

# NORTH CAROLINA



## REGISTER

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Office of Administrative Hearings  
Rules Division  
424 North Blount Street (27601)  
6714 Mail Service Center  
Raleigh, NC 27699-6714  
(919) 733-2678  
FAX (919) 733-3462

Julian Mann III, Director  
Camille Winston, Deputy Director  
Molly Masich, Director of APA Services  
Dana Sholes, Publications Coordinator  
Linda Dupree, Editorial Assistant  
Julie Brincefield, Editorial Assistant

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<http://ncoah.com/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.*

<b>NCAC TITLES</b>		<b>TITLE 21 LICENSING BOARDS</b>	<b>TITLE 24 INDEPENDENT AGENCIES</b>
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	
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**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 2005 – December 2005

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 <sup>th</sup> day from publication in the Register
19:13	01/03/05	12/08/04	01/18/05	03/04/05	03/21/05	05/01/05	05/06	09/30/05
19:14	01/18/05	12/22/04	02/02/05	03/21/05	04/20/05	06/01/05	05/06	10/15/05
19:15	02/01/05	01/10/05	02/16/05	04/04/05	04/20/05	06/01/05	05/06	10/29/05
19:16	02/15/05	01/25/05	03/02/05	04/18/05	04/20/05	06/01/05	05/06	11/12/05
19:17	03/01/05	02/08/05	03/16/05	05/02/05	05/20/05	07/01/05	05/06	11/26/05
19:18	03/15/05	02/22/05	03/30/05	05/16/05	05/20/05	07/01/05	05/06	12/10/05
19:19	04/01/05	03/10/05	04/16/05	05/31/05	06/20/05	08/01/05	05/06	12/27/05
19:20	04/15/05	03/24/05	04/30/05	06/14/05	06/20/05	08/01/05	05/06	01/10/06
19:21	05/02/05	04/11/05	05/17/05	07/01/05	07/20/05	09/01/05	05/06	01/27/06
19:22	05/16/05	04/25/05	05/31/05	07/15/05	07/20/05	09/01/05	05/06	02/10/06
19:23	06/01/05	05/10/05	06/16/05	08/01/05	08/22/05	10/01/05	05/06	02/26/06
19:24	06/15/05	05/24/05	06/30/05	08/15/05	08/22/05	10/01/05	05/06	03/12/06
20:01	07/01/05	06/10/05	07/16/05	08/30/05	09/20/05	11/01/05	05/06	03/28/06
20:02	07/15/05	06/23/05	07/30/05	09/13/05	09/20/05	11/01/05	05/06	04/11/06
20:03	08/01/05	07/11/05	08/16/05	09/30/05	10/20/05	12/01/05	05/06	04/28/06
20:04	08/15/05	07/25/05	08/30/05	10/14/05	10/20/05	12/01/05	05/06	05/12/06
20:05	09/01/05	08/11/05	09/16/05	10/31/05	11/21/05	01/01/06	05/06	05/29/06
20:06	09/15/05	08/25/05	09/30/05	11/14/05	11/21/05	01/01/06	05/06	06/12/06
20:07	10/03/05	09/12/05	10/18/05	12/02/05	12/20/05	02/01/06	05/06	06/30/06
20:08	10/17/05	09/26/05	11/01/05	12/16/05	12/20/05	02/01/06	05/06	07/14/06
20:09	11/01/05	10/11/05	11/16/05	01/03/06	01/20/06	03/01/06	05/06	07/29/06
20:10	11/15/05	10/24/05	11/30/05	01/17/06	01/20/06	03/01/06	05/06	08/12/06
20:11	12/01/05	11/07/05	12/16/05	01/30/06	02/20/06	04/01/06	05/06	08/28/06
20:12	12/15/05	11/22/05	12/30/05	02/13/06	02/20/06	04/01/06	05/06	09/11/06

## 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.

NOTICE OF RULE MAKING PROCEEDINGS AND PUBLIC HEARING

NORTH CAROLINA BUILDING CODE COUNCIL

**Notice of Rule-making Proceedings** is hereby given by NC Building Code Council in accordance with G.S. 150B-21.5(d).

**Citation to Existing Rule Affected by this Rule-Making:** NC Administrative, Building, Energy Conservation, Fire Prevention, Fuel Gas, Mechanical, and Plumbing Codes.

**Authority for Rule-making:** G.S. 143-136; 143-138.

**Reason for Proposed Action:** To incorporate changes in the NC Building Codes as a result of rulemaking petitions filed with the NC Building Code Council and to incorporate changes proposed by the Council.

**Public Hearing:** August 8, 2005, 9:00AM, Wake County Commons Building, 4011 Cary Drive, Raleigh, NC 27610.

**Comment Procedures:** Written comments may be sent to Barry Gupton, Secretary, NC Building Code Council, c/o NC Department of Insurance, 322 Chapanoke Road, Suite 200, Raleigh, NC 27603. Comment period expires on September 12, 2005.

**Statement of Subject Matter:**

**1. Request by the staff of the NC Department of Insurance to adopt the following codes:**

- A. 2006 NC Administrative Rules and Policies
- B. 2003 International Building Code  
Chapters 1-15 (with 2006 NC Amendments)  
Chapters 16-end (with 2006 NC Amendments)
- C. 2003 International Energy (with 2006 NC Amendments)
- D. 2003 International Fire Prevention Code (with 2006 NC Amendments)
- E. 2003 International Fuel Gas Code (with 2006 NC Amendments)
- F. 2003 International Mechanical Code (with 2006 NC Amendments)
- G. 2003 International Plumbing Code (with 2006 NC Amendments)

**The Initial Public Hearing was held on March 7, 2005. The Second Public Hearing was held on June 13, 2005. Final Adoption is anticipated on September 13, 2005.**

Barry Gupton, NCDOI, spoke to the Council regarding this item. Mr. Gupton stated that the intent of these code adoptions is to also include any modifications made by the current ad hoc committees. Marshall Knight made a motion to Grant the Petition for the adoption of the codes. Butch Simmons seconded the motion. The motion carried (December 2004). The 2006 NC Administrative Rules and Policies is a reorganization and rewrite of the 2002 NC Administration and Enforcement Requirements Code. All other proposed 2006 NC Codes are based on the 2003 International Codes with amendments from the various Ad Hoc Committees. All Committees have completed their reviews for the 2006 NC Codes with Amendments. The 2006 NC Amendment documents for the 2003 International Codes will be available online at the following site on or before July 15, 2005: [www.ncbuildingcodes.com](http://www.ncbuildingcodes.com) (click on NC State Building Codes, 2006 Edition).

**SUMMARY OF NOTICE OF  
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY**

**Mojo Properties, LLC**

Pursuant to N.C.G.S. § 130A-310.34, Mojo Properties, LLC has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Burgaw, Pender County, North Carolina. The Property consists of approximately five (5) acres and is located at 513 South Dudley Street. Environmental contamination exists on the Property in groundwater. Mojo Properties, LLC has committed itself to redevelopment of the Property for the manufacture of sound and other music-related equipment or other industrial/light manufacturing use if it is approved in writing in advance by DENR. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and Mojo Properties, LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) proposed investigation and remediation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35. The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the Pender County Public Library, 103 South Cowan Street, Burgaw, NC 28425 by contacting the Circulation Desk, or telephoning (910) 259-1234; or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Shirley Liggins at that address, at shirley.liggins@ncmail.net, or at (919) 733-2801, ext. 336, where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents. Written public comments may be submitted to DENR within 60 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later. Written requests for a public meeting may be submitted to DENR within 30 days after the period for written public comments begins. Thus, if Mojo Properties, LLC, as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on July 1, 2005. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson  
Brownfields Program Manager  
Division of Waste Management  
NC Department of Environment and Natural Resources  
401 Oberlin Road, Suite 150  
Raleigh, North Carolina 27605

**SUMMARY OF NOTICE OF  
INTENT TO REDEVELOP A BROWNFIELDS PROPERTY**

**National Textiles, LLC**

Pursuant to N.C.G.S. § 130A-310.34, National Textiles, LLC has filed with the North Carolina Department of Environment and Natural Resources ("DENR") a Notice of Intent to Redevelop a Brownfields Property ("Property") in Morganton, Burke County, North Carolina. The Property consists of approximately 32 acres and is located at 100 Reep Drive. Environmental contamination exists on the Property in soil and groundwater. National Textiles, LLC has committed itself to redevelopment of the Property for industrial uses. The Notice of Intent to Redevelop a Brownfields Property includes: (1) a proposed Brownfields Agreement between DENR and National Textiles, LLC, which in turn includes (a) a map showing the location of the Property, (b) a description of the contaminants involved and their concentrations in the media of the Property, (c) the above-stated description of the intended future use of the Property, and (d) proposed investigation; and (2) a proposed Notice of Brownfields Property prepared in accordance with G.S. 130A-310.35. The full Notice of Intent to Redevelop a Brownfields Property may be reviewed at the Burke County Public Library, North Carolina Room, 204 South King Street, Morganton, NC, 28655, by contacting Ms. Gale Benfield at 828-437-5638, or at [benfield@bcpls.org](mailto:benfield@bcpls.org); or at 401 Oberlin Rd., Raleigh, NC 27605 by contacting Shirley Liggins at that address, at [shirley.liggins@ncmail.net](mailto:shirley.liggins@ncmail.net), or at (919) 508-8411, where DENR will provide auxiliary aids and services for persons with disabilities who wish to review the documents. Written public comments may be submitted to DENR within 60 days after the date this Notice is published in a newspaper of general circulation serving the area in which the brownfields property is located, or in the North Carolina Register, whichever is later.

Written requests for a public meeting may be submitted to DENR within 30 days after the period for written public comments begins. Thus, if National Textiles, LLC, as it plans, publishes this Summary in the North Carolina Register after it publishes the Summary in a newspaper of general circulation serving the area in which the brownfields property is located, and if it effects publication of this Summary in the North Carolina Register on the date it expects to do so, the periods for submitting written requests for a public meeting regarding this project and for submitting written public comments will commence on July 2, 2005. All such comments and requests should be addressed as follows:

Mr. Bruce Nicholson  
Brownfields Program Manager  
Division of Waste Management  
NC Department of Environment and Natural Resources  
401 Oberlin Road, Suite 150  
Raleigh, North Carolina 27605

U.S. Department of Justice

Civil Rights Division

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RJW:MSR:NT:par  
DJ 166-012-3  
2005-1209  
2005-1701

*Voting Section – NWB.  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530*

May 25, 2005

David A. Holec, Esq.  
City Attorney  
P.O. Box 7207  
Greenville, NC 27835-7207

Dear Mr. Holec:

This refers to eight annexations (Ordinance Nos. 05-10, 05-11, 05-12, 05-16 through 05-20) and their designation to districts of the City of Greenville in Pitt County, North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submissions on March 29 and May 12, 2005.

The Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. In addition, as authorized by Section 5, we reserve the right to reexamine these submissions if additional information that would otherwise require an objection comes to our attention during the remainder of the sixty-day review period. See the Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41 and 51.43).

Sincerely,

Rebecca J. Wertz  
Acting Chief, Voting Section



**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 21 – OCCUPATIONAL LICENSING BOARDS**

**CHAPTER 36 – BOARD OF NURSING**

*Notice is hereby given in accordance with G.S. 150B-21.2 that the Board of Nursing intends to amend the rules cited as 21 NCAC 36 .0120, .0218, .0302-.0303, .0309, .0317, .0320-.0321, .0323 and repeal the rule cited as 21 NCAC 36 .0324.*

**Proposed Effective Date:** December 1, 2005

**Public Hearing:**

**Date:** September 23, 2005

**Time:** 1:00 p.m.

**Location:** NC Board of Nursing Office, 3724 National Drive, Suite 201, Raleigh, NC

**Reason for Proposed Action:**

**21 NCAC 36 .0120** – To define terms utilized in Section .0300. The changes in **Bold/Italics** are pending approval by the Rules Review Commission.

**21 NCAC 36 .0218** – To clarify requirements for all endorsement applicants education in all foreign countries to include Canada.

**21 NCAC 36 .0302-.0303, .0309, .0317, .0320-.0321, .0323, .0324** – The Board of Nursing has been in the process of revising these rules for two years in an effort to make them more current, to elevate the rules for nursing education in North Carolina, and to allow programs flexibility to meet the educational needs for nursing.

**Procedure by which a person can object to the agency on a proposed rule:** Persons may submit objections to these rules by contacting Jean H. Stanley, APA Coordinator, NC Board of Nursing, P.O. Box 2129, Raleigh, NC 27602-2129, fax (919) 781-9461 and email [jeans@ncbon.com](mailto:jeans@ncbon.com) or [polly@ncbon.com](mailto:polly@ncbon.com).

**Written comments may be submitted to:** Jean H. Stanley, APA Coordinator, NC Board of Nursing, P.O. Box 2129, Raleigh, NC 27602-2129, phone (919) 782-3211, ext. 252, fax (919) 781-9461, or email [jeans@ncbon.com](mailto:jeans@ncbon.com).

**Comment period ends:** September 23, 2005

**Procedure for Subjecting a Proposed Rule to Legislative Review:** If an objection is not resolved prior to the adoption of the rule, 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 day following the day the Commission approves the rule. 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

**SECTION .0100 - GENERAL PROVISIONS**

**21 NCAC 36 .0120 DEFINITIONS**

The following definitions shall apply throughout this Chapter unless the context indicates otherwise:

- (1) "Academic term" means one semester of a school year.
- (2)(4) "Accountability/Responsibility" means being answerable for action or inaction of self, and of others in the context of delegation or assignment.
- (3) "Accredited institution" means an institution accredited by a United States Department of Education approved institutional accrediting body.
- (4)(6) "Advanced Practice Registered Nurse (APRN)" means for the purposes of Board qualification a nurse who meets the criteria specified in G.S. 90-171.21(d)(4).
- (5)(2) "Assigning" means designating responsibility for implementation of a specific activity or set of activities to a person licensed and competent to perform such activities.
- (6) "Clinical experience" means application of nursing knowledge in demonstrating clinical judgment.
- (7) "Clinical judgment" means the application of the nursing student's knowledge, skills, abilities and experience in making decisions about client care.
- (8) "Competent" means having the knowledge, skills and ability to safely perform an activity or role.

- (9) "Controlling institution" means the degree-granting organization or hospital under which the nursing education program is operating.
- (10) "Curriculum" means an organized system of teaching and learning activities directed toward the achievement of specified learning objectives/outcomes.
- (11)(3) "Delegation" means transferring to a competent individual the authority to perform a selected nursing activity in a selected situation. The nurse retains accountability for the delegation.
- (12) "Distance education" means the teaching/learning strategies used to meet the learning needs of students, when the students and faculty are separate from each other.
- (13) "Faculty directed clinical practice" means the responsibility of nursing program faculty in overseeing student clinical learning including the utilization of preceptors.
- (14) "Focused client care experience" means a clinical experience that simulates an entry-level work experience. The intent is to assist the student to transition to an entry-level practice. There is no specific setting requirement. Supervision may be by faculty/preceptor dyad or direct faculty supervision.
- (15) "Interdisciplinary faculty" means faculty from professions other than nursing.
- (16) "Interdisciplinary team" means all individuals involved in providing a client's care, who cooperate, collaborate, communicate and integrate care to ensure that care is continuous and reliable.
- (17) "Level of Licensure" means practice of nursing by either a Licensed Practice Nurse or a Registered Nurse as defined in G.S. 90-171.20(7) and (8).
- (18) "Level of student" means the point in the program to which the student has progressed.
- (19) "Maximum enrollment" means the total number of pre-licensure students that can be enrolled in the nursing program at any one time. The number reflects the capacity of the nursing program based on demonstrated resources sufficient to implement the curriculum.
- (20) "Methods of Instruction" means the planned process through which teacher and student interact with selected environment and content so that the response of the student gives evidence that learning has taken place. It is based upon stated course objectives/outcomes for learning experiences in classroom, laboratory and clinical settings.
- (21)(7) "National Credentialing Body" means a credentialing body that offers certification or re-certification in the licensed nurse's or
- Advanced Practice Registered Nurse's specialty area of practice.
- (22) "NCLEX-PN™" means the National Council Licensure Examinations for Practical Nurses.
- (23) "NCLEX-RN™" means the National Council Licensure Examinations for Registered Nurses.
- (24) "Nursing Accreditation body" means a national nursing accrediting body, recognized by the United States Department of Education.
- (25) "Nursing program faculty" means individuals employed full or part time by academic institution responsible for developing, implementing, evaluation and updating nursing curricula.
- (26)(5) "Participating in" means to have a part in or contribute to the elements of the nursing process.
- (27) "Pattern of noncompliance" means episodes of recurring non-compliance with one or more rules in Section .0300.
- (28) "Preceptor" means a registered nurse at or above the level of licensure that an assigned student is seeking, who may serve as a teacher, mentor, role model and supervisor for a faculty directed clinical experience.
- (29)(8) "Prescribing Authority" means the legal permission granted by the Board of Nursing and Medical Board for the nurse practitioner and nurse midwife to procure and prescribe legend and controlled pharmacological agents and devices to a client in compliance with Board of Nursing rules and other applicable federal and state law and regulations.
- (30) "Program Closure" means to cease operation of a nursing program.
- (31) "Program Type" means a course of study that prepares an individual to function as an entry-level practitioner of nursing. The three program types are:
- (a) BSN - Curriculum components for Bachelor of Science in Nursing provides for the attainment of knowledge and skill sets in the current practice in nursing, nursing theory, nursing research, community and public health, health care policy, health care delivery and finance, communications, therapeutic interventions and current trends in health care. For this program type, the client is the individual, family, group, and community.
- (b) Associate Degree in Nursing (ADN)/Diploma in Registered Nursing - Curriculum components for the ADN/Diploma in Registered Nursing provides for the attainment of knowledge and skill sets in the

current practice in nursing, community concepts, health care delivery, communications, therapeutic interventions and current trends in health care. For this program type, client is the individual, group of individuals, and family.

(c) Practical Nurse Diploma - Curriculum prepares for functioning in a dependent role in providing direct nursing care under the direction of a registered nurse or other health care provider as defined by the Nursing Practice Act. Curriculum components provide for the attainment of knowledge and skill sets in the current practice of practical nursing, communications, therapeutic interventions, including pharmacology, growth and development and current trends in health care. For this program type client is the individual, or group of individuals.

(32) "Review" means collecting and analyzing information to assess compliance with Section .0300 of this Chapter. Information may be collected by multiple methods including review of written reports and materials, on-site observations and review of documents or in person or telephone interview(s) and conference(s).

(33) "Rescind Approval" means a Board action that removes the approval status previously granted.

~~(34)~~(9) **"Specialty" means a broad, population-based focus of study encompassing the common health-related problems of that group of patients and the likely co-morbidities, interventions and responses to those problems.**

(35)(4) "Supervision" means the provision of guidance or direction, evaluation and follow-up by the licensed nurse for accomplishment of an assigned or delegated nursing activity or set of activities.

(36) "Survey" means an on-site visit for the purpose of gathering data in relation to reviewing nursing programs compliance with Section .0300 of this Chapter.

(a) The Board shall provide an application form which the applicant who wishes to apply for licensure without examination (by endorsement) shall complete in its entirety.

(b) The applicant for licensure by endorsement as a registered nurse shall show evidence of:

- (1) completion of a program of nursing education for registered nurse licensure which was approved by the jurisdiction of original licensure;
- (2) attainment of the standard score on the examination which was required by the jurisdiction issuing the original certificate of registration;
- (3) self-certification that the applicant is of mental and physical health necessary to competently practice nursing;
- (4) unencumbered license in all jurisdictions in which a license is or has ever been held. A license that has had all encumbrances resolved in the jurisdictions in which the reasons for the encumbrances occurred shall be considered an unencumbered license for purposes of this provision;
- (5) current license in a jurisdiction; if the license has been inactive or lapsed for five or more years, the applicant shall be subject to requirements for a refresher course as indicated in G.S. 90-171.35 and G.S. 90-171.36;
- (6) completion of all court conditions resulting from any misdemeanor or felony convictions; and
- (7) a written explanation and all related documents if the nurse has been listed as a Nurse Aide and there has been a substantiated finding(s) pursuant to G.S. 131E-255. The Board may take the finding(s) into consideration when determining if a license should be denied pursuant to G.S. 90-171.37. In the event a finding(s) is pending, the Board may withhold taking any action until the investigation is completed.

(c) The applicant for licensure by endorsement as a licensed practical nurse shall show evidence of:

- (1) completion of:
  - (A) a program in practical nursing approved by the jurisdiction of original licensure; or
  - (B) course(s) of study within a program(s) which shall be comparable to that required of practical nurse graduates in North Carolina; or
  - (C) course of study for military hospital corpsman which shall be comparable to that required of practical nurse graduates in North Carolina.

The applicant who was graduated prior to July 1956 shall be considered on an individual

Authority G.S. 90-171.23; 90-171.38.

**SECTION .0200 - LICENSURE**

**21 NCAC 36 .0218 LICENSURE WITHOUT EXAMINATION (BY ENDORSEMENT)**

- basis in light of licensure requirements in North Carolina at the time of original licensure;
- (2) attainment of the standard score on the examination which was required by the jurisdiction issuing the original certificate of registration;
  - (3) self-certification that the applicant is of mental and physical health necessary to competently practice nursing;
  - (4) unencumbered license in all jurisdictions in which a license is or has ever been held. A license that has had all encumbrances resolved in the jurisdictions in which the reasons for the encumbrances occurred shall be considered an unencumbered license for purposes of this provision;
  - (5) current license in a jurisdiction; if the license has been inactive or lapsed for five or more years, the applicant shall be subject to requirements for a refresher course as indicated in G.S. 90-171.35 and G.S. 90-171.36;
  - (6) completion of all court conditions resulting from any misdemeanor or felony convictions; and
  - (7) a written explanation and all related documents if the nurse has been listed as a Nurse Aide and there has been a substantiated finding(s) pursuant to G.S. 131E-255. The Board may take the finding(s) into consideration when determining if a license should be denied pursuant to G.S. 90-171.37. In the event a finding(s) is pending, the Board may withhold taking any action until the investigation is completed.)
- (d) A nurse educated in a foreign country (including Canada) shall be eligible for North Carolina licensure by endorsement if the nurse has:
- (1) proof of education as required by the jurisdiction issuing the original certificate;
  - (2) prior to January 1, 2004 proof of passing either the:
    - (A) Canadian Nurses Association Test Service Examination (CNATS) in the English language; or
    - (B) Canadian Registered Nurse Examination (CRNE) in the English language; or
    - (C) the licensing examination developed by the National Council of State Board of Nursing (NCLEX).
  - (3) beginning January 1, 2004, the applicant educated in a foreign country including Canada shall show evidence of Subparagraph (d)(1) and Part (2)(C) of this Paragraph; Parts (d)(2)(A) and (B) shall no longer apply;

- (4) self-certification that the applicant is of mental and physical health necessary to competently practice nursing;
- (5) unencumbered license in all jurisdictions in which a license is or has ever been held. A license that has had all encumbrances resolved in the jurisdictions in which the reasons for the encumbrances occurred shall be considered an unencumbered license for purposes of this provision;
- (6) current license in another jurisdiction or foreign country. If the license has been inactive or lapsed for five or more years, the applicant shall be subject to requirements for a refresher course as indicated in G.S. 90-171.35 and G.S. 90-171.36;
- (7) completed all court conditions resulting from any misdemeanor or felony conviction(s); and
- (8) a written explanation and all related documents if the nurse has been listed as a Nurse Aide and if there has been a substantiated finding(s) pursuant to G.S. 131E-255. The Board may take the finding(s) into consideration when determining if a license should be denied pursuant to G.S. 90-171.37. In the event a finding(s) is pending, the Board may withhold taking any action until the investigation is completed.

(e) When an applicant is eligible for licensure consistent with Part (d)(2)(A) or (d)(2)(B) of this Rule the license issued by the Board will not permit the individual to practice in other states party to the Nurse Licensure Compact.

(f) Facts provided by the applicant and the Board of Nursing of original licensure shall be compared to confirm the identity and validity of the applicant's credentials. Status in other states of current licensure may be verified. When eligibility is determined, a certificate of registration and a current license for the remainder of the biennial period shall be issued.

*Authority G.S. 90-171.23(b); 90-171.32; 90-171.33; 90-171.37; 90-171.48.*

**SECTION .0300 - APPROVAL OF NURSING PROGRAMS**

**21 NCAC 36 .0302 ESTABLISHMENT OF A NURSING PROGRAM - INITIAL APPROVAL**

~~(a) At least 12 months prior to the proposed enrollment of students in a nursing program, the administrative officer of the parent institution considering establishing a nursing program shall submit a feasibility study documenting the following:~~

- ~~(1) approval of the program by the governing body of the parent institution or written evidence that the approval is in process;~~
- ~~(2) evidence of an educational need which cannot be met by existing nursing programs or extensions of those programs;~~
- ~~(3) proposed student population;~~
- ~~(4) projected student enrollment;~~

- ~~(5) potential employment opportunities for graduates;~~
- ~~(6) available clinical resources and maximum numbers of students that can be accommodated in clinical areas;~~
- ~~(7) evidence from existing nursing programs of the potential impact of the proposed program on clinical resources; and~~
- ~~(8) a plan with a specified time frame for availability of:~~
  - ~~(A) qualified faculty as specified in rules;~~
  - ~~(B) adequate financial resources;~~
  - ~~(C) adequate physical facilities to house the program; and~~
  - ~~(D) support services available to the program from the institution.~~

~~(b) The feasibility study shall be presented at the next regular Education Committee meeting. If the Education Committee determines there is a need for the program and the plan includes the availability of the necessary resources to establish a program, the Education Committee shall recommend to the Board that the institution be approved to proceed with the development of the program. The recommendation to proceed shall be contingent upon approval by the governing body.~~

~~(a)(e) If the Board determines that a program is approved for development, a minimum of At least six months prior to the proposed enrollment of students in a nursing program starting date, the an institution seeking approval to operate a nursing program shall employ a program director qualified pursuant to 21 NCAC 36 .0317(c) and nurse faculty member(s) to develop the proposed program application documenting the following:~~

~~(d) The director and faculty shall prepare an application to establish a nursing program, which shall include:~~

- ~~(1) a narrative description of the organizational structure of the program and its relationship to the controlling ~~institution;~~ institution, including accreditation status. The controlling institution must be an accredited institution;~~
- ~~(2) a general overview of the proposed total curriculum that includes:~~
  - ~~(A) program philosophy, purposes, and objectives;~~
  - ~~(B) master plan of the curriculum, indicating the sequence for both nursing and non-nursing courses, as well as prerequisites and corequisites;~~
  - ~~(C) course descriptions and course objectives for all courses; and~~
  - ~~(D) course syllabi as specified in pursuant to 21 NCAC 36 .0321(i) ~~36 .0321(h)~~ for all first-year nursing courses;~~
- ~~(3) proposed student population;~~
- ~~(4) projected student enrollment;~~
- ~~(5) evidence of learning resources to implement and maintain the program;~~
- ~~(6) financial resources adequate to begin and maintain program;~~
- ~~(7) physical facilities adequate to house the program;~~

- ~~(8) support services available to the program from the institution;~~
- ~~(9) approval of the program by the governing body of the parent institution; and~~
- ~~(10) a plan with a specified time frame for:~~
  - ~~(A) availability of qualified faculty as specified in 21 NCAC 36 .0318;~~
  - ~~(B) course syllabi as specified in 21 NCAC 36 .0321(h) of this Section for all nursing courses;~~
  - ~~(C) student policies pursuant to 21 NCAC 36 .0320 of this Section for admission, progression, and graduation of students; and~~
  - ~~(D) total program evaluation pursuant to 21 NCAC 36 .0317(e).~~
- ~~(3) student policies consistent with rules for admission, progression, and graduation of students;~~
- ~~(4) curriculum vitae for employed nursing faculty members whose numbers and qualifications are consistent with assigned responsibilities in the development of the program; and~~
- ~~(5) proposed agreements with clinical agencies, including types of units available and number of students that can be accommodated in each area at one time.~~

~~(e) The completed application shall be submitted to the Board not less than 90 days prior to a regular meeting of the Board to allow for:~~

- ~~(1) survey of the proposed program and agencies;~~
- ~~(2) preparation of the report of the survey;~~
- ~~(3) response to the survey report by persons from the proposed program; and~~
- ~~(4) review by the Education Committee of the Board for recommendations to the Board.~~

~~(b) The application to establish a nursing program must be on a Board form, contain current and accurate information, be complete, and be signed by the program director and the chief executive officer of the controlling institution.~~

~~(c) The completed application shall be received by the Board not less than 90 days prior to a regular meeting of the Board to be considered on the agenda of that meeting.~~

~~(d) The Board shall conduct an on-site survey of the proposed program and agencies and afford the petitioning institution an opportunity to respond to the survey.~~

~~(e)(f) The Board shall consider all evidence, including the application, the survey report, and any testimony from representatives of the recommendations of the Education Committee. Representatives of the petitioning institution in determining approval status, may speak at the meeting. The Board shall act upon the data available at the meeting.~~

~~(f)(g) If the Board finds, from the evidence presented, that the resources and plans meet finds that the application meets all rules for establishing a new nursing program, program and that the petitioning institution is able and willing to maintain support and resources essential to meet the rules of the Board, and if the first class of students is enrolled within one year after this~~

~~finding, the Board shall grant Initial Approval including a maximum enrollment and implementation date. initial approval.~~

~~(g) If the Board determines that a proposed program does not comply with all rules, Initial Approval Standards, initial approval shall be denied. Following the Initial Approval, if the first class of students is not enrolled within one year, the approval shall be rescinded. The period of time a program may retain initial approval status shall be influenced by the length of time necessary for full implementation of the program. A program shall be considered eligible for removal from Initial Approval status and placement on Full Approval status following a survey during the final term of total curriculum implementation.~~

~~(h) Programs with initial approval shall be surveyed as follows:~~

- ~~(1) annually during the specified period of initial approval;~~
- ~~(2) during the final term of complete implementation of the program; and~~
- ~~(3) as directed by the Board when a decision has been made that the program is not complying with Law or rules.~~

~~(i) Following any survey the Board shall act upon data from the following:~~

- ~~(1) a report of the survey;~~
- ~~(2) response from the program representatives to the survey report; and~~
- ~~(3) recommendations from the Education Committee.~~

~~(j) If at any time it comes to the attention of the Board or its designated representative(s) that the program is not complying with all rules or the Law, the program shall correct the area of noncompliance and submit written evidence or submit a written plan for correction to the Board for review and action. Failure to respond shall result in further Board action.~~

~~(k) Upon finding by the Board that the program complies with the Law and rules, the Board shall direct that the program remain on the Initial Approval status. If, following the survey during the final term for total curriculum implementation, the Board finds that the program is complying with the Law and all rules, the Board shall direct that the program be placed on Full Approval status and resurveyed within three years.~~

~~(l) Upon finding by the Board that the program does not comply with the Law or all rules by the final academic term of initial approval, the Board shall:~~

- ~~(1) provide the program with written notice of the Board's decision;~~
- ~~(2) upon written request from the program submitted within 10 business days of the Board's written notice, schedule a hearing. Such hearing shall be held not less than 20 business days from the date on which the request was received.~~

~~(m) Following the hearing and consideration of all evidence provided, the Board shall assign the program Full Approval status or shall enter an Order removing the Initial Approval status, which shall constitute discontinuance of the program.~~

~~(h) Failure of the controlling institution to submit documentation consistent with the time specified in the plan of~~

~~Subparagraph (a)(10) of this Rule shall result in Initial Approval being rescinded.~~

~~(i) Following the Initial Approval, if the first class of students are not enrolled in the program within one year, the approval shall be rescinded.~~

~~(j) For 12 months following rescinded approval, the controlling institution shall not submit an application for establishing a nursing program.~~

~~(k) A program may retain Initial Approval Status for the time necessary for full implementation of the curriculum.~~

- ~~(l) Programs with Initial Approval shall be surveyed:~~
- ~~(1) during the final term of curriculum implementation of the program; and~~
  - ~~(2) when there is information that the program may not be complying with Section .0300.~~

~~(m) If at any time it comes to the attention of the Board that a program on initial approval is not complying with Section .0300 of this Chapter, the program, upon written notification, shall:~~

- ~~(1) correct the area of noncompliance and submit written evidence of correction to the Board; or~~
- ~~(2) submit and implement a plan for correction to the Board.~~

~~(n) If the Board determines that the program does not comply with Paragraph (m) of this Rule, Initial Approval shall be rescinded.~~

~~(o) If, following the survey during the final term for curriculum implementation, the Board finds that the program is complying with Section .0300 of this Chapter, the Board shall place the program on Full Approval status.~~

~~(p) If, following the survey during the final term for curriculum implementation the Board finds that the program does not comply with the Section .0300 of this Chapter, the Board shall rescind Initial Approval and provide the program with written notice of the Board's decision.~~

~~(q) Upon written request from the program submitted within 10 business days of the Board's written notice, the Board shall schedule a hearing within 30 business days from the date on which the request was received.~~

~~(r) Following the hearing and consideration of all evidence provided, the Board shall assign the program Full Approval status or shall enter an Order rescinding the Initial Approval status, which shall constitute closure of the program pursuant to 21 NCAC 36 .0309.~~

*Authority G.S. 90-171.23(b)(8); 90-171.38; 90-171.39; 90-171.41; 90-171.43; 90-171.44(4).*

**21 NCAC 36 .0303 EXISTING NURSING PROGRAM**

~~(a) All nursing programs under the authority of the Board shall obtain national program accreditation by a Board approved nursing accreditation body by December 31, 2015. Thereafter, the program must maintain national accreditation to remain Board approved.~~

- ~~(b)(a) Full Approval/Approval with Stipulations:~~
- ~~(1) The Board shall review approved programs at least every eight years as specified in G.S. 90-171.40. Reviews of individual programs shall be conducted at shorter intervals upon request~~

from the individual institution or as considered necessary by the Board.

~~(2) If at any time it comes to the attention of the Board that a program is not complying with all Rules in this Section, the program shall correct the area of noncompliance and submit written evidence of such or submit a written plan for correction to the Board for review and action.~~

~~(2)(3) The Board shall send a written report of the review no more than ~~30~~ 20 business days following the completion of the review process. Responses from a nursing education program regarding a review report or Board stipulation ~~must~~ Warning Status as referenced in Paragraph (c) of this Rule shall be received in the Board office by the deadline date specified in the letter accompanying the report or notification of Warning Status stipulation. ~~The specified deadline date shall allow time to meet the rules and shall not exceed 12 months from the review.~~~~

~~(A) If no materials or documents are received by the specified deadline date, the Board shall act upon the findings in the review report or and testimony of the Board staff consultant(s).~~

~~(B) When a nursing education program has responded by the deadline date, additional materials and documents shall be accepted and reviewed by the Board up to 10 business days before the Education Committee meeting. No materials or documents shall be reviewed during the interval between the Education Committee meeting and the Board meeting.~~

~~(3)(4) If the Board determines that a program has complied with the rules in this Section, the program shall be continued on Full Approval status.~~

~~(4)(5) If the Board determines a pattern of noncompliance with one or more rules in this Section, a review shall be conducted. The program shall submit to the Board a detailed plan of compliance to correct the identified pattern. Failure to comply with the correction plan shall result in withdrawal of approval, constituting closure, consistent with 21 NCAC 36 .0309, that a program has substantially but not completely complied with the rules in this Section, the Board shall specify stipulations which shall be met by the program within a designated period of time, which shall not exceed 12 months, and shall direct that the program be assigned Approved with Stipulations status.~~

(b) Provisional Approval:

(c) Warning Status

(1) If the Board determines that a program is not complying with the rules in this ~~Section~~ Section or stipulations the Board shall assign the program Warning Status, Provisional Approval status, and shall give written notice by certified or registered mail to the program specifying:

(A) the areas in which there is noncompliance; and

(B) ~~a time no later than 12 months from the date of notice by which the program must comply. The maximum timeframe for compliance is two years; and~~

(C) the opportunity to schedule a hearing.

~~(2) At the end of the specified time, the Board shall conduct a review to determine the program's compliance with the rules in this Section.~~

~~(3) The Board shall send a written report of the review to the program no more than 30 business days following the completion of the review. Program responses shall follow the receipt deadlines as specified in Subparagraph (a)(3)(A) and (B) of this Rule.~~

~~(4) If the Board determines that the program is complying with the rules in this Section, the Board shall assign the program Full Approval status.~~

~~(5) If the Board determines that the program is not complying with the rules in this Section, the Board shall assign the program Probational Approval status.~~

~~(2) On or before the required date of compliance identified in this Paragraph, if the Board determines that the program is complying with the rules in this Section, the Board shall assign the program Full Approval Status.~~

~~(3) If the Board finds the program is not in compliance with the rules in this Section by the date specified in Part (c)(1)(B) of this Rule, the Board shall withdraw approval constituting closure consistent with 21 NCAC 36 .0309.~~

~~(4) Upon written request from the program, submitted within 10 business days of the Board's written notice of Warning Status, the Board shall schedule a hearing within 30 business days from the date on which the request was received.~~

~~(5) When a hearing is held at the request of the program and the Board determines that:~~

~~(A) the program is in compliance with the rules in this Section, the Board shall assign the program Full Approval status; or~~

~~(B) the program is not in compliance with the rules in this Section, the program shall remain on Warning Status. A~~

review by the Board shall be conducted during that time.

(c) Probational Approval:

- (1) ~~When the Board has assigned the program Probational Approval status the Board shall:~~
  - (A) ~~determine if the program may continue to admit students based on evidence that the program can comply with the rules in this Section before the end of the designated period for probational approval;~~
  - (B) ~~provide the program with written notice of the Board's decision regarding probational approval and admission of students;~~
  - (C) ~~schedule a hearing if the program submits a written request for such within 10 business days of the receipt of the Board's notice. Such hearing shall be held not less than 20 days from the date on which the request was received.~~
- (2) ~~If the program does not request a hearing, the program shall remain on Probational Approval and shall be reviewed by within one year of the Board's initial determination of probational approval.~~
- (3) ~~When a hearing is held at the request of the program:~~
  - (A) ~~If the Board determines that the program is in compliance with the rules in this Section, the Board shall assign the program Full Approval status.~~
  - (B) ~~If the Board determines that the program is not in compliance with the rules in this Section the program shall remain on Probational Approval for no more than one year from the date that the program was placed on Probational Approval. A review by the Board shall be conducted during that time.~~
- (4) ~~The Board shall send a written report of the review to the program no more than 30 business days following the review.~~
- (5) ~~If the Board determines that the program is complying with the rules in this Section, the Board shall assign the program Full Approval status.~~
- (6) ~~If the Board determines that the program is not complying with the rules in this Section, the Board shall cause notice to be served on the program and shall specify a date for a hearing to be held not less than 20 days from the date on which notice is given.~~
- (7) ~~If the Board determines from evidence presented at the hearing that the program is complying with the rules in this Section, the~~

~~Board shall assign the program Full Approval status.~~

- (8) ~~If the Board, following a hearing, finds the program is not in compliance with the rules in this Section, the Board shall withdraw approval.~~
  - (A) ~~This action constitutes discontinuance of the program.~~
  - (B) ~~The parent institution shall present a plan to the Board for transfer of students to approved programs. Closure shall take place after the transfer of students to approved programs within a time frame established by the Board.~~
  - (C) ~~The parent institution shall notify the Board of the arrangement for storage of permanent records.~~

*Authority G.S. 90-171.23(b); 90-171.38; 90-171.39; 90-171.40.*

**21 NCAC 36 .0309 PROCESS FOR CLOSURE OF A PROGRAM**

- (a) ~~When the parent controlling institution makes the decision to close a nursing program, the Administration of the institution shall advise the Board and submit a written plan for the discontinuation of the program to the Board program.~~
- (b) ~~When the Board closes a nursing program, the program director shall develop and submit to the Board a plan, for discontinuation of the program including the transfer of students to approved programs. Closure shall take place after the transfer of students to approved programs.~~
- (b) ~~Educational standards shall be maintained until the last student has transferred or completed the program.~~
- (c) ~~The Board shall be notified controlling institution shall notify the Board of the arrangement for storage of permanent records.~~

*Authority G.S. 90-171.38; 90-171.39; 90-171.40.*

**21 NCAC 36 .0317 ADMINISTRATION**

- (a) ~~The controlling institution of a nursing program shall give evidence of a continuing commitment to provide those human, physical, technical, and financial resources and services essential to support program processes, outcomes and maintain compliance with Section .0300 of this Chapter. Standards prescribed by the Board.~~
- (b) ~~Delineation of authority, responsibility and accountability at all levels in the institution, as they affect the nursing program, shall be stated.~~
- (b)(c) ~~Authority for direction of the program shall be delegated to a full time registered nurse qualified to serve as director. A full time registered nurse qualified pursuant to Paragraph (c) of this Rule shall have the authority for the direction of the nursing program. This authority must encompass responsibilities for maintaining compliance with rules Standards and other legal requirements in all areas of the program. The program director shall have non-teaching time sufficient to allow for program~~



organization, administration, continuous review, planning and development.

(c) Program director qualifications in a program preparing for nurse licensure shall include:

- (1) faculty qualifications as specified in 21 NCAC 36 .0318;
- (2) beginning January 1, 2015, two years of full-time experience as a faculty member with a master/s degree in an approved nursing program.
- (3) for a program preparing individuals for registered nurse practice, a master's degree; and
- (4) for a program leading to a baccalaureate, a doctoral degree in nursing; or a master's degree in nursing and a doctoral degree in a health or education field.

~~(d) Evidence shall exist that administration supports the implementation of established policies.~~

(d) The nursing education program shall implement, for quality improvement, a comprehensive program evaluation which shall include:

- (1) students' achievement of program outcomes;
- (2) evidence of program resources including fiscal, physical, human, clinical and technical learning resources; student support services, and the availability of clinical sites and the viability of those sites adequate to meet the objectives of the program;
- (3) measures of program outcomes for graduates;
- (4) evidence that accurate program information for consumers is readily available;
- (5) evidence that the head of the academic institution and the administration support program outcomes;
- (6) evidence that program director and program faculty meet board qualifications and are sufficient in number to achieve program outcomes;
- (7) evidence that the academic institution assures security of student information;
- (8) evidence that collected evaluative data is utilized in implementing quality improvement activities; and
- (9) evidence of student participation in program planning, implementation, evaluation and continuous improvement.

(e) The controlling institution and the nursing education program shall communicate information describing the nursing education program that is accurate, complete, consistent across mediums and accessible by the public. At least the following must be made known to all applicants and students:

- (1) admission policies and practices;
- (2) policy on advanced placement, transfer of credits;
- (3) number of credits required for completion of the program;
- (4) tuition, fees and other program costs;

(5) policies and procedures for withdrawal, including refund of tuition/fees;

(6) grievance procedure;

(7) criteria for successful progression in the program including graduation requirements; and

(8) policies for clinical performance.

*Authority G.S. 90-171.23(b)(8); 90-171.38.*

**21 NCAC 36 .0320 STUDENTS**

(a) Students in nursing programs shall meet requirements established by the controlling institution. Additional requirements may be stipulated by the nursing program for students because of the nature and legal responsibilities of nursing education and nursing practice.

(b) Admission requirements and practices shall be clearly stated and published by ~~in the~~ controlling institution ~~institution's publications~~ and shall include assessment of:

- (1) record of high school graduation, high-school equivalent, or earned credits from a post-secondary institution; ~~and~~
- (2) achievement potential through the use of previous academic records and pre-entrance examination cut-off scores that are consistent with curriculum demands and scholastic expectations; and
- (3) physical and emotional health that would provide evidence that is indicative of the applicant's ability to provide safe nursing care to the public.

~~Initial~~ Provisional admission may be based on Subparagraphs (b)(1) and (2) of this Rule and any other institutional requirements; however, ~~final~~ full admission shall be contingent upon Subparagraph (b)(3) of this Rule.

(c) The number of students enrolled in nursing courses shall not exceed the maximum number approved by the Board as defined in 21 NCAC 36 .0302(f) ~~36.0302~~ and 21 NCAC 36 .0321 Paragraph (k) of this Section by more than 10 students. ~~36.0321.~~

~~Published~~ The nursing program shall publish policies and practices ~~shall exist~~ that provide for identification and dismissal of students who:

- (1) present physical or emotional problems which conflict with safety essential to nursing practice and do not respond to appropriate treatment or counseling within a timeframe that enables meeting program objectives, reasonable period of time.
- (2) demonstrate behavior which conflicts with safety essential to nursing practice.

~~(e) Criteria for progression through a program shall clearly define the level of performance required to pass each course in the curriculum, the level at which failure of the course is determined, and the level of performance in prerequisite courses required for progression to subsequent courses or levels. These criteria shall apply to both theoretical and clinical components of nursing courses.~~

~~(f) Program objectives shall be consistent with components of basic nursing practice as defined for the licensure level.~~

~~(c)(g)~~ Implementation of the The nursing program shall maintain result in no less than an annual 75 percent a three year average at or above 95 percent of the national pass rate for licensure level pass rate on first writing of the licensure examination for the calendar years year ending December 31.

~~(f)(h)~~ Policies The controlling institution shall publish policies for transfer of credits or for admission to advanced placement shall be stated and must provide that: the nursing program shall determine the total number of nursing courses or credits awarded for advanced placement.

- ~~(1)~~ general admission, progression, and graduation requirements of the nursing program shall apply to the applicant; and
- ~~(2)~~ the nursing program shall determine the total number of nursing courses or credits allowed for advancement placement.

Authority G.S. 90-171.23(b)(8); 90-171.38; 90-171.43.

**21 NCAC 36 .0321 CURRICULUM**

~~(a)~~ The Nursing program curriculum shall:

- ~~(1)~~ be planned by nursing program faculty;
- ~~(2)~~ reflect the stated program philosophy, purposes, and objectives pursuant to 21 NCAC 36 .0302(a)(2); objectives; and
- ~~(3)~~ be consistent with the Law and administrative rules Statutes and Rules governing the practice of nursing; nursing.
- ~~(4)~~ define the level of performance required to pass each course in the curriculum;
- ~~(5)~~ enable the student to develop the nursing knowledge, skills and competencies necessary for the level, scope and all applicable Rules as defined in 21 NCAC 36 .0221, .0224, .0225, and .0231 consistent with the level of licensure; and
- ~~(6)~~ include content in the biological, physical, social and behavioral sciences to provide a foundation for safe and effective nursing practice.

~~(b)~~ Didactic content and supervised clinical experience appropriate to program type shall include:

- ~~(1)~~ Using informatics to communicate, manage knowledge, mitigate error and support decision making.
- ~~(2)~~ Employing evidence-based practice to integrate best research with clinical expertise and client values for optimal care, including skills to identify and apply best practices to nursing care by:
  - ~~(A)~~ providing client-centered, culturally competent care;
  - ~~(B)~~ respecting client differences, values, preferences and expressed needs;
  - ~~(C)~~ involving clients in decision-making and care management;
  - ~~(D)~~ coordinating and managing continuous client care consistent with the level of licensure. This includes

demonstration of the ability to supervise others and provide leadership of the profession appropriate for program type; and

~~(E)~~ promoting healthy lifestyles for clients and populations.

~~(3)~~ Working in interdisciplinary teams to cooperate, collaborate, communicate and integrate client care and health promotion.

~~(4)~~ Participating in quality improvement processes to measure client outcomes, identify hazards and errors, and develop changes in processes of client care.

~~(c)~~ Clinical experience shall be comprised of sufficient hours to accomplish the curriculum, shall be supervised by qualified faculty pursuant to 21 NCAC 36 .0318 and shall ensure students' ability to practice at an entry level.

~~(d)~~ All student clinical experiences, including those with preceptors, shall be directed by nursing faculty.

~~(e)~~ By January 1, 2008, a focused client care experience with a minimum of 120 hours shall be provided in the final year of curriculum implementation for programs preparing registered nurses.

~~(f)~~ Beginning January 1, 2008, a focused client care experience with a minimum of 90 hours shall be provided in the final semester of curriculum implementation for programs preparing practical nurses.

~~(g)~~ Learning experiences and methods of instruction, including distance education methods, shall be consistent with the written curriculum plan and demonstrate logical progression.

~~(b)~~ The curriculum shall include, but not necessarily be limited to, instruction in:

- ~~(1)~~ biological, physical, and social science principles;
- ~~(2)~~ components of basic nursing practice as legally defined for the licensure level; and
- ~~(3)~~ utilization of the nursing process in the care of individuals and families throughout the life cycle including the following areas:
  - ~~(A)~~ maternal and child health;
  - ~~(B)~~ common medical and surgical conditions; and
  - ~~(C)~~ aging populations.

Instruction in nursing care in all areas named shall include both theory and clinical learning experiences.

~~(e)~~ The curriculum for a nursing program designed to prepare persons for registered nurse licensure shall also include instruction in the nursing care of persons with mental, emotional, or psychiatric disorders. Instruction shall include both theory and clinical learning experiences.

~~(d)~~ The curriculum for a baccalaureate nursing program shall also include public health nursing. Instruction shall include both theory and clinical learning experiences.

~~(e)~~ The curriculum for a nursing program designed to prepare persons for practical nurse licensure shall include basic mental health principles and therapeutic communication.

~~(f)~~ Learning opportunities shall be planned in logical sequence so that prerequisite knowledge is provided prior to the experience to which that knowledge is basic. Corequisites must

~~be placed concurrently with the experience(s) [course(s)] to which they relate.~~

~~(h)(g)~~ Objectives for each course shall indicate the knowledge and skills expected of the students. These objectives shall be stated to:

- (1) indicate the relationship between the classroom learning and the application of this learning in the clinical laboratory experience;
- (2) serve as criteria for the selection of the types of and settings for learning experiences; and
- (3) serve as the basis for evaluating student performance.

~~(i)(h)~~ Student course syllabi shall ~~include~~include, in addition to the objectives described in Paragraph (g) of this Rule, a description and outline of content, learning environments and activities, course placement, allocation of time, and methods of evaluation of student performance, including clinical evaluation tools.

~~(j)(i)~~ ~~There shall be evidence that each~~ Each course is ~~shall be~~ implemented in accordance with the student course syllabus.

~~(j)~~ ~~Nurse faculty shall demonstrate that they have authority and responsibility for:~~

- ~~(1) teaching and evaluating all classroom and clinical experiences, including precepted experiences;~~
- ~~(2) planning and implementing learning experiences so that objectives for each course are met; and~~
- ~~(3) providing placement and logical sequencing of clinical learning experiences to support application of theory and attainment of knowledge and skills.~~

~~(k)~~ ~~There shall be a written plan for total program evaluation and documentation of ongoing implementation of the plan. The evaluation components shall include administration, faculty, students, curriculum, facilities, and records and reports. The process of evaluation shall include faculty, student, and graduate involvement.~~

~~(k)(4)~~ Requests for approval of changes in, or expansion of, the program accompanied by all required documentation shall be submitted on the form provided by the Board at least 30 days prior to implementation for approval by the Board. Criteria for approval include the availability of classrooms, laboratories, clinical placements, equipment and supplies and faculty sufficient to implement the curriculum to an increased number of students. ~~Board through its designated representatives.~~

Approval is required ~~for:~~ for any

- ~~(1)~~ increase in enrollment which may exceed that exceeds, by more than 10 students, the maximum number approved by the Board. Requests for expansion are considered only for programs with Full Approval status; status that demonstrate at least a three-year average student retention rate equal to or higher than the state average retention rate for program type.
- ~~(2)~~ ~~changes in curriculum related to philosophy, purpose, or focus of the program; and~~
- ~~(3)~~ ~~alternative or additional program schedules.~~

(l) The nursing education program shall notify the Board of:

- (1) alternative or additional program schedules;  
and
- (2) planned decrease in the Board-approved student enrollment number to accurately reflect program capacity.

*Authority G.S. 90-171.20; 90-171.23(b)(8); 90-171.38; 90-171.43(2).*

**21 NCAC 36 .0323 RECORDS AND REPORTS**

(a) The controlling institution's publications describing the nursing program shall be ~~current and accurate~~ accurately describe the nursing program.

(b) There shall be ~~a evidence of an accurate and complete~~ system for maintaining official records. Current and permanent student records shall be stored in a manner that prevents damage and unauthorized use.

(c) Both permanent and current records shall be available for review by ~~Board staff representatives of the Board.~~

(d) The official permanent record for each graduate shall include documentation of graduation from the program and a transcript of the individual's achievement in the program.

(e) The record for each enrolled student shall contain up-to-date and complete information, including:

- (1) documentation of admission criteria met by the student;
- (2) ~~evidence of high school graduation, high school equivalent, or earned credits from an approved post-secondary institution~~ approved pursuant to G.S. 90-171.38(a); and
- (3) transcript of credit hours achieved in the classroom, laboratory, and clinical instruction for each course that reflects progression consistent with program policies.

(f) The nursing program shall file with the Board ~~such~~ records, data, and reports ~~as may be required~~ in order to furnish information concerning operation of the program as prescribed in the rules in this Section including:

- (1) an Annual Report received by the Board by November 1 of each year;
- (2) a Program Description Report for non-accredited programs received by the Board at least 30 days prior to a scheduled review;
- (3) notification by institution administration of any change of the registered nurse responsible for the nursing program. This notification must include a vitae for the new individual and must be submitted within ~~40~~ 20 business days of the effective date of the change; and
- (4) a curriculum vitae for new faculty submitted by the program director within ~~40~~ 20 business days from the time of employment.

(g) All communications relevant to accreditation shall be submitted to the North Carolina Board of Nursing at the same time the communications are submitted to the accrediting body.

~~(h)(g)~~ The Board may require additional records and reports for review at any time to provide evidence and substantiate

compliance with the rules in this Section by a program and its associated agencies.

~~(i)(h) The Application for Licensure by Examination shall be submitted on forms provided by the Board.~~

~~(1) The part of the application for licensure by examination to be submitted by the nursing program shall include a statement verifying satisfactory completion of all requirements for graduation and the date of completion.~~

~~(2) The verification form is to be submitted as soon as possible. The nursing program director shall submit the verification form to the Board within one month following completion of the program.~~

~~(i) When a nursing program closes, the Board shall be notified by the parent institution of the arrangements for storage of permanent records. The storage method shall prevent damage or unauthorized use.~~

*Authority G.S. 90-171.23(b)(8); 90-171.29; 90-171.38.*

**21 NCAC 36 .0324 EXPERIMENTAL APPROACHES**

~~(a) In the interest of promoting innovations in nursing programs, the Board will consider proposals for experimental approaches in nursing education by existing nursing programs with Full Approval status.~~

~~(b) Proposals shall be submitted 60 days prior to the next scheduled Board meeting to allow time for review by the Education Committee for recommendations to the Board. The proposal shall include the following:~~

- ~~(1) description of the experimental approach and rationale;~~
- ~~(2) purposes and objectives; and~~
- ~~(3) strategies for implementation including:
 
  - ~~(A) anticipated date of implementation;~~
  - ~~(B) methodologies;~~
  - ~~(C) course(s) involved;~~
  - ~~(D) resources available;~~
  - ~~(E) numbers of students and faculty members involved;~~~~

~~(F) responsibilities and activities of the faculty members;~~

~~(G) responsibilities and activities of the students;~~

~~(H) relationship to existing curriculum;~~

~~(I) effect on admission and progression of students; and~~

~~(J) proposed length.~~

- ~~(4) strategies for evaluation of the experimental approach including:
 
  - ~~(A) evaluation process to be used;~~
  - ~~(B) anticipated outcome(s); and~~
  - ~~(C) implications of the outcome(s).~~~~

~~(c) Program representatives will be notified of the time and date that the Education Committee and the Board will consider the proposal. Program representatives shall attend these meetings.~~

~~(d) When approved by the Board, experimental approaches are to be implemented for one time only.~~

~~(e) When a nursing program utilizes an experimental approach, the program shall have sole responsibility for determining the criteria for student participation. Students must be informed that they will be participating in an experimental approach.~~

~~(f) Nurse faculty members have the final responsibility for evaluation of the outcomes. The program director may be required to submit periodic evaluation reports. A report of outcomes resulting from the experimental experience must be submitted within 90 days of its completion.~~

~~(g) If, at any time during the implementation of the approach, the nursing program faculty members become aware that student learning or patient care is being jeopardized, they shall immediately take corrective action. The program director shall notify the Board.~~

~~(h) Request from the program for the experimental approach to become a permanent part of the program must be submitted 30 days prior to a regularly scheduled Board meeting. No request will be considered until the final evaluation of the project has been completed and submitted.~~

*Authority G.S. 90-171.23(b)(8); 90-171.38.*

## **TEMPORARY RULES**

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**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 270<sup>th</sup> day from publication in the Register unless the agency submits the permanent rule to the Rules Review Commission by the 270<sup>th</sup> 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.*

### **EXPIRED TEMPORARY RULES**

The following temporary rule has expired and has been removed from the NC Administrative Code. The date shown to the right of the rule citation is the original effective date and the date the rule expired.

<u>Rule Citation</u>	<u>Effective Date</u>	<u>Expiration Date</u>
DENR/Marine Fisheries Commission 15A NCAC 03M .0503 FLOUNDER	September 1, 2004	June 12, 2005

**RULES REVIEW COMMISSION**

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*This Section contains information for the meeting of the Rules Review Commission on Thursday July 21, 2005, 10:00 a.m. at 1307 Glenwood Avenue, Assembly Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments by Monday, July 18, 2005 to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-733-2721. Anyone wishing to address the Commission should notify the RRC staff and the agency at least 24 hours prior to the meeting.*

**RULES REVIEW COMMISSION MEMBERS**

**Appointed by Senate**

Jim R. Funderburke - 1st Vice Chair  
David Twiddy - 2nd Vice Chair  
Thomas Hilliard, III  
Robert Saunders  
Jeffrey P. Gray

**Appointed by House**

Jennie J. Hayman - Chairman  
Graham Bell  
Lee Settle  
Dana E. Simpson  
Dr. John Tart

**RULES REVIEW COMMISSION MEETING DATES**

July 21, 2005  
August 18, 2005                      September 15, 2005  
October 20, 2005                      November 17, 2005  
December 15, 2005

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**LIST OF APPROVED PERMANENT RULES**

**June 16, 2005 Meeting**

**AGRICULTURE, BOARD OF**

Standards for Shell Eggs	02	NCAC	43H	.0103
Uniform Rules and Methods Tuberculosis	02	NCAC	52A	.0101
Poultry Requirements	02	NCAC	52A	.0102
Uniform Methods and Rules Brucellosis	02	NCAC	52A	.0103
Pseudorabies Program	02	NCAC	52A	.0111
Uniform Methods and Rules Scrapie	02	NCAC	52A	.0112
National Poultry Improvement Plan	02	NCAC	52B	.0601
Certain Standards Adopted Exceptions	02	NCAC	52D	.0101

**CEMETERY COMMISSION**

Cemetery License Fee	04	NCAC	05A	.0107
Application and Filing Fee	04	NCAC	05C	.0101
Change of Control	04	NCAC	05C	.0103
Meeting Requirement	04	NCAC	05C	.0105
License	04	NCAC	05C	.0202
Application and Filing Fee	04	NCAC	05C	.0301

**STATE BUDGET AND MANAGEMENT, OFFICE OF**

Purpose	09	NCAC	03M	.0101
Definitions	09	NCAC	03M	.0102
Allowable Use of State Funds	09	NCAC	03M	.0202
Grantee Responsibilities	09	NCAC	03M	.0203

Subgrantee Responsibilities	09	NCAC	03M	.0204
Office of the State Controller Responsibilities	09	NCAC	03M	.0301
Agency Responsibilities	09	NCAC	03M	.0401
Office of the State Auditor Responsibilities	09	NCAC	03M	.0501
Office of State Budget and Management Responsibilities	09	NCAC	03M	.0601
Grant Documentation	09	NCAC	03M	.0701
Subordination of Other Contracts Agreements	09	NCAC	03M	.0702
Required Contract Provisions	09	NCAC	03M	.0703
Grant Monitoring and Evaluation	09	NCAC	03M	.0704
Noncompliance with Rules	09	NCAC	03M	.0801
Recovery of State Funds	09	NCAC	03M	.0802

**CHILD CARE COMMISSION**

Scope	10A	NCAC	09	.2601
Definitions	10A	NCAC	09	.2602
Special Provisions for Licensure	10A	NCAC	09	.2603
Operational Policies	10A	NCAC	09	.2604
Staff/Child Ratios	10A	NCAC	09	.2605
Space Requirements	10A	NCAC	09	.2606
Staff Qualifications	10A	NCAC	09	.2607
Nutrition Requirements	10A	NCAC	09	.2609
Transportation	10A	NCAC	09	.2610

**MANUFACTURED HOUSING BOARD**

Complaint Handling and Inspection Procedure	11	NCAC	08	.0910
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**ALARM SYSTEMS LICENSING BOARD**

Company Business License	12	NCAC	11	.0209
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**LOCKSMITH LICENSING BOARD**

Due Date	21	NCAC	29	.0702
Reinstatement of Expired License	21	NCAC	29	.0703

**PHARMACY, BOARD OF**

Prerequisites for Disease State Management Examination	21	NCAC	46	.1508
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**APPRAISAL BOARD**

Qualifications for Trainee Registration	21	NCAC	57A	.0201
Fitness for Registration Licensure or Certification	21	NCAC	57A	.0202
Expired Registration License or Certificate	21	NCAC	57A	.0206
Temporary Practice	21	NCAC	57A	.0210
Time and Place	21	NCAC	57A	.0301
Re-examination	21	NCAC	57A	.0303
Use of Titles	21	NCAC	57A	.0401
Advertising	21	NCAC	57A	.0403

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**RULES REVIEW COMMISSION**

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Business Practices	21	NCAC 57A	.0406
Supervision of Trainees	21	NCAC 57A	.0407
Appraisal Standards	21	NCAC 57A	.0501
Registered Trainee and Licensed Residential Real Estate A...	21	NCAC 57B	.0101
Certificate of Course Completion	21	NCAC 57B	.0209
Course Records	21	NCAC 57B	.0210
Course Content	21	NCAC 57B	.0302
Course Completion Standards	21	NCAC 57B	.0303
Course Scheduling	21	NCAC 57B	.0304
Instructor Requirements	21	NCAC 57B	.0306
Criteria for Course Approval	21	NCAC 57B	.0603
Prelicensing and Precertification Courses	21	NCAC 57B	.0604
Course Operational Requirements	21	NCAC 57B	.0606
Sponsor Reporting of Continuing Education Credit	21	NCAC 57B	.0608

**RESPIRATORY CARE BOARD**

Continuing Duty to Report	21	NCAC 61	.0308
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**STATE PERSONNEL COMMISSION**

Mentoring Program Participation	25	NCAC 01K	.0804
Funding for Mentoring Program	25	NCAC 01K	.0805

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**AGENDA**  
**RULES REVIEW COMMISSION**  
**July 21, 2005, 10:00 A.M.**

- I. Call to Order and Opening Remarks
- II. Review of minutes of last meeting
- III. Follow-Up Matters
  - A. Cemetery Commission – 4 NCAC 5C .0201 (Bryan)
  - B. Office of State Budget and Management – 9 NCAC 3M .0205 (Bryan)
  - C. Child Care Commission – 10A NCAC 9 .2608 (Bryan)
  - D. Commission of Mental Health – 10A NCAC 27G .1301; .1701-.1708; .1901-.1904 (DeLuca)
  - E. Appraisal Board – 21 NCAC 57A .0204 (DeLuca)
- IV. Review of Rules (Log Report #223)
- V. Review of Temporary Rules
  - DENR - 15A NCAC 1C .0412 Temporary Rule Objection 6/16 (Bryan)
- VI. Commission Business
- VII. Next meeting: August 18, 2005



**COMMISSION REVIEW/PERMANENT RULES**

*Log of Filings*

*May 21, 2005 through June 20, 2005*

\* Approval Recommended, \*\* Objection Recommended, \*\*\* Other

**HEALTH SERVICES, COMMISSION FOR**

The rules in Chapter 41 are Health and Epidemiology rules adopted by the Commission for Health Services. The rules in Subchapter 41A concern communicable disease control including rules about reporting (.0100); control measures (.0200 and .0300); immunizations (.0400); purchase and distribution of vaccine (.0500); special program and project funding (.0600); licensed nursing home services (.0700); grants and contracts (.0800); and the biological agent registry (.0900).

Method of Reporting	10A NCAC 41A .0102
Amend/*	

**SOCIAL SERVICES COMMISSION**

The rules in Chapter 71 are from the Social Services Commission and cover adult and family support. The rules in Subchapter 71S cover service cost sharing including purpose (.0100); and service cost sharing requirements (.0200).

Purpose of Consumer Contributions	10A NCAC 71S .0101
Amend/**	
Services Subject to Consumer Contributions	10A NCAC 71S .0201
Amend/**	
Initial and Annual Reviews	10A NCAC 71S .0202
Amend/**	
Annual Review	10A NCAC 71S .0203
Repeal/*	
Service Cost Sharing Form	10A NCAC 71S .0205
Repeal/*	
Service Cost Sharing Schedule	10A NCAC 71S .0206
Repeal/*	
Collection of Cost Contributions Revenue	10A NCAC 71S .0207
Amend/*	
Termination	10A NCAC 71S .0208
Amend/*	

**INSURANCE, DEPARTMENT OF**

The rules in Chapter 12 cover life and health insurance including general provisions applicable to all rules and all life and health insurance policies (.0100 - .0300); general life insurance provisions (.0400); general accident and health insurance provisions (.0500); replacement of insurance (.0600); credit insurance (.0700); medicare supplement insurance (.0800); long-term care insurance (.1000); mortgage insurance consolidations (.1100); accelerated benefits (.1200); small employer group health coverage (.1300); HMO and point-of-service coverage (.1400); uniform claim forms (.1500); retained asset accounts (.1600); viatical settlements (.1700); and preferred provider plan product limitations (.1800).

Purpose and Definitions	11 NCAC 12 .0815
Repeal/*	
Applicability and Scope	11 NCAC 12 .0816
Repeal/*	
Policy Definitions and Terms	11 NCAC 12 .0818
Repeal/*	
Policy Provisions	11 NCAC 12 .0819

Repeal/*				
Minimum Benefit Standards Before January 1, 1992	11	NCAC	12	.0820
Repeal/*				
Standards for Claims Payment	11	NCAC	12	.0821
Repeal/*				
Loss Ratio Standards and Refund or Credit of Premium	11	NCAC	12	.0822
Repeal/*				
Required Disclosure Provisions	11	NCAC	12	.0824
Repeal/*				
Requirements for Application Forms and Replacement Coverage	11	NCAC	12	.0825
Repeal/*				
Filing Requirements for Advertising	11	NCAC	12	.0826
Repeal/*				
Standards for Marketing	11	NCAC	12	.0827
Repeal/*				
Appropriateness of Recommended Purchase/Excessive Insurance	11	NCAC	12	.0828
Repeal/*				
Reporting of Multiple Policies	11	NCAC	12	.0829
Repeal/*				
Prohibitions in Replacement Policies or Certificates	11	NCAC	12	.0830
Repeal/*				
Permitted Compensation Arrangements	11	NCAC	12	.0834
Repeal/*				
Minimum Benefit Standards on or After January 1, 1992	11	NCAC	12	.0835
Repeal/*				
Standard Medicare Supplement Benefit Plans	11	NCAC	12	.0836
Repeal/*				
Open Enrollment	11	NCAC	12	.0837
Repeal/*				
Filing and Approval of Policies/Certificates and Premium ...	11	NCAC	12	.0838
Repeal/*				
Medicare Select Policies and Certificates	11	NCAC	12	.0839
Repeal/*				
High Deductible Plans	11	NCAC	12	.0840
Repeal/*				
Creditable Coverage	11	NCAC	12	.0841
Repeal/*				
Guaranteed Issue for Eligible Persons	11	NCAC	12	.0842
Repeal/*				
NAIC Medicare Supplement Insurance Minimum Standards Mode...	11	NCAC	12	.0843
Adopt/*				

The rules in Chapter 16 are from the Actuarial Division and relate to fire and casualty statistical data (.0100); individual accident and health insurance (.0200); credit life accident and health rate deviation (.0400); credit unemployment minimum loss ratio standard (.0500); health maintenance organization filings and standards (.0600); health maintenance organization claim reserve data requirements (.0700).

Data Requirements for Rate Revision Submission	11	NCAC	16	.0205
Amend/*				

**CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION**

The rules in Chapter 9 are from the Criminal Justice Education and Training Standards Commission. This Commission has primary responsibility for setting statewide education, training, employment, and retention standards for criminal justice personnel (not including sheriffs). The rules in Subchapter 9B cover minimum standards for: employment (.0100); schools and training programs (.0200); criminal justice instructors (.0300); completion of training (.0400); school directors (.0500); and certification of post-secondary criminal justice education programs (.0600).

Training Course Enrollment Amend/*	12	NCAC	09B	.0204
Criminal Justice Instructor Training Amend/*	12	NCAC	09B	.0209

The rules in Subchapter 9F cover concealed handgun training program.

Instructor Qualifications Amend/**	12	NCAC	09F	.0104
Sanctions Amend/**	12	NCAC	09F	.0106

**SOIL AND WATER CONSERVATION COMMISSION**

The rules in Chapter 6 are from the Soil and Water Conservation Commission and are intended to further the state policy of conserving soil resources and preventing soil erosion and floodwater and sediment damages to the farms, forests, and grazing land assets of the state. They cover the organization and operation of the Commission (6A); operation of district programs (6B); the small watershed program (6C) including loans (.0100), applications (.0200), plans (.0300) and grants (.0400); the agriculture cost share program for nonpoint source pollution controls (6E); animal waste management systems non-discharge rules (6F); conservation reserve enhancement program (CREP)(6G); and approval of technical specialists and BMPs for water quality protection (6H).

Allocation Guidelines and Procedures Amend/**	15A	NCAC	06E	.0103
Technical Assistance Funds Amend/*	15A	NCAC	06E	.0106

**REVENUE, DEPARTMENT OF**

The rules in Chapter 5 are the rules dealing with the corporate income tax and franchise tax. The rules in Subchapter 5C are corporate income tax rules and include corporations subject to the tax (.0100); computation of income (.0300); interest income on government obligations (.0400); allocation of income taxable in another state (.0600); apportionable and nonapportionable income (.0700); property factor (.0800); payroll factor (.0900); sales factor (.1000); amortization of bond premiums (.1400); net economic loans carry over (.1500); partnerships and the corporate partner (.1700); extension of time for filing return (.2000); dissolutions and withdrawals (.2100); and domestic international sales corporation (.2400).

Attribution/Expenses/Nontaxable Income Amend/*	17	NCAC	05C	.0304
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**LANDSCAPE ARCHITECTS, BOARD OF**

The rules in Chapter 26 are from the N. C. Board of Landscape Architects and include statutory and administrative provisions (.0100); practice of registered landscape architects (.0200); examination and licensing procedures (.0300); rules, petitions and hearings (.0400); and board disciplinary procedures (.0500).

Unprofessional Conduct Amend/*	21	NCAC	26	.0209
Dishonest Practice Amend/*	21	NCAC	26	.0210

Incompetence Amend/**	21	NCAC	26	.0211
Reinstatement After Revocation Amend/**	21	NCAC	26	.0306
Disciplinary Review Adopt/**	21	NCAC	26	.0510

**NURSING, BOARD OF**

The rules in Chapter 36 are the rules of the Board of Nursing including rules relating to general provisions (.0100); licensure (.0200); approval of nursing programs (.0300); unlicensed personnel and nurses aides (.0400); professional corporations (.0500); articles of organization (.0600); implementation of Nurse Licensure Compact Act (.0700); and approval and practice parameters for nurse practitioners (.0800).

Definitions Amend/*	21	NCAC	36	.0120
Clinical Nurse specialist Practice Amend/**	21	NCAC	36	.0228
Listing and Renewal Amend/*	21	NCAC	36	.0404

## 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 <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>
<b><u>AUCTIONEERS LICENSING BOARD</u></b>				
Robert H. Rankin, Jr., NCAL #6727 v. Auctioneers Licensing Board	04 CFA 1497	Mann	05/13/05	
<b><u>HEALTH AND HUMAN SERVICES</u></b>				
Otis D. Wyche, Jr., v. DHHS, Div. of Facility Services	04 DHR 0294	Chess	05/16/05	
Jamie Lynn Hensley v. DHHS, Div. of Facility Services	04 DHR 0917	Wade	05/16/05	
Wake Forest University Health Sciences (Lessor) and Huntersville Dialysis Center of Wake Forest University d/b/a Huntersville Dialysis Center (Lessee) v. DHHS, Div. of Facility Services, CON Section and Bio-Medical Applications of NC, Inc. and Total Renal Care of North Carolina, LLC	04 DHR 1406	Conner	05/18/05	
Dawn Allison v. Div. of Medical Assistance	04 DHR 1444	Mann	05/27/05	
Joseph Plachcinski v. DHHS	04 DHR 2019	Elkins	06/14/05	20:01 NCR 27
Tara Sue Clark-Grubb v. Guilford County Dept. of Social Services, Laura Blackwell, Tonya Dupree Freeman, Stacy Taylor-Greene	05 DHR 0243	Conner	06/10/05	
Belinda Darnell Hawkins v. DHHS, Div of Facility Services	05 DHR 0265	Elkins	06/09/05	
Tammy Trejo v. OAH	05 DHR 0452	Gray	06/15/05	
D'Jetta D Miley for Jordana Correa v. Wake Co. Dept. of Human Services	05 DHR 0570	Lassiter	06/02/05	
William Henry Lane v. DHHS, Div. of Medical Assistance	05 DHR 0571	Chess	05/31/05	
A list of Child Support Decisions may be obtained by accessing the OAH Website: <a href="http://www.ncoah.com/decisions">www.ncoah.com/decisions</a> .				
<b><u>DEPARTMENT OF JUSTICE</u></b>				
David Upchurch v. Criminal Justice Education and Training Stds. Comm.	04 DOJ 1157	Lassiter	05/13/05	
Amanda Gayle Talbert v. Criminal Justice Educ. and Training Stds. Comm.	05 DOJ 0648	Lassiter	06/15/05	
<b><u>ENVIRONMENT AND NATURAL RESOURCES</u></b>				
Robert L. Grissett v. DENR	04 EHR 1237	Chess	05/16/05	
Matthew and Kathy Johnson v. DENR	04 EHR 2163	Conner	06/01/05	
Affordable Appliance, Jack Steale v. DENR	04 EHR 2164	Conner	05/31/05	
<b><u>OFFICE OF STATE PERSONNEL</u></b>				
Eddie Ray Creech v. DOC	03 OSP 0831	Wade	05/17/05	
Thomas A Horton v. Dept. of Crime Control and Public Safety	05 OSP 0389	Lassiter	06/02/05	
Derek H. Babson v. DOT	05 OSP 0515	Chess	05/31/05	
Milton W. Nobles v. DHHS/Dorothea Dix Hospital	05 OSP 0815	Gray	06/15/05	
<b><u>SECRETARY OF STATE</u></b>				
Janice W. Craver v. Dept. of the SOS	05 SOS 0286	Conner	06/06/05	

**CONTESTED CASE DECISIONS**

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**UNC HOSPITALS**

Amanda Mathis Miller v. UNC Hospitals  
Darian C. Jones Ph.D v. UNC Hospitals  
Tereasa King v. UNC Hospitals

05 UNC 0247  
05 UNC 0315  
05 UNC 0376

Lassiter  
Lassiter  
Lassiter

06/02/05  
06/02/05  
06/02/05

STATE OF NORTH CAROLINA  
COUNTY OF DURHAM

IN THE OFFICE  
OF ADMINISTRATIVE HEARINGS  
04 DHR 2019

JOSEPH PLACHCINSKI, )  
Petitioner, )  
 )  
v. )  
 )  
NORTH CAROLINA DEPARTMENT of )  
HEALTH and HUMAN SERVICES, )  
Respondent. )

**DECISION**

**THIS MATTER** came on for hearing before the undersigned Administrative Law Judge, Augustus B. Elkins II, on April 19, 2005 in Raleigh, North Carolina, and on May 16 and 17, 2005 in Durham, North Carolina.

**APPEARANCES**

**For Petitioner:** Douglas Sea  
Legal Services of Southern Piedmont  
1431 Elizabeth Avenue  
Charlotte, North Carolina 28204

Susan H. Pollitt  
Carolina Legal Assistance  
Post Office Box 2446  
Raleigh, North Carolina 27602

**For Respondent:** Belinda A. Smith  
Assistant Attorney General  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, North Carolina 27699-9001

**ISSUE**

Whether Petitioner’s condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons such that he qualifies for ICF/MR level of care within the meaning of federal law and regulations.

**EXHIBITS**

Petitioner’s exhibits 1 through 31, and 34 through 42, and 44 through 47 were admitted.

Respondent’s exhibits 1 and 3 were admitted.

**WITNESSES**

**For the Petitioner:**

- a. Dr. Carlos Sotolongo, M.D., Petitioner’s personal physician, who was qualified as an expert in the fields of medicine and developmental disabilities;

- b. Dr. Barbara Walter, Ph.D., M.P. II, Assistant Clinical Professor of Medical Psychology, Department of Psychiatry and Behavioral Sciences, Duke University Medical Center, Petitioner's treating Psychologist, who was qualified as an expert in the fields of psychology, psychological testing and evaluation, developmental disabilities, and in the evaluation of CAP-DD/ICF-MR criteria;
- c. David J. Wysocki, MS, OTR/L, ATP who was qualified as an expert in the fields of occupational therapy, developmental disabilities and multidisciplinary treatment planning for persons with developmental disabilities;
- d. Martha Simpson, MSW, a medical social worker at Durham County Health Department who is Petitioner's CAP-DA case manager and who was qualified as an expert in the CAP-DA program and social work (testified by telephone);
- e. Joseph Plachcinski, the Petitioner;
- f. Denise Plachcinski, the Petitioner's mother;
- g. Kaye Crossland, Team Manager for the ARC of North Carolina and a CAP-MR/DD Case Manager, who was qualified as an expert in the CAP-MR/DD program.

**For the Respondent:**

- a. Dr. David Goff, M.D., a consultant with the N.C. Medicaid Program, qualified as an expert in pediatrics and internal medicine;
- b. Dr. Sarah Morrow, M.D., the Medical Director for Electronic Data Systems (EDS), who was qualified as an expert in the fields of pediatrics and making level of care decisions for the ICF-MR (testified by telephone);
- c. Marilyn Southard, employed by the N.C. Division of Medical Assistance, who was qualified as an expert in ICF-MR level of care as it relates to mentally retarded persons and those with related conditions, the federal requirements for ICF facilities, and special education with an emphasis in diagnosing learning disabilities.

**APPLICABLE LAW AND AUTHORITY**

42 U.S.C. § 1396  
42 C.F.R. § 435.1009  
42 C.F.R. § 440.150  
42 C.F.R. § 483.440  
42 C.F.R. § 441.301  
10 N.C.A.C. § 27G .2101

42 U.S.C. § 1396n(c)(1) provides as follows:

The Secretary may by waiver provide that a State plan approved under this title [42 USCS §§ 1396 et seq.] may include as "medical assistance" under such plan payment for part or all of the cost of home or community-based services (other than room and board) approved by the Secretary which are provided pursuant to a written plan of care to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan. For purposes of this subsection, the term "room and board" shall not include an amount established under a method determined by the State to reflect the portion of costs of rent and food attributable to an unrelated personal care giver who is residing in the same household with an individual who, but for the assistance of such care giver, would require admission to a hospital, nursing facility, or intermediate care facility for the mentally retarded.

42 C.F.R. § 441.301 requires a request for a waiver to provide, *inter alia*, that the services are furnished "only to recipients who the agency determines would, in the absence of these services, require the Medicaid covered level of care provided in . . . an ICF/MR (as defined in 440.150)."

In order for an intermediate care facility for the mentally retarded to qualify for federal financial participation (FFP) to receive Medicaid dollars, it must provide active treatment services for each client. 42 C.F.R. § 435.1009. Active treatment in intermediate care facilities is defined for purposes of FFP as



treatment that meets the requirements specified in the standard concerning active treatment for intermediate care facilities for persons with mental retardation under 42 C.F.R. § 483.440(a).

42 C.F.R. § 435.1009 (2005).

Active treatment is defined as follows:

Each client must receive a continuous active treatment program, which includes aggressive, consistent implementation of a program of specialized and generic training, treatment, health services and related services described in this subpart, that is directed toward--

- (i) The acquisition of the behaviors necessary for the client to function with as much self determination and independence as possible; and
- (ii) The prevention or deceleration of regression or loss of current optimal functional status.

42 C.F.R. 483.440(a) (2005).

Clients who are admitted by the facility must be in need of and receiving active treatment services. 42 C.F.R. 483.440(b)(1) (2005). A person without mental retardation must meet the definition of persons with related conditions in order to be eligible for the ICF/MR level of care.

Persons with related conditions mean individuals who have a severe, chronic disability that meets all of the following conditions:

- (a) It is attributable to –
  - (1) Cerebral palsy or epilepsy; or
  - (2) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.
- (b) It is manifested before the person reaches age 22.
- (c) It is likely to continue indefinitely.
- (d) It results in substantial functional limitations in three or more of the following areas of major life activity:
  - (1) Self-care.
  - (2) Understanding and use of language.
  - (3) Learning.
  - (4) Mobility.
  - (5) Self-direction.
  - (6) Capacity for independent living.

42 C.F.R. § 435.1009 (2005).

42 C.F.R. § 435.1009 also defines the phrase “in an institution.” This phrase “refers to an individual who is admitted to live there and receive treatment or services provided there that are appropriate to his requirements.”

**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 make 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 judgment of credibility, including but not limited to the demeanor of the witnesses, any interests, bias, or prejudice a witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witnesses testified, whether the testimony of the witness is reasonable, whether the testimony is consistent with all other believable evidence in the case, and the qualifications of the witness as an expert.

**FINDINGS OF FACT**

1. Petitioner Joseph Plachcinski is a 20-year-old man who resides in his home in Durham, North Carolina with his mother and father, Denise and Henry Plachcinski. At age two, Petitioner was diagnosed with severe dyspraxia, a neuromuscular dysfunction affecting speech, integration of reflexes, motor planning, and execution. (Pet. Exhs. 10, 16.) At age three, Petitioner was

diagnosed with Duchenne's muscular dystrophy, a disease causing progressive muscle degeneration. Duchenne's muscular dystrophy is generally viewed in the medical community as a developmental disability. (Testimony of Dr. Sotolongo, Dr. Walter, Mr. Wysocki; Pet. Exhs. 10, 16) Dyspraxia is a developmental disability. (Testimony of Dr. Walter, Dr. Sotolongo)

2. Petitioner's primary diagnosis is Duchenne muscular dystrophy (DMD). DMD is a general wasting of the proximal muscles. It is progressive and the intellectual function in Petitioner's case is not affected. Petitioner is on a ventilator, has a tracheotomy, and is paralyzed with the exception of some movement in his hands and neck muscles. Petitioner still has a valid diagnosis of severe dyspraxia. (Testimony of Dr. Sotolongo, Dr. Walter; Pet. Exhs. 1 (¶ 1), 13, 14, 16, 17)
3. Petitioner is unable to stand or walk and is confined to a wheelchair. Petitioner has significant motor coordination and control deficits. Petitioner cannot brush his teeth, fix meals, dress himself, or open a door. Petitioner has some fine motor ability and can operate his electric chair after positioning. (Testimony of Dr. Sotolongo, Mr. Wysocki, Denise Plachcinski, Pet. Exhs. 1 (¶2), 16, 21, 36.) While Petitioner's family has a Hoyer lift, it requires adjustments to be safely used, and Petitioner does not use the lift at this time. Petitioner's father, Henry Plachcinski, does all the lifting of Petitioner, from bed to chair, and for bathroom and shower needs. (Testimony of Dr. Sotolongo, Mr. Wysocki; Pet. Exhs. 19, 22, 36)
4. Petitioner is almost totally dependent upon others for his self care. (Testimony of Denise Plachcinski) Total personal care assistance is required for Petitioner's bathing, dressing and toileting needs. Petitioner requires protective/supportive devices including but not limited to a wheelchair, ventilator, glasses, adaptive clothing, adaptive eating utensils, lap trays, tracheal suction machine, and oxygen concentrator. (Testimony of Dr. Sotolongo, Mr. Wysocki, Denise Plachcinski; Pet. Exhs. 1 (¶3), 16, 19, 20, 21, 22, 36) At the present time, Petitioner needs twenty-four hour per day supervision and care. (Testimony of Dr. Sotolongo, Mr. Wysocki; Pet. Exhs. 16, 40, 41)
5. As a young man, Petitioner had difficulty with articulation, formulating ideas and expressing himself, planning responses, and learning. The diagnoses of dyspraxia and sensory integration continue to affect Petitioner's articulation, his execution and sequencing of motor events, his organization of thoughts, and acceptance of changes in his environment. (Testimony of Dr. Sotolongo, Dr. Walter, Mr. Wysocki; Pet. Exh. 13, 16, 24)
6. Petitioner is a high school graduate who graduated on time with his class. His cognitive function is normal. He is "intelligent, thoughtful, and very interested in history, politics, religion, and current events." (Pet. Ex. 13) He generally understands how things are done, but cannot do them himself. (Testimony of Petitioner, Denise Plachcinski, Dr. Sotolongo, Dr. Walter)
7. According to Petitioner's treating physician, Dr. Sotolongo, the treatments for dyspraxia are occupational therapy and speech therapy. There is a large anxiety component in Petitioner's disability, and the treatment for that is psychotherapy. (Testimony of Dr. Sotolongo, Dr. Walter)
8. On or about March 4, 2004, Petitioner applied for services under the federally-approved Medicaid Waiver in North Carolina, known as the Community Alternative Program for persons with Mental Retardation or Developmental Disabilities (CAP-MR/DD). (Pet. Exh. 39) The purpose of this waiver program is to provide home and community based services to individuals who, but for the provision of such services, would require the level of care in an intermediate care facility for the mentally retarded (ICF-MR). (Testimony of Ms. Crossland, Ms. Southard; Pet. Exhs. 8, 9)
9. To receive CAP-MR/DD services, Petitioner was required to obtain prior approval of his medical need for the ICF-MR level of care. On June 25, 2004, Petitioner, through his treating physician Dr. Sotolongo, requested prior approval of the ICF-MR level of care. (Pet. Exhs. 1, 11; Pet. Exh. 26) Dr. Sotolongo signed the MR2 recommending ICF-MR level of care for Petitioner.
10. On August 12, 2004, Respondent, through its agent Electronic Data Systems (EDS), denied Petitioner's request for prior approval of medical need for services at the ICF-MR level of care. (Pet. Exh. 42; 1 (¶ 12)) Petitioner timely requested an informal appeal to review the August 12, 2004 decision. (Pet. Exh. 1(¶ 13)) On September 15, 2004, Respondent issued a decision upholding the August 12, 2004 EDS denial. (Pet. Exh. 1(¶ 14).)
11. On November 9, 2004, Petitioner timely and properly filed and served upon Respondent a Petition for a Contested Case Hearing to appeal the September 15, 2004 decision of the Respondent.
12. To be eligible for certification at the ICF/MR level of care, federal Medicaid regulations require, in pertinent part, that the individual must have a severe chronic disability that meets all of the following conditions:

(a) It is attributable to:

- (1) Cerebral palsy or epilepsy; or
- (2) Any other condition, other than mental illness, found to be closely related to mental retardation because this condition results in impairment of general intellectual function or adaptive behavior similar to that of mentally retarded persons, and requires treatment or services similar to those required for these persons.

- (b) It is manifested before the person reaches age 22.
- (c) It is likely to continue indefinitely.
- (d) It results in substantial functional limitations in three or more of the following areas of major life activity:
  - (1) Self-care.
  - (2) Understanding and use of language.
  - (3) Learning.
  - (4) Mobility.
  - (5) Self-direction.
  - (6) Capacity for independent living.

(Pet. Exh. 2, 42 CFR 435.1009.)

- 13. Active treatment, as provided at the ICF-MR level of care, is defined in federal Medicaid regulations as a continuous program which includes aggressive, consistent implementation of specialized and generic training, treatment, health services and related services that are directed toward the acquisition of behaviors necessary for the client to function with as much self determination and independence as possible and the prevention and deceleration of regression or loss of current optimal functional status. (Pet. Exh. 3, 42 C.F.R. 483.440(a))
- 14. Petitioner has normal intelligence. His success at high school was possible due in part to special care, training and treatment provided by many qualified clinicians, aides, special education staff, and his parents during his school years. (Testimony of Dr. Goff, Dr. Walter, Denise Plachcinski; Pet. Exhs. 10, 11, 13, 24, 25, 38)
- 15. Since preschool, Petitioner received an array of services because of the difficulty he has had in many areas of adaptive functioning. Through Petitioner's Individual Educational Plans, he received speech therapy, physical therapy, occupational therapy, assistive technology, modified assignments and tests, a 1:1 aide during school, and the opportunity to practice skills he was developing in the areas of speech, mobility, socialization, self-direction, and capacity for independent living. Petitioner's ability to successfully graduate high school was at least partially the result of a coordinated plan of active treatment. (Testimony of Dr. Walter, Denise Plachcinski; Pet. Exh. 10, 11, 13)
- 16. Dr. Sotolongo is Petitioner's current primary care treating physician. His practice, Triangle Family Practice, treats a large number of group home patients in Durham, North Carolina. He has experience treating persons with developmental disabilities and currently has 15 to 20 patients with developmental disabilities, more than 15 of which have mental retardation. He currently has two to four patients with dyspraxia. He reviewed written information about the Petitioner, his diagnoses, and ICF-MR criteria before he testified. Dr. Sotolongo was qualified as an expert in developmental disabilities and medicine. (Testimony of Dr. Sotolongo; Pet. Exhs. 15, 16.)
- 17. Dr. Sotolongo testified that there is overlap in the functional effects of Petitioner's dyspraxia and his Duchenne's muscular dystrophy. Dr. Sotolongo testified that Petitioner's condition is related to mental retardation because it results in deficits in adaptive behavior similar in presentation and extent to that of individuals with mental retardation. It was Dr. Sotolongo's opinion that Petitioner needs active treatment similar to the services needed by persons with mental retardation. When asked if he would admit Petitioner to an ICF/MR, Dr. Sotolongo stated that he did not know; he would have to defer to the treatment team. As a treating physician who is very familiar with Petitioner and his medical records and history, and as an expert in developmental disabilities, Dr. Sotolongo's opinions on these issues are being given appropriate weight by this fact finder. (Testimony of Dr. Sotolongo; Pet. Exhs. 15, 16, 17)
- 18. Dr. Walter has been Petitioner's treating Psychologist intermittently since 1993 and consistently since 2001. She has treated Petitioner on 75 to 80 occasions in total. Her most recent treatment of Petitioner was two weeks before she testified. She also reviewed written information about Petitioner, his diagnoses, and ICF-MR criteria before she testified and was accepted as an expert in psychology, psychological testing and evaluations, developmental disabilities, and in the evaluation of CAP-MR/DD criteria. (Testimony of Dr. Walter, Pet. Exh. 13)
- 19. Dr. Walter has an extensive background of work with the mentally retarded and developmentally disabled. Respondent's expert witnesses acknowledged Dr. Walter's expertise in her field. Dr. Walter has specialized academic training in the area of developmental disabilities, worked at Lennox Baker Children's Hospital and other facilities as part of multidisciplinary teams for

developmental disabilities, and has worked with over 400 developmentally delayed persons, a third of whom had mental retardation. (Testimony of Dr. Walter, Pet. Exhs. 12, 13)

20. In her testimony, Dr. Walter described a regression in Petitioner's adaptive skills since his graduation from high school in 2003. It was her testimony that this regression is a result of the lack of a program of active treatment, which needs to include coordinated intervention on a daily basis and opportunities for Petitioner to practice adaptive skills for daily living. Dr. Walter opined that an active treatment program would permit Petitioner to regain some of the skills he has lost and to make further progress. This testimony is found to be consistent with the other evidence of record. (Testimony of Dr. Walter; Pet. Exhs. 13, 14)
21. Dr. Walter has been professionally trained in the administration and interpretation of the Vineland Adaptive Behavior Scales ("Vineland") and has administered that test over one hundred times. (Testimony of Dr. Walter) The Vineland is considered in the medical community to be a standard measure of adaptive behavior. Dr. Walter, Mr. Wysocki, and Respondent's experts Marilyn Southard and Dr. Morrow all agreed that motor function is part of adaptive behavior and that the Vineland properly includes motor function in measuring adaptive behavior. Dr. Walter testified that, based on her professional experience and her clinical experience treating the Petitioner, these Vineland scores are valid and an accurate measure of Petitioner's adaptive behavior deficits. (Testimony of Dr. Walter, Mr. Wysocki, Ms. Southard, Dr. Morrow; Pet. Exh. 14.)
22. As shown in Petitioner's Exhibit 14, Dr. Walter administered the Vineland for Petitioner in August 2004. Petitioner received the following scores:
- Communication.....42  
Daily living.....less than 20  
Socialization.....52.
23. Dr. Walter used the Vineland Adaptive Behavior Scales to assess Petitioner's adaptive functioning in the areas of communication, daily living skills and social skills. Petitioner has moderate deficits in expressive and written communication. He has profound deficits in personal, domestic and community areas. Petitioner has mild to moderate deficits in socialization. (Pet. Ex. 13, 14; Testimony of Dr. Walter) Dr. Walter opined that Petitioner needs an aggressive, consistent implementation of a program of care that would teach him such skills as how to manage money, remember dates, plan for appointments, execute and sequence motor events, develop compensatory strategies, and learn the appropriate expression of emotions.
24. Petitioner's Vineland scores compare to adaptive behavior scores for persons with moderate to severe mental retardation. People with moderate to severe mental retardation generally have a standard score of less than 70 out of a possible score of 100 on the Vineland. (Testimony of Dr. Walter and Mr. Wysocki) Dr. Walter opined that ICF-MR placement is appropriate for Petitioner because it would give him structure, 24-hour care and socialization. Since Petitioner's peers in an ICF-MR would be mentally retarded, Dr. Walter asserted that Petitioner would obtain the milieu he needs for socialization and communication from interactions with the staff of the ICF-MR facility.
25. Expert witness David Wysocki is an occupational therapist and works in multidisciplinary treatment planning for persons with developmental disabilities. He evaluated Petitioner's condition and treatment needs on two occasions, including a few weeks before he testified. He also reviewed written information about the Petitioner, his diagnoses, and ICF-MR criteria before he testified. (Testimony of Mr. Wysocki; Pet. Exhs. 35, 36)
26. Mr. Wysocki opined that with the appropriate assistance, equipment, and training, Petitioner could likely develop greater functional capacities in the areas of directing his self care, functional communication outside of immediate family and service providers, and greater mobility within his home and outside in his community. This testimony is found to be consistent with the other evidence. (Testimony of Mr. Wysocki; Pet. Exh. 36)
27. Petitioner would like to attend college but needs support in order to do so. (Testimony of Petitioner) Petitioner is in the process of obtaining services from Vocational Rehabilitation. (Testimony of Petitioner and Denise Plachcinski) Petitioner is capable of communicating his personal care needs, making known to others his basic needs and wants, and understanding simple commands. Petitioner needs reminders for his daily schedule of bathing, eating, and going out. Petitioner currently receives medical services from his primary care physician, a cardiologist, a neurologist, a pulmonary specialist, physical therapist and psychotherapist. (Testimony of Joseph Plachcinski) Petitioner needs more interactions with his peers. Petitioner is not used to talking with new people and feels anxious and nervous. He knows that he can be abrasive. He does not like new experiences. Petitioner can learn new things, but it is very difficult for him if he does not use the new skills. (Testimony of Joseph Plachcinski)
28. Dr. David Goff was qualified as an expert in pediatrics and internal medicine. He was a consultant to the Respondent after the decision was made that prompted this case. He has treated several dozen patients with muscular dystrophy over the past 20 years

and currently treats about 6 patients with mental retardation and developmental disabilities. He has treated a number of children over the years with dyspraxia type conditions. He has treated more than a dozen patients with cognitive problems who required ICF-MR level of care. Dr. Goff testified that dyspraxia is a new, general term in neurology that describes a spectrum of symptoms from clumsiness to cognitive deficits. A variety of terms have been used over the last 20 years to describe dyspraxia.

29. Dr. Goff believed that Petitioner's impairment issues were mostly related to his paralysis which is caused by the muscular dystrophy. He thought it was difficult to separate out symptoms caused by dyspraxia and Duchenne's muscular dystrophy, but believed the majority of Petitioner's impairments were due to his inability to engage in physical movement. Based upon medical records produced by Petitioner, Dr. Goff believed that Petitioner has the ability to manage self-direction and the ability to make decisions. Dr. Goff opined that the diagnosis of dyspraxia had a mild affect on Petitioner's oral and decision-making skills given the fact that he graduated from high school on time. He testified that the diagnosis of dyspraxia was not the cause of the majority of impairments that Petitioner experiences.
30. Dr. Goff's observation regarding the use of the Vineland Adaptive Behavior Scales was that he would expect deficits in expressive and written communication due to Petitioner's paralysis. Dr. Goff's expert opinion is that Petitioner does not qualify for ICF/MR level of care and that such an institution would be inappropriate for someone with Petitioner's normal cognitive function.
31. Dr. Sarah Morrow has been the medical director for EDS for 20 years. EDS is the independent contractor that makes medical necessity recommendations for Respondent with respect to prior approvals for various medical services including ICF-MR level of care. Dr. Morrow was qualified as an expert in ICF-MR level of care prior approval reviews. She has never approved a request for ICF-MR level of care for a Medicaid patient with a diagnosis of muscular dystrophy.
32. Dr. Morrow is familiar with intermediate care facility institutions for the mentally retarded from her experience as Secretary for the Department of Health and Human Services, which is responsible for the regulation of such facilities. Dr. Morrow believed that a placement in a State ICF-MR was inappropriate for Petitioner given his normal cognitive functioning and paralysis. She stated that impairments in adaptive behaviors of mentally retarded persons are the result of an inability to respond to situations cognitively. (Testimony of Dr. Goff and Dr. Morrow) Dr. Morrow testified that Petitioner is completely dependent upon others in his daily living skills, but it is not because of impairment correlated with his level of intellectual functioning. (Testimony of Dr. Goff and Dr. Morrow) Dr. Morrow concurred with Dr. Goff that Petitioner's dyspraxia diagnosis does not cause his adaptive behavior impairments. Dr. Morrow did not believe that Petitioner would benefit from the type of treatment in basic fundamental skills that is provided in an ICF-MR.
33. Marilyn Southard, M.S. was qualified as an expert in ICF-MR level of care as it relates to mentally retarded persons and those with related conditions, in special education with an emphasis in diagnosing learning disabilities, and in the federal requirements for ICF/MR facilities. Ms. Southard believes that although Petitioner's diagnosis of dyspraxia is a neurological condition, it manifests as a learning disability. Ms. Southard agreed with Dr. Goff and Dr. Morrow that the majority of Petitioner's impairments in his adaptive behaviors are caused by his near paralysis and not dyspraxia.
34. Currently Petitioner receives in-home care under the Community Alternatives Program for Disabled Adults (CAP/DA), another Medicaid home and community-based waiver program. The CAP/DA program has a monthly financial limit of \$3487.00 for all outpatient Medicaid services except prescriptions, doctor visits, and hospital visits. Through CAP/DA, Petitioner is provided with a Certified Nurse Assistant (CAN I) six nights per week from 11 P.M. to 7 A.M., two hours of social worker case management a month, a monthly nursing assessment, and a yearly reassessment by a social worker. The CAN I is not certified to perform suctioning Petitioner might need during the night, so Henry or Denise Plachcinski must be awakened if suctioning is required. The CAP/DA budget will not support a CNA II, which is a position certified to perform suctioning. Petitioner also is unable to receive many other Medicaid services he needs such as additional physical therapy, speech therapy, occupational therapy, assistive technology, and other services because of the CAP-DA budget limit. (Testimony of Denise Plachcinski, Martha Simpson; Pet. Exh. 39)
35. Martha Simpson, a medical social worker, has been Petitioner's CAP/DA case manager for two and one-half years and has visited his home on approximately thirty occasions. She testified to a number of services, therapies, training, and technology which are needed by the Petitioner and which cannot be provided under the CAP/DA program but which could be provided under the CAP-MR/DD program through a program of active treatment. (Testimony of Martha Simpson)
36. Dr. Walter and Mr. Wysocki both have experience regarding the level of services provided in ICF-MR facilities and community-based ICF-MR services. It was their shared opinion that there is much room for improvement in all domains of Petitioner's adaptive functioning with appropriate therapeutic interventions, supports, accommodations, and modifications, and that Petitioner would benefit from many of the same types of services that are considered active treatment when provided in an ICF-MR facility.

This shared opinion was supported by the testimony of Dr. Sotolongo, Ms. Crossland, Ms. Simpson, and Denise Plachcinski and is consistent with the written evidence of record. (Testimony of Dr. Walter, Dr. Sotolongo, Mr. Wysocki, Ms. Crossland, Ms. Simpson, Denise Plachcinski; Pet. Exhs. 12, 13, 16, 17, 19-24, 36, 38, 39) Petitioner could achieve a higher level of function with active treatment including a program of systematic desensitization, training on new assistive technology, practice and experience in the community on the execution and sequencing of motor events. The active treatment would not be aimed at teaching Petitioner to perform tasks his body can no longer do, but at teaching him ways to be more functional despite the dyspraxia and Duchenne's muscular dystrophy. (Testimony of Dr. Walter, Dr. Sotolongo, Mr. Wysocki; Pet. Exhs. 12, 13, 16, 17, 19-24, 36, 38, 39)

37. Petitioner has experienced minimal decline of his limited hand function and head control over the past year. He has experienced limited progression of muscle contractures over the past year. Range of motion and joint mobilizations are integral to maintain his function, including his independent form of mobility in his power wheelchair with joystick control. Dr. Sotolongo testified that he agrees with the physical therapist recommendations for active treatment to prevent or limit further regression in motor control. (Testimony of Dr. Sotolongo; Pet. Exhs. 19, 20)
38. Petitioner exhibits several maladaptive behaviors and affective development skill deficits which impede his ability to live independently and which could be lessened or eliminated with active treatment. Dr. Sotolongo testified that Petitioner's adaptive behavior was like that of mentally retarded persons in his inability to assess new situations and then, in a rational manner, proceed to behave appropriately in a new situation. Dr. Walter testified that some of the behaviors, such as anxiety over new caregivers and new environments and situations, sometimes being critical or demanding, avoidance, irritability, and fluctuation in mood, can be overcome by a program of active treatment. (Testimony of Dr. Walter, Dr. Sotolongo; Pet. Exh. 13)
39. Dr. Sotolongo, Dr. Walter, and Mr. Wysocki testified that introductions of new assistive technologies will not be successful without a program of consistent, repetitious treatment using a team approach including therapy, training, and practice. Petitioner has difficulty integrating with new equipment. Active treatment consisting of ongoing and repetitive training would be critical to his success in using adaptive technology. (Testimony of Dr. Sotolongo, Dr. Walter, Mr. Wysocki; Pet. Exhs. 22, 24, 36)
40. Since leaving school Petitioner has become socially isolated and has adaptive deficits in the area of social development. Active treatment would increase Petitioner's independent living skills. Expert testimony established the medical necessity for Petitioner to increase his independent living skills for his future competency and that, because of his developmental problems, obtaining these skills will require extensive training. Petitioner needs a developmental plan to build personal knowledge and responsibility for managing his personal life and making adequate decisions necessary to protect himself. Petitioner needs to learn what to look out for in terms of safety issues while navigating the community, as well as learn to manage his finances, monitor his medical treatment, plan for upcoming appointments, and maintain his independence. (Testimony of Dr. Walter, Dr. Sotolongo, Mr. Wysocki; Pet. Exhs. 13, 36)
41. Petitioner was evaluated by a trained employee of Respondent's agent using the NC-SNAP scale, an accepted and empirically validated measure of need for services under the CAP-MR/DD program. Petitioner's SNAP score of 5 indicates the highest level of need. Expert testimony confirmed the validity of this score. (Testimony of Dr. Walter, Mr. Wysocki, Ms. Simpson, Ms. Crossland; Pet. Exhs. 40, 44)
42. Petitioner's goals for himself include additional education and employment. Expert testimony established that these goals may be realistic but only with a program of active treatment on a daily basis to provide structure, routine, practice of skills, and other support at the ICF-MR level of care to help him be more self-directed and to increase his level of independent living. (Testimony of Petitioner, Mrs. Plachcinski, Dr. Walter) Life expectancy for Duchenne's muscular dystrophy has substantially increased and a life expectancy cannot be determined for Petitioner at this time. (Testimony of Dr. Sotolongo; Pet. Exhs. 16, 17)
43. The treating and examining clinicians, Dr. Sotolongo, Dr. Walter, and Mr. Wysocki, unanimously testified that Petitioner has a condition closely related to mental retardation as defined in 42 CFR 435.1009, meets the other criteria in 42 CFR 435.1009, and requires active treatment as defined in 42 CFR 483.440. (Testimony of Dr. Sotolongo, Dr. Walter, Mr. Wysocki; Pet. Exhs. 13, 16, 36)
44. The treating clinicians' testimony is given considerable weight. Their testimonies were based on and included their relevant clinical experience, training, and expertise in the treatment of developmental disabilities, their knowledge about the Petitioner and the applicable regulations which they reviewed prior to testifying, the visits and interaction with the Petitioner and the Petitioner's family, and by the corroboration of their testimony with the other evidence of record, including many admissions by Respondent's experts on cross examination.

45. None of Respondent's witnesses has ever treated or examined Petitioner. Neither Dr. Morrow nor Dr. Goff ever spoke to Petitioner's parents. None of Respondent's witnesses discussed Petitioner's case with Dr. Walter, Dr. Sotolongo, Mr. Wysocki, or any other treating or examining clinician. None of Respondent's three witnesses spoke to any of Petitioner's nurses, therapists, or other caregivers before testifying. None of Respondent's witnesses ever visited Petitioner's home.
46. Dr. Goff had not visited an ICF-MR facility or treated a patient in such a facility and stated he did not know what services are provided in an ICF-MR facility. Dr. Goff testified that his opinion was based on a position that persons without an impairment of intellectual functioning whose limitations in adaptive behavior are caused by a physical disability cannot qualify for the ICF-MR level of care. Dr. Morrow also testified that her opinion was based on her position that persons with normal intellectual functioning cannot qualify for ICF-MR services. Ms. Southard admitted that there are persons in ICF-MR facilities with normal intelligence and profound physical disabilities. Ms. Southard also admitted that other persons with Duchenne's' Muscular Dystrophy have been approved for ICF-MR level of care in North Carolina.
47. Dr. Morrow testified she had not treated any child with either of Petitioner's conditions for more than 28 years. Dr. Morrow testified that the opinions of Dr. Sotolongo and Dr. Walter should be given more weight than her own in determining what type of treatment Petitioner needs. All three experts for the Respondent testified they had no basis to dispute the expertise of Dr. Sotolongo or Dr. Walter or their opinions about the Petitioner's treatment needs. All of Respondent's witnesses admitted that persons with severe or profound mental retardation may have significant limitations in the same areas of adaptive behavior and major life activity in which the Petitioner has substantial functional limitations.
48. Respondent's witnesses did not dispute that Petitioner could benefit from several specific services, e.g. speech therapy, physical therapy, occupational therapy, assistive technology and training on the use of it, personal care services, skilled nursing, environmental accessibility adaptations, home modifications, counseling, educational and pre-vocational supportive services; or that these same services may be provided in ICF-MR facilities or as community based ICF-MR services as part of a program of active treatment.
49. The record shows that Petitioner has significant or profound adaptive behavior deficits in the areas of self care, receptive and expressive communication, mobility, capacity for independent living, sensory motor development, self-direction, socialization, vocational development, affective development, adapting to new environments, sensitivity to touch, and maladaptive behaviors. Individuals in ICF-MR facilities frequently have significant adaptive behavior deficits in these same areas.
50. The record shows that the following services are medically necessary for the Petitioner: physical therapy, occupational therapy, speech therapy, case management, respite, personal care services and other assistance with self care and activities of daily living, skilled nursing and other medical support, assistive technology and training to use it, individual psychotherapy, family training, family counseling, aggressive and repetitive training in acquiring, retaining, or improving adaptive skills including skills for more independent living, mobility, socialization, self-direction, adapting to new environments, behavior management, applying adaptive skills to new environments, navigating unfamiliar terrains, coping strategies for managing anxiety and depression, development of social contacts, community participation, more active participation in health care monitoring and decision-making, better monitoring of safety, as well as environmental accessibility adaptations, physical home modifications, educational and pre-vocational supportive services. These medically necessary services are within the scope of active treatment provided at the ICF-MR level of care, either in a facility or in the community or both.

**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 N.C. Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C.G.S. 150B-23, *et. seq.*, and there is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in the matter. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.
2. The Medicaid program provides a federal subsidy to states that choose to reimburse qualified individuals for certain medical care. *See* [42 U.S.C. § 1396](#) *et seq.* Although participation in the program is voluntary, states which choose to participate in the Medicaid program must comply with federal Medicaid law. [42 U.S.C. § 1396a\(a\)](#); *Schweiker v. Gray Panthers*, 453 U.S. 34, 101 S.Ct. 2633 (1981). Like all other states, North Carolina participates in the federal Medicaid program and is bound by its requirements.

3. The CAP-MR/DD is a Medicaid waiver program permitted under 42 U.S.C. § 1396n(c) which provides for home or community-based services. This waiver allows North Carolina to pay for home and community-based services for an individual who would otherwise need institutionalization in an Intermediate Care Facility for the Mentally Retarded (ICF-MR). 42 U.S.C. § 1396n(c).
4. The Medicaid program is jointly financed with federal and state funds "and is basically administered by each state within certain broad requirements and guidelines." House Subcomm. on Health and the Environment, Data on the Medicaid Program: Eligibility, Services, Expenditures Fiscal Years 1967-77, H.R.Rep. No. 10, 95th Cong., 1st Sess. 1. The state determines the scope of the services offered and generally determines the eligibility level for the programs. *Id.* The Act implements a federal-state joint venture in which participating states administer a Medicaid program developed by the state within the parameters established by federal law and regulations. Generally, the Medicaid Act consists of numerous sections and subsections that together form a cooperative mosaic through which the federal government reimburses a portion of the payments made by participating states to providers furnishing care to eligible persons. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981).
5. Federal law mandates that each state participating in the Medicaid program must designate "a single state agency" responsible for the program in that state. 42 U.S.C. §1396a(a)(5). The North Carolina Department of Health and Human Services operates as this State's single state agency.
6. The N.C. Department of Health and Human Services' rules concerning appeals by Medicaid recipients for the denial, termination or reduction in services (10A N.C.A.C. Subch. 22H) have been promulgated pursuant to the federal provisions of 42 C.F.R. §431, Subpt. E (200 to 246). These provisions, along with North Carolina's Administrative Procedures Act (N.C. Gen. Stat. Ch.150B), entitle Medicaid recipients requesting review of denials of requested Medicaid services to pursue their due process rights through Article 3 of N.C. Gen. Stat. Ch. 150B.
7. The federal regulations governing the Medicaid appeal process mandate that a final agency decision be made within ninety (90) days from the date of the request for hearing. 42 C.F.R. §431.244(f). Based on this regulation, a procedure for Medicaid prior approval appeals in the Office of Administrative Hearings (OAH) agreed to by the Respondent requires that a final decision by Respondent be issued within thirty (30) days of the date that the OAH record is provided to the Respondent, unless good cause for further delay is shown.
8. Pursuant to 42 C.F.R. §431.244 and G.S. §150B-34, this decision is issued pursuant to a *de novo* hearing held on April 19 and May 16 and 17, 2005, and the findings of fact are based upon the preponderance of the evidence admitted at the hearing.
9. The determination that a Medicaid covered service is medically necessary lies primarily with the recipient's treating physician or other qualified health care provider. Sen. Rpt. No. 404, 89<sup>th</sup> Cong. 1<sup>st</sup> Sess., reprinted in 1965 U.S.C.C.A.N. 1943 (1986) ("The physician is to be the key figure in determining the utilization of health services. It is the physician who is to decide upon ...treatments.") The state agency may review this determination; however, absent evidence the prescribed treatment is not medical in nature, is unsafe or experimental, or is otherwise not a service covered under the State Plan, the agency should normally defer to the recommendation of the treating clinicians if it is supported by other evidence. See, e.g., *Weaver v. Reagen*, 886 F.2d 194, 199-200 (8th Cir. 1989) (Medicaid statute creates presumption in favor of the medical judgment of the attending physician.)
10. A person without mental retardation must meet the definition of persons with related conditions in order to be eligible for the ICF/MR level of care.

Persons with *related conditions* mean individuals who have a **severe, chronic disability** that meets all of the following conditions:

- (a) It is *attributable to* –
  - (1) *Cerebral palsy* or epilepsy; *or*
  - (2) *Any other* condition, other than mental illness, found to be **closely related** to mental retardation **because** this condition results in *impairment of* general intellectual functioning *or adaptive behavior similar* to that of mentally retarded persons, *and requires* treatment *or services* similar to those required for these persons.
- (b) It is manifested before the person reaches age 22.
- (c) It is likely to continue indefinitely.
- (d) It results in substantial functional limitations in three or more of the following areas of major life activity:
  - (1) Self-care.



- (2) Understanding and use of language.
- (3) Learning.
- (4) Mobility.
- (5) Self-direction.
- (6) Capacity for independent living.

(Emphasis added by the Undersigned)

11. The applicable federal regulation, 42 CFR 435.1009, specifies that “any other condition” can qualify as a condition related to mental retardation and that impairments in adaptive behavior similar to persons with mental retardation can meet the criteria for a related condition even if there is no impairment of general intellectual functioning.
12. Clients who are admitted by a facility must be in need of and receiving active treatment services. 42 C.F.R. 483.440(b)(1) (2005). The definition of active treatment in 42 CFR 483.440 is broad in scope and encompasses a wide range of services to address both physical and non-physical disabilities, including skilled nursing and other medical care as well as habilitative training and technology.
13. The preponderance of the evidence shows that ICF-MR level of services is medically necessary to the proper treatment of Petitioner’s conditions. The weight of the evidence indicates that without such services Petitioner’s condition and behavior will likely worsen and that he will be at increased risk of regression and loss of optimal functional status.
14. Petitioner has proven by a preponderance of evidence that he suffers from a severe chronic disability, manifested before age 22, that is likely to continue indefinitely and that results in substantial functional limitations in the following areas of major life activity: self care, understanding and use of language, mobility, and capacity for independent living.
15. Petitioner has proven by a preponderance of the evidence that his condition is closely related to mental retardation because it results in *impairment of adaptive behavior* similar to that of persons with mental retardation and *requires services* similar to services required by persons with mental retardation.
16. Petitioner has proven by a preponderance of the evidence that his condition necessitates active treatment directed toward the acquisition of behavior necessary for him to function with as much self determination and independence as possible and toward the prevention or deceleration of regression or loss of current optimal functional status.
17. Petitioner meets the eligibility criteria for ICF-MR level of services and for the CAP-MR/DD program.

**BASED UPON** the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

**DECISION**

There is sufficient evidence to properly and lawfully support Petitioner’s application for services under the federally approved Medicaid Waiver in North Carolina known as the Community Alternative Program for persons with Mental Retardation or Developmental Disabilities (CAP-MR/DD). The decision of the Division of Medical Assistance to deny prior approval for ICF-MR level of care and CAP-MR/DD services to the Petitioner is IN ERROR.

**NOTICE**

The agency making the final decision in this contested case 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 is required to give each party an opportunity to file exceptions to this Decision issued by the Undersigned, and to present written arguments to those in the agency who will make the final decision. N. C. Gen. Stat. § 150B-36(a).

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 that will make the final decision in this case is the North Carolina Department of Health and Human Services. The agency is required by N.C.G.S. 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

**IT IS SO ORDERED.**

This the 14<sup>th</sup> day of June, 2005.

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Augustus B. Elkins II  
Administrative Law Judge