Charlotte, is compensation with public funds for services rendered by Petitioner as a full time employee and thereby qualified as such for purposes of his highest average final compensation under Chapter 128, Article 3. The City cannot now reconstitute its document by parol evidence.
3. Respondent's decision that the \$60,000 payment made to Petitioner by the City of Charlotte in connection with the Agreement between the parties dated July 26, 2002 is not compensation is erroneous as a matter of law and is not supported by the evidence.
4. In order for Petitioner to prevail in this matter, Respondent is entitled to have its Local Government Retirement Fund secure all of the contributions it would have received had the \$60,000 payment to Petitioner been classified as compensation. Such contributions include both the employee's contribution and the employer's matching share.

Based upon the above Findings and Conclusions, the undersigned makes the following:

DECISION

The payment of \$60,000 to Petitioner from his employer under the July 26, 2002 Agreement was "compensation" as defined in G.S. § 128-21(7a), under the facts and circumstances of this contested case, and Respondent erroneously determined that it should not be included in Petitioner's "average final compensation" used in computing his retirement benefit.

ORDER

It is hereby ordered that the agency serve a copy of the final decision on the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714, in accordance with G.S. § 150B-36(b).

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this decision and to present written arguments to those in the agency who will make the final decision. G.S. § 150B-36(a).

The agency is required by G.S. § 150B-36(b3) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

The agency that will make the final decision in this contested case is the Board of Trustees of the Local Governmental Employees' Retirement System.

This the 30th day of January, 2004.

Beecher R. Gray
Administrative Law Judge