

NORTH CAROLINA REGISTER

VOLUME 28 • ISSUE 05 • Pages 373 - 517

September 3, 2013

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Contact List for Rulemaking Questions or Concerns

For questions or concerns regarding the Administrative Procedure Act or any of its components, consult with the agencies below. The bolded headings are typical issues which the given agency can address, but are not inclusive.

Rule Notices, Filings, Register, Deadlines, Copies of Proposed Rules, etc.

Office of Administrative Hearings

Rules Division

1711 New Hope Church Road

(919) 431-3000

Raleigh, North Carolina 27609

(919) 431-3104 FAX

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Rules Review Commission

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(919) 431-3000

Raleigh, North Carolina 27609

(919) 431-3104 FAX

contact: Joe DeLuca Jr., Commission Counsel

joe.deluca@oah.nc.gov

(919) 431-3081

Amanda Reeder, Commission Counsel

amanda.reeder@oah.nc.gov

(919) 431-3079

Fiscal Notes & Economic Analysis and Governor's Review

Office of State Budget and Management

116 West Jones Street

(919) 807-4700

Raleigh, North Carolina 27603-8005

(919) 733-0640 FAX

Contact: Anca Grozav, Economic Analyst

osbmruleanalysis@osbm.nc.gov

(919) 807-4740

NC Association of County Commissioners

215 North Dawson Street

(919) 715-2893

Raleigh, North Carolina 27603

contact: Amy Bason

amy.bason@ncacc.org

NC League of Municipalities

(919) 715-4000

215 North Dawson Street

Raleigh, North Carolina 27603

contact: Erin L. Wynia

ewynia@nclm.org

Legislative Process Concerning Rule-making

Joint Legislative Administrative Procedure Oversight Committee

545 Legislative Office Building

300 North Salisbury Street

(919) 733-2578

Raleigh, North Carolina 27611

(919) 715-5460 FAX

contact: Karen Cochrane-Brown, Staff Attorney

Karen.cochrane-brown@ncleg.net

Jeff Hudson, Staff Attorney

Jeffrey.hudson@ncleg.net

NORTH CAROLINA REGISTER
Publication Schedule for January 2013 – December 2013

| 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 31st legislative day of the session beginning: | 270 th day from publication in the Register |
| 27:13 | 01/02/13 | 12/06/12 | 01/17/13 | 03/04/13 | 03/20/13 | 05/01/13 | 05/2014 | 09/29/13 |
| 27:14 | 01/15/13 | 12/19/12 | 01/30/13 | 03/18/13 | 03/20/13 | 05/01/13 | 05/2014 | 10/12/13 |
| 27:15 | 02/01/13 | 01/10/13 | 02/16/13 | 04/02/13 | 04/22/13 | 06/01/13 | 05/2014 | 10/29/13 |
| 27:16 | 02/15/13 | 01/25/13 | 03/02/13 | 04/16/13 | 04/22/13 | 06/01/13 | 05/2014 | 11/12/13 |
| 27:17 | 03/01/13 | 02/08/13 | 03/16/13 | 04/30/13 | 05/20/13 | 07/01/13 | 05/2014 | 11/26/13 |
| 27:18 | 03/15/13 | 02/22/13 | 03/30/13 | 05/14/13 | 05/20/13 | 07/01/13 | 05/2014 | 12/10/13 |
| 27:19 | 04/01/13 | 03/08/13 | 04/16/13 | 05/31/13 | 06/20/13 | 08/01/13 | 05/2014 | 12/27/13 |
| 27:20 | 04/15/13 | 03/22/13 | 04/30/13 | 06/14/13 | 06/20/13 | 08/01/13 | 05/2014 | 01/10/14 |
| 27:21 | 05/01/13 | 04/10/13 | 05/16/13 | 07/01/13 | 07/22/13 | 09/01/13 | 05/2014 | 01/26/14 |
| 27:22 | 05/15/13 | 04/24/13 | 05/30/13 | 07/15/13 | 07/22/13 | 09/01/13 | 05/2014 | 02/09/14 |
| 27:23 | 06/03/13 | 05/10/13 | 06/18/13 | 08/02/13 | 08/20/13 | 10/01/13 | 05/2014 | 02/28/14 |
| 27:24 | 06/17/13 | 05/24/13 | 07/02/13 | 08/16/13 | 08/20/13 | 10/01/13 | 05/2014 | 03/14/14 |
| 28:01 | 07/01/13 | 06/10/13 | 07/16/13 | 08/30/13 | 09/20/13 | 11/01/13 | 05/2014 | 03/28/14 |
| 28:02 | 07/15/13 | 06/21/13 | 07/30/13 | 09/13/13 | 09/20/13 | 11/01/13 | 05/2014 | 04/11/14 |
| 28:03 | 08/01/13 | 07/11/13 | 08/16/13 | 09/30/13 | 10/21/13 | 12/01/13 | 05/2014 | 04/28/14 |
| 28:04 | 08/15/13 | 07/25/13 | 08/30/13 | 10/14/13 | 10/21/13 | 12/01/13 | 05/2014 | 05/12/14 |
| 28:05 | 09/03/13 | 08/12/13 | 09/18/13 | 11/04/13 | 11/20/13 | 01/01/14 | 05/2014 | 05/31/14 |
| 28:06 | 09/16/13 | 08/23/13 | 10/01/13 | 11/15/13 | 11/20/13 | 01/01/14 | 05/2014 | 06/13/14 |
| 28:07 | 10/01/13 | 09/10/13 | 10/16/13 | 12/02/13 | 12/20/13 | 02/01/14 | 05/2014 | 06/28/14 |
| 28:08 | 10/15/13 | 09/24/13 | 10/30/13 | 12/16/13 | 12/20/13 | 02/01/14 | 05/2014 | 07/12/14 |
| 28:09 | 11/01/13 | 10/11/13 | 11/16/13 | 12/31/13 | 01/21/14 | 03/01/14 | 05/2014 | 07/29/14 |
| 28:10 | 11/15/13 | 10/24/13 | 11/30/13 | 01/14/14 | 01/21/14 | 03/01/14 | 05/2014 | 08/12/14 |
| 28:11 | 12/02/13 | 11/06/13 | 12/17/13 | 01/31/14 | 02/20/14 | 04/01/14 | 05/2014 | 08/29/14 |
| 28:12 | 12/16/13 | 11/21/13 | 12/31/13 | 02/14/14 | 02/20/14 | 04/01/14 | 05/2014 | 09/12/14 |

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.

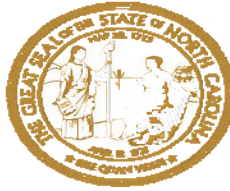
NOTICE OF TEXT

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.



State of North Carolina

PAT McGRORY
GOVERNOR

July 31, 2013

EXECUTIVE ORDER NO. 18

STATEWIDE IMPAIRED DRIVING TASK FORCE

WHEREAS, impaired drivers pose a serious threat to the health and safety of those traveling on North Carolina highways; and

WHEREAS, in accordance with MAP-21, as a mid-range State, North Carolina is required to submit a statewide impaired driving plan to the U.S. Department of Transportation, National Highway Traffic Safety Administration; and

WHEREAS, the purpose of a statewide impaired driving plan is to provide a comprehensive strategy for preventing and reducing impaired driving behavior; and

NOW THEREFORE, by the power vested in me as Governor by the Constitution and laws of the State of North Carolina, IT IS ORDERED:

Section 1. Established

The Statewide Impaired Driving Task Force (hereinafter "Task Force") is hereby established.

Section 2. Membership

The Task Force shall consist of not more than thirty (30) voting members. All members shall be appointed by the Governor and shall serve at the pleasure of the Governor. The Governor shall appoint a Chair from among the membership of the Task Force.

The Task Force shall be composed of individuals from a variety of transportation and law enforcement backgrounds and disciplines in order that many different perspectives and experiences are represented. Members shall include representatives from the General Assembly.

Section 3. Meetings

The Task Force shall meet upon the call of the Governor or the Chair. The Chair shall set the agenda for the Task Force meetings. The Task Force may establish such committees or other working groups as are necessary to assist in performing its duties.

Section 4. Duties

The Task Force shall review existing North Carolina data, laws, regulations, and programs and develop a statewide impaired driving plan to provide a comprehensive strategy for preventing and reducing impaired driving behavior.

Other duties as assigned by the Governor.

Section 5. Administration

The Department of Transportation shall provide all administrative and staff support services required by the Task Force. Members shall serve without compensation, but may receive necessary travel and subsistence expenses in accordance with State law and the policies and regulations of the Office of State Budget and Management.

Section 6. Effect and Duration

This Executive Order is effective immediately and shall remain in effect until July 31, 2016, pursuant to N.C. Gen. Stat. § 147-16.2(b), or until earlier rescinded.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 31st day of July, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-eighth.


Pat McCrory
Governor

ATTEST:


Elaine F. Marshall
Secretary of State



From the Codifier of Rules

**North Carolina Administrative Code
Recodification of Administrative Rules
Title 5, Title 14A, Title 28, 01 NCAC 04H, and 04 NCAC 19L to Title 14B**

Pursuant to Session Law 2011-145, s. 19.1(a), the General Assembly of North Carolina established a new executive department, the Department of Public Safety. The Department of Correction, the Department of Crime Control and Public Safety, and the Department of Juvenile Justice and Delinquency Prevention are transferred to, vested in, and consolidated within the Department of Public Safety.

Pursuant to Session Law 2009-451 and 2011-145, the State Capitol Police rules were consolidated into the Department of Public Safety from the Department of Administration.

Pursuant to Executive Order 8 under Governor Michael Easley June 6, 2001, the rules for the North Carolina Community Development Block Grant Program (Hurricane Floyd Recovery Assistance) were consolidated into the Department of Public Safety from the Department of Commerce.

These transfers were completed in June 2013. In order to assist the public in locating rules in Title 14B that were previously codified in Title 5, Title 14A, Title 28, 01 NCAC 04H, and 04 NCAC 19L, OAH has included on its website the crosswalk. The crosswalk references the rule as codified in Title 5, Title 14A, Title 28, 01 NCAC 04H, and 04 NCAC 19L and provides the new codified cite in Title 14B. (<http://ncrules.state.nc.us/title10totitle1/default.htm>)

Please contact the Office of Administrative Hearings, Rules Division, should you need assistance or have any questions.

Note from the Codifier

*Approved Rules Pending the Legislative Session
August 2013*

The following rule has been entered into the NC Administrative Code effective July 26, 2013 unless the agency specified a later effective date. This approved rule was pending the legislative session beginning in January 2013, a bill was introduced to disapprove the rule within the first 30 legislative days, but the legislative bill was not ratified.

| | RRC | Bill |
|--------------------------------------|----------|------------|
| | Approved | Introduced |
| WILDLIFE RESOURCES COMMISSION | | |
| 15A NCAC 10B .0219 Coyote | 06/20/12 | HB 352 |

The following rules were disapproved by the General Assembly by a ratified bill. A rule that is specifically disapproved by a bill ratified by the General Assembly before it becomes effective does not become effective.

INDUSTRIAL COMMISSION
See S.L. 2013-294.

Union County - Proposed Interbasin Transfer

NOTICE OF PUBLIC MEETINGS

October 3, 2013, 4:30 PM
Stanly County Public Library
133 East Main Street
Albemarle, NC 28001

October 14, 5:00 PM
Rowan-Cabarrus Community College – Salisbury Campus
1333 Jake Alexander Blvd. South
Salisbury, NC 28146-1595

October 15, 2013, 5:00 PM
Northeast Technical College – Cheraw Campus
1201 Chesterfield Highway
Cheraw, SC 29520

Union County will hold public meetings to receive comments on their request for an interbasin transfer (IBT) certificate from the source river basin of the Yadkin River Sub-Basin to the receiving river basin of the Rocky River Sub-Basin, both of which are part of the Yadkin River Basin. Union County currently serves customers in the Catawba River Basin and the Rocky River Sub-Basin of the Yadkin River Basin. Union County is requesting an IBT certificate for a maximum daily flow of 28 million gallons per day (mgd) from the Yadkin River Sub-Basin to the Rocky River Sub-Basin. The requested transfer amount is based on 2050 water demand projections in Union County's Yadkin River Basin service area.

These meetings are being held to provide stakeholders and the public an opportunity to participate in this project through an open and active public process, and in accordance with North Carolina General Statute 143-215.22. This statute requires that one public meeting be held in the source river basin (i.e. the Yadkin River Sub-Basin) both upstream and downstream from the proposed point of withdrawal, and that one public meeting be held in the receiving river basin (i.e. the Rocky River Sub-Basin).

The meetings will be at the times listed above. The format of the meetings will include a short overview presentation (~30 minutes) of the IBT request at the beginning and 90 minutes into the session (e.g. at 5:00 PM and 6:30 PM for meetings scheduled at 5:00 PM). The presentation will be the same at each venue. The remaining time will be utilized for public questions and comment. Based on the number of people who desire to comment, the length of the verbal presentations may be limited. All statements made at the meeting will be audio recorded, but will not be transcribed to prepare a written record of the event. Verbal comments will be given equal consideration as written comments. The North Carolina Division of Water Resources staff may be in attendance. Individuals who prefer to enter written comments need to submit these comments no later than November 15, 2013.

These meetings are being conducted as part of the scoping phase of the project where Union County, the North Carolina Department of Environment and Natural Resources, and other agencies are considering the alternatives to be evaluated, and the scope of impacts to be evaluated in an environmental impact statement (EIS).

Written comments should be mailed to:

Union County – YRWSP – IBT Comments
HDR Engineering Inc. of the Carolinas
Attn: Mr. Kevin Mosteller, PE
440 South Church Street
Charlotte, NC 28202

Comments may also be submitted electronically to unioncountyYRWSP@hdrinc.com. Mailed and emailed comments will be given equal consideration. The public comment period for this phase of the project closes on November 15, 2013. Interested parties will have future opportunities to provide input during the overall IBT certificate request process.

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 15A – DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

Notice is hereby given in accordance with G.S. 150B-21.2 that the Department of Environment and Natural Resources intends to amend the rule cited as 15A NCAC 12B .0901.

Agency obtained G.S. 150B-19.1 certification:

- ☒ OSBM certified on: August 7, 2013
- ☐ RRC certified on:
- ☐ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c):
http://www.ncparks.gov/About/rule_change.php

Proposed Effective Date: January 1, 2014

Public Hearing:

Date: September 19, 2013

Time: 9:00 a.m.

Location: Environment & Natural Resources Building, Room 4001, 217 W. Jones Street, Raleigh, NC 27603

Reason for Proposed Action: This rule amendment is necessary to comply with Session Law 2011-268, which amended G.S. 14-415(c1) to allow an individual with a concealed handgun permit to possess and carry a concealed handgun on the grounds or waters of a park within the State Park System as defined by G.S. 113-44.9 unless otherwise specifically prohibited by law. Additionally, this rule amendment would permit certain individuals, identified in G.S. 14-269, to possess and carry concealed handguns on grounds or waters of a park within the State Park System in statutorily specified circumstances.

Comments may be submitted to: Will Hendrick, Division of Parks and Recreation, 1615 Mail Service Center, Raleigh, NC 27699-1615

Comment period ends: November 4, 2013

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 919-431-3000.

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☒ Approved by OSBM
- ☒ No fiscal note required by G.S. 150B-21.4

CHAPTER 12 - PARKS AND RECREATION AREA RULES

SUBCHAPTER 12B - PARKS AND RECREATION AREAS

SECTION .0900 - FIREARMS: EXPLOSIVES: FIRES: ETC.

15A NCAC 12B .0901 FIREARMS: WEAPONS: EXPLOSIVES

(a) Except as provided in Paragraph (b) of this Rule, No no person except authorized park employees, their agents, or contractors, ~~or officers of the state~~ shall carry or possess firearms, air guns, air soft guns, paint ball guns, bows and arrows, sling shots, or lethal missiles of any kind within any park. park except as provided by a valid concealed carry permit or as approved under G.S. 14-269.

(b) A person with a valid concealed handgun permit issued by one of the United States who adheres to the requirements set forth in G.S. 14-415.11 may carry a concealed handgun on the grounds and waters of a State Park. Persons acting under this exception should take notice that certain Division managed properties are owned by the U.S. Army Corps of Engineers and subject to separate regulations governing firearms. Accordingly, concealed handguns are prohibited at Falls Lake, Jordan Lake and Kerr Lake State Recreation Areas.

~~(b)(c)~~ (c) The possession or use of cap pistols is prohibited. The possession or use of dynamite or other powerful explosives as defined in G.S. 14-284.1 is prohibited.

~~(e)(d)~~ (d) The possession or use of pyrotechnics is prohibited except for pyrotechnics exhibited, used, or discharged in connection with an authorized public exhibition and approved by the Director of the Division of Parks and Recreation, or

designee. Persons wishing to possess or use pyrotechnics in connection with a public exhibition, such as a public celebration shall file an application for a special use permit with the appropriate park superintendent. All applicants shall enter an indemnification agreement with the Department and obtain general liability and property damage insurance, with limits as determined by the Secretary or designee, which are reasonably necessary to cover possible liability for damage to property and bodily injury or damage to persons which may result from, or be caused by, the public exhibition of pyrotechnics or any act(s) or omission(s) on the part of the applicant(s) or the applicant's agents, servants, employees, or subcontractors presenting the public exhibition. The Division Director, or designee, may deny an application as deemed necessary to protect the public health, safety, and welfare, or to protect the natural resources of the park unit.

Authority G.S. 14-269; 14-410; 14-415; 14-415.11; 14-415.24; 113-35.

TITLE 21 – OCCUPATIONAL LICENSING BOARDS AND COMMISSIONS

CHAPTER 08 - BOARD OF CERTIFIED PUBLIC ACCOUNTANT EXAMINERS

Notice is hereby given in accordance with G.S. 150B-21.2 that the NC State Board of CPA Examiners intends to amend the rules cited as 21 NCAC 08A .0301; 08F .0103, .0502; 08G .0401, .0403, .0409-.0410; 08I .0104; 08J .0105-.0107; 08M .0105; and 08N .0202-.0203, .0208, .0302.

Agency obtained G.S. 150B-19.1 certification:

- ☐ OSBM certified on:
- ☐ RRC certified on:
- ☒ Not Required

Link to agency website pursuant to G.S. 150B-19.1(c):
www.nccpaboard.gov

Proposed Effective Date: *January 1, 2014*

Public Hearing:

Date: *October 21, 2013*

Time: *10:00 a.m.*

Location: *NC State Board of CPA Examiners, 1101 Oberlin Road, Suite 104, Raleigh, NC 27605*

Reason for Proposed Action: *The purpose of the rule-making is to amend rules effected by the deletion of retired status; amend language regarding information and restrictions on exam and certificate applications; amend language for certificate of completion and language on computation of CPE credits and language registering Board CPE sponsors; amend language regarding the modification of discipline process; amend language for additional address information; amend date requirement for peer review; amend language for prohibited*

conduct; amend reporting requirement; and amend language for consistency.

Comments may be submitted to: *Robert N. Brooks, NC State Board of CPA Examiners, 1101 Oberlin Road, Suite 104, Raleigh, NC 27605; phone (919) 733-1425; fax (919) 733-4209; email rbrooks@nccpaboard.gov*

Comment period ends: *November 4, 2013*

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 after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule 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 919-431-3000.

Fiscal impact (check all that apply).

- ☐ State funds affected
- ☐ Environmental permitting of DOT affected
- ☐ Analysis submitted to Board of Transportation
- ☐ Local funds affected
- ☐ Date submitted to OSBM:
- ☐ Substantial economic impact (≥\$500,000)
- ☐ Approved by OSBM
- ☒ No fiscal note required by G.S. 150B-21.4

SUBCHAPTER 08A - DEPARTMENTAL RULES

SECTION .0300 - DEFINITIONS

21 NCAC 08A .0301 DEFINITIONS

(a) The definitions set out in G.S. 93-1(a) apply when those defined terms are used in this Chapter.

(b) In addition to the definitions set out in G.S. 93-1(a), the following definitions and other definitions in this Section apply when these terms are used in this Chapter:

- (1) "Active," when used to refer to the status of a person, describes a person who possesses a North Carolina certificate of qualification and who has not otherwise been granted "~~Retired~~" or "Inactive" status;
- (2) "Agreed upon procedures" means a professional service whereby a CPA is engaged to issue a report of findings based on specific procedures performed on financial information prepared by a responsible party;
- (3) "AICPA" means the American Institute of Certified Public Accountants;

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| <p>(4) "Applicant" means a person who has applied to take the CPA examination or applied for a certificate of qualification;</p> <p>(5) "Attest service or assurance service" means:</p> <p style="padding-left: 20px;">(A) any audit or engagement to be performed in accordance with the Statements on Auditing Standards, Statements on Generally Accepted Governmental Auditing Standards, and Public Company Accounting Oversight Board Auditing Standards;</p> <p style="padding-left: 20px;">(B) any review or engagement to be performed in accordance with the Statements on Standards for Accounting and Review Services;</p> <p style="padding-left: 20px;">(C) any compilation or engagement to be performed in accordance with the Statements on Standards for Accounting and Review Services; or</p> <p style="padding-left: 20px;">(D) any agreed-upon procedure or engagement to be performed in accordance with the Statements on Standards for Attestation Engagements;</p> <p>(6) "Audit" means a professional service whereby a CPA is engaged to examine financial statements, items, accounts, or elements of a financial statement, prepared by management, in order to express an opinion on whether the financial statements, items, accounts, or elements of a financial statement are presented in conformity with generally accepted accounting principles or other comprehensive basis of accounting;</p> <p>(7) "Calendar year" means the 12 months beginning January 1 and ending December 31;</p> <p>(8) "Candidate" means a person whose application to take the CPA examination has been accepted by the Board and who may sit for the CPA examination;</p> <p>(9) "Client" means a person or an entity who orally or in writing agrees with a licensee to receive any professional services performed or delivered in this State;</p> <p>(10) "Commission" means compensation, except a referral fee, for recommending or referring any product or service to be supplied by another person;</p> <p>(11) "Compilation" means a professional service whereby a CPA is engaged to present, in the form of financial statements, information that is the representation of management without undertaking to express any assurance on the statements;</p> <p>(12) "Contingent fee" means a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise</p> | <p>dependent upon the finding or result of such service;</p> <p>(13) "CPA" means certified public accountant;</p> <p>(14) "CPA firm" means a sole proprietorship, a partnership, a professional corporation, a professional limited liability company, or a registered limited liability partnership which uses "certified public accountant(s)" or "CPA(s)" in or with its name or offers to or renders any attest services in the public practice of accountancy;</p> <p>(15) "CPE" means continuing professional education;</p> <p>(16) "Disciplinary action" means revocation or suspension of, or refusal to grant, membership, or the imposition of a reprimand, probation, constructive comment, or any other penalty or condition;</p> <p>(17) "FASB" means the Financial Accounting Standards Board;</p> <p>(18) "Forecast" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions the entity expects to exist and the course of action the entity expects to take;</p> <p>(19) "GASB" means the Governmental Accounting Standards Board;</p> <p>(20) "Inactive," when used to refer to the status of a person, describes one who has requested inactive status and been approved by the Board and who does not use the title "certified public accountant" nor does he or she allow anyone to refer to him or her as a "certified public accountant," and neither he nor she nor anyone else refers to him or her in any representation as described in 21 NCAC 08A .0308(b).</p> <p>(21) "IRS" means the Internal Revenue Service;</p> <p>(22) "Jurisdiction" means any state or territory of the United States or the District of Columbia;</p> <p>(23) "License year" means the 12 months beginning July 1 and ending June 30;</p> <p>(24) "Member of a CPA firm" means any CPA who has an equity ownership interest in a CPA firm;</p> <p>(25) "NASBA" means the National Association of State Boards of Accountancy;</p> <p>(26) "NCACPA" means the North Carolina Association of Certified Public Accountants;</p> <p>(27) "North Carolina office" means any office physically located in North Carolina;</p> <p>(28) "Person" means any natural person, corporation, partnership, professional limited liability company, registered limited liability</p> |
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- partnership, unincorporated association, or other entity;
- (29) "Professional" means arising out of or related to the particular knowledge or skills associated with CPAs;
- (30) "Projection" means prospective financial statements that present, to the best of the responsible party's knowledge and belief, given one or more hypothetical assumptions, an entity's expected financial position, results of operations, and changes in financial position or cash flows that are based on the responsible party's assumptions reflecting conditions it expects would exist and the course of action it expects would be taken given such hypothetical assumptions;
- (31) "Referral fee" means compensation for recommending or referring any service of a CPA to any person;
- ~~(32) "Retired," when used to refer to the status of a person, describes one possessing a North Carolina certificate of qualification who verifies to the Board that the applicant does not receive or intend to receive in the future any earned compensation for current personal services in any job whatsoever and will not return to active status. However, retired status does not preclude volunteer services for which the retired CPA receives no direct or indirect compensation so long as the retired CPA does not sign any documents, related to such services, as a CPA;~~
- ~~(33)~~(32) "Revenue Department" means the North Carolina Department of Revenue;
- ~~(34)~~(33) "Review" means a professional service whereby a CPA is engaged to perform procedures, limited to analytical procedures and inquiries, to obtain a reasonable basis for expressing limited assurance on whether any material modifications should be made to the financial statements for them to be in conformity with generally accepted accounting principles or other comprehensive basis of accounting;
- ~~(35)~~(34) "Reviewer" means a member of a review team including the review team captain;
- ~~(36)~~(35) "Suspension" means a revocation for a specified period of time. A CPA may be reinstated after a specific period of time if the CPA has met all conditions imposed by the Board at the time of suspension;
- ~~(37)~~(36) "Trade name" means a name used to designate a business enterprise;
- ~~(38)~~(37) "Work papers" mean the CPA's records of the procedures applied, the tests performed, the information obtained, and the conclusions reached in attest services, tax, consulting, special report, or other engagement. Work papers include programs used to perform

professional services, analyses, memoranda, letters of confirmation and representation, checklists, copies or abstracts of company documents, and schedules of commentaries prepared or obtained by the CPA. The forms include handwritten, typed, printed, word processed, photocopied, photographed, computerized data, or any other form of letters, words, pictures, sounds or symbols;

- ~~(39)~~(38) "Work product" means the end result of the engagement for the client which may include a tax return, attest or assurance report, consulting report, and financial plan. The forms include handwritten, typed, word processed, photocopied, photographed, computerized data, or in any other form of letters, words, pictures, sounds, or symbols.

(c) Any requirement to comply by a specific date to the Board that falls on a weekend or federal holiday shall be received as in compliance if postmarked by U.S. Postal Service cancellation, by that date, if received by a private delivery service by that date, or received in the Board office on the next business day.

Authority G.S. 93-1; 93-12.

SUBCHAPTER 08F - REQUIREMENTS FOR CERTIFIED PUBLIC ACCOUNTANT EXAMINATION AND CERTIFICATE APPLICANTS

SECTION .0100 - GENERAL PROVISIONS

21 NCAC 08F .0103 FILING OF EXAMINATION APPLICATIONS AND FEES

(a) All applications for CPA examinations shall be filed with the Board, accompanied by the examination fee. The Board sets the fee for each examination at the amount that enables the Board to recover its actual costs of examination services. If a check or credit card authorization fails to clear the bank, the application shall be deemed incomplete and returned.

(b) The initial application filed to take the examination shall include supporting documentation demonstrating that all legal requirements have been met, such as:

- (1) minimum legal age;
- (2) education;
- (3) experience, if required in order to qualify for the examination; and
- (4) good moral character.

(c) Any person born outside the United States shall furnish to the Board office evidence of citizenship; evidence of resident alien status; or

- (1) other bona fide evidence that the applicant is legally allowed to remain in the United States for the purposes of becoming a U.S. citizen; or
- (2) a notarized affidavit of intention to become a U.S. citizen; or
- (3) evidence that the applicant is a citizen of a foreign jurisdiction which extends to citizens of this state like or similar privileges to be examined.

(d) Official transcripts (originals – not photocopies) signed by the college registrar and bearing the college seal are required to prove education and degree requirements. A letter from the college registrar of the school may be filed as documentation that the applicant has met the graduation requirements if the degree has not been awarded and posted to the transcript. However, no examination grades shall be released until an official transcript is filed confirming the information supplied in the college registrar's letter.

(e) In order to document good moral character as required by G.S. 93-12(5), three certificates of good moral character signed by persons not related by blood or marriage to the applicant shall accompany the application.

(f) No additional statements or affidavits regarding education are required for applications for re-examination.

(g) An applicant shall include as part of any application for the CPA examination a statement of explanation and a certified copy of final disposition if the applicant has been arrested, charged, convicted or found guilty of, received a prayer for judgment continued or pleaded *nolo contendere* to any criminal offense.

(h) If an applicant has been denied any license by any state or federal agency, the applicant shall include as part of the application for the CPA examination a statement explaining such denial. An applicant shall include a statement of explanation and a certified copy of applicable license records if the applicant has been registered with or licensed by a state or federal agency and has been disciplined by that agency.

(i) Two identical photographs shall accompany the application for the CPA examination and the application for the CPA certificate. These photographs shall be of the applicant alone, 2x2 inches in size, front view, full face, taken in normal street attire without a hat or dark glasses, printed on thin paper with a plain light background and taken within the last six months. Photographs may be in black and white or in color. Photographs retouched so that the applicant's appearance is changed are unacceptable. Applicants shall write their names on the back of their photos.

(j) If an applicant's name has legally changed and is different from the name on any transcript or other document supplied to the Board, the applicant shall furnish copies of the documents legally authorizing the name change.

(k) Candidates shall file initial and re-exam applications to sit for the CPA Examination on forms provided by the Board.

(l) Examination fees are valid for a six-month period from the date of the applicant's notice to schedule for the examination from the examination vendor.

(m) No application for examination shall be considered while the applicant is serving a sentence for any criminal offense. Serving a sentence includes incarceration, probation (supervised or unsupervised), parole, or conditionally suspended sentence, any of which are imposed as a result of having been convicted or having plead to a criminal charge.

Authority G.S. 93-12(3); 93-12(4); 93-12(5); 93-12(7).

SECTION .0500 - APPLICATIONS FOR CERTIFICATES

21 NCAC 08F .0502 APPLICATION FOR CPA CERTIFICATE

(a) A person applying for a certificate of qualification must file with the Board an application and an experience affidavit on forms provided by the Board and such other evidence as the Board may require in order to determine that the applicant has met the statutory and regulatory requirements.

(b) Three certificates of good moral character signed by CPAs shall be submitted with the application for a CPA certificate.

(c) An applicant shall include as part of any application for a CPA certificate a statement of explanation and a certified copy of final disposition if the applicant has been arrested, charged, convicted or found guilty of, received a prayer for judgment continued or pleaded *nolo contendere* to any criminal offense. If an applicant has been denied any license by any state or federal agency, the applicant shall also include as part of the application for the CPA certificate a statement explaining such denial. An applicant shall include a statement of explanation and a certified copy of applicable license records if the applicant has been registered with or licensed by a state or federal agency and has been disciplined by that agency.

(d) No application for a certificate shall be considered while the applicant is serving a sentence for any criminal offense. Serving a sentence includes incarceration, probation (supervised or unsupervised), parole, or conditionally suspended sentence, any of which are imposed as a result of having been convicted or having plead to a criminal charge.

Authority G.S. 93-12(5).

SUBCHAPTER 08G - CONTINUING PROFESSIONAL EDUCATION (CPE)

SECTION .0400 - CPE REQUIREMENTS

21 NCAC 08G .0401 CPE REQUIREMENTS FOR CPAS

(a) In order for a CPA to receive CPE credit for a course:

- (1) the CPA must attend or complete the ~~course;~~ course and receive a certificate of completion as set forth in 21 NCAC 08G .0403(c)(17);
- (2) the course must meet the requirements set out in 21 NCAC 08G .0404(a) or (c); and
- (3) the course must increase the professional competency of the CPA.

~~(b) The Board registers sponsors of CPE courses. A CPE course provided by a registered sponsor is presumed to meet the CPE requirements set forth in 21 NCAC 08G .0404(a) if the sponsor has indicated that the course meets those requirements. However, it is up to the individual CPAs attending the course and desiring to claim CPE credit for it to assess whether it increases their professional competency.~~

~~(c)~~ (b) A course that increases the professional competency of a CPA is a course in an area of accounting in which the CPA practices or is planning to practice in the near future, or in the area of professional ethics or an area related to the profession.

~~(d)~~ (c) Because of differences in the education and experience of CPAs, a course may contribute to the professional competence of one CPA but not another. Each CPA must therefore exercise

judgment in selecting courses for which CPE credit is claimed and choose only those that contribute to that CPA's professional competence.

~~(e)(d)~~ Active CPAs must complete 40 CPE hours, computed in accordance with 21 NCAC 08G .0409 by December 31 of each year, except as follows:

- (1) CPAs having certificate applications approved by the Board in April-June must complete 30 CPE hours during the same calendar year.
- (2) CPAs having certificate applications approved by the Board in July-September must complete 20 CPE hours during the same calendar year.
- (3) CPAs having certificate applications approved by the Board in October-December must complete 10 CPE hours during the same calendar year.

~~(f)(e)~~ There are no CPE requirements for ~~retired or~~ inactive CPAs.

~~(g)(f)~~ Any CPE hours completed during the calendar year in which the certificate is approved may be used for that year's requirement even if the hours were completed before the certificate was granted. When a CPA has completed more than the required number of hours of CPE in any one calendar year, the extra hours, not in excess of 20 hours, may be carried forward and treated as hours earned in the following year. Ethics CPE hours may not be included in any carry forward hours. A CPA may not claim CPE credit for courses taken in any year prior to the year of certification.

~~(h)(g)~~ Any CPE hours used to satisfy the requirements for change of status as set forth in 21 NCAC 08J .0105, for reinstatement as set forth in 21 NCAC 08J .0106, or for application for a new certificate as set forth in 21 NCAC 08I .0104 may also be used to satisfy the annual CPE requirement set forth in Paragraph ~~(e)(d)~~ of this Rule.

~~(i)(h)~~ It is the CPA's responsibility to maintain records substantiating the CPE credits claimed for the current year and for each of the four calendar years prior to the current year.

~~(j)(i)~~ A non-resident licensee may satisfy the annual CPE requirements including 21 NCAC 08G .0401 in the jurisdiction in which he or she is actively licensed and currently works or resides. If there is no annual CPE requirement in the jurisdiction in which he or she is actively licensed and currently works or resides, he or she must comply with Paragraph ~~(e)(d)~~ of this Rule.

Authority G.S. 93-12(8b).

21 NCAC 08G .0403 QUALIFICATION OF CPE SPONSORS

(a) The Board ~~registers~~ does not register sponsors of CPE courses ~~and not or~~ courses. ~~The Board will maintain a list of sponsors which have agreed to conduct programs in accordance with the standards for CPE set forth in this Subchapter. Such sponsors shall indicate their agreement by signing a CPE program sponsor agreement form provided by the Board. These sponsors are registered sponsors.~~

(b) ~~Notwithstanding Paragraph (a) of this Rule, sponsors~~ Sponsors of continuing education programs which are listed in good standing on the National Registry of CPE Sponsors

maintained by NASBA are considered to be ~~registered~~ CPE sponsors ~~compliant with the CPE requirements with of the Board. Board in Paragraph (c) of this Rule. These sponsors are not required to sign a CPE program sponsor agreement form with this Board.~~

~~(c) In the CPE program sponsor agreement with the Board, the registered sponsor shall agree to:~~ CPE requirements required of NASBA sponsors:

- (1) allow the Board to audit courses offered by the sponsor in order to determine if the sponsor is complying with the terms of the agreement and shall refund the registration fee to the auditor if requested by the auditor;
- (2) have an individual who did not prepare the course review each course to be sure it meets the standards for CPE;
- (3) state the following in every brochure or other publication or announcement concerning a course:
 - (A) the general content of the course and the specific knowledge or skill taught in the course;
 - (B) any prerequisites for the course and any advance preparation required for the course and if none, that should be stated;
 - (C) the level of the course, such as basic, intermediate, or advanced;
 - (D) the teaching methods to be used in the course;
 - (E) the amount of sponsor recommended CPE credit a CPA who takes the course could claim; and
 - (F) the date the course is offered, if the course is offered only on a certain date, and, if applicable, the location;
- (4) ensure that the instructors or presenters of the course are qualified to teach the subject matter of the course and to apply the instructional techniques used in the course;
- (5) evaluate the performance of an instructor or presenter of a course to determine whether the instructor or presenter is suited to serve as an instructor or presenter in the future;
- (6) encourage participation in a course only by those who have the appropriate education and experience;
- (7) distribute course materials to participants in a timely manner;
- (8) use physical facilities for conducting the course that are consistent with the instructional techniques used;
- (9) assign accurately the number of CPE credits each participant may be eligible to receive by either:
 - (A) monitoring attendance at a group course; or

- (B) testing in order to determine if the participant has learned the material presented;
- (10) provide, before the course's conclusion, an opportunity for the attendees to evaluate the quality of the course by questionnaires, oral feedback, or other means, in order to determine whether the course's objectives have been met, its prerequisites were necessary or desirable, the facilities used were satisfactory, and the course content was appropriate for the level of the course;
- (11) inform instructors and presenters of the results of the evaluation of their performance;
- (12) systematically review the evaluation process to ensure its effectiveness;
- (13) retain for five years from the date of the course presentation or completion:
 - (A) a record of participants completing course credit requirements;
 - (B) an outline of the course (or equivalent);
 - (C) the date and location of presentation;
 - (D) the participant evaluations or summaries of evaluations;
 - (E) the documentation of the instructor's qualifications; and
 - (F) the number of contact hours recommended for each participant;
- (14) have a visible, continuous and identifiable contact person who is charged with the administration of the sponsor's CPE programs and has the responsibility and is accountable for assuring and demonstrating compliance with these rules by the sponsor or by any other organization working with the sponsor for the development, distribution or presentation of CPE courses;
- (15) develop and promulgate policies and procedures for the management of grievances including, but not limited to, tuition and fee refunds;
- (16) possess a budget and resources that are adequate for the activities undertaken and their continued improvement; and
- (17) provide persons completing course requirements with written proof of completion indicating the participant's name, the name of the course, the date the course was held or completed, the sponsor's name and address, and the number of CPE hours calculated and recommended in accordance with 21 NCAC 08G .0409.

~~(d) Failure of a registered sponsor to comply with the terms of the CPE program sponsor agreement shall be grounds for the Board to terminate the agreement, to remove the registered sponsor's name from the list of registered sponsors and to notify the public of this action.~~

~~(e)(d)~~ Failure of a National Registry of CPE Sponsor to comply with the terms of this Rule shall be grounds for the Board to disqualify the sponsor ~~to be registered~~ as a CPE sponsor compliant with the CPE requirements with this Board and to notify NASBA and the public of this action.

Authority G.S. 93-12(8b).

21 NCAC 08G .0409 COMPUTATION OF CPE CREDITS

(a) Group Courses: Non-College. CPE credit for a group course that is not part of a college curriculum shall be given based on contact hours. A contact hour shall be 50 minutes of instruction. One-half credits shall be equal to 25 minutes after the first credit hour has been earned in a formal learning activity. For example, a group course lasting 100 minutes shall be two contact hours and thus two CPE credits. A group course lasting 75 minutes shall be only one and one-half contact hours and thus one and one-half CPE credits. When individual segments of a group course shall be less than 50 minutes, the sum of the individual segments shall be added to determine the number of contact hours. For example, five 30-minute presentations shall be 150 minutes, which shall be three contact hours and three CPE credits. No credit shall be allowed for a segment unless the participant completes the entire segment. Internet based programs shall employ a monitoring mechanism to verify that participants are actively participating during the duration of the course pursuant to the NASBA Statement on Standards for CPE Programs, Standard No. 13.

(b) Completing a College Course. CPE credit for completing a college course in the college curriculum shall be granted based on the number of credit hours the college gives the CPA for completing the course. One semester hour of college credit shall be 15 CPE credits; one quarter hour of college credit shall be 10 CPE credits; and one continuing education unit (CEU) shall be 10 CPE credits. However, under no circumstances shall CPE credit be given to a CPA who audits a college course.

(c) Self Study. CPE credit for a self-study course shall be given based on the average number of contact hours needed to complete the course. The average completion time shall be allowed for CPE credit. A sponsor must determine, on the basis of pre-tests or word count formula pursuant to the NASBA Statement on Standards for CPE Programs, Standard No. 14 the average number of contact hours it takes to complete a course.

(d) Instructing a CPE Course. CPE credit for teaching or presenting a CPE course for CPAs shall be given based on the number of contact hours spent in preparing and presenting the course. No more than 50 percent of the CPE credits required for a year shall be credits for preparing for and presenting CPE courses. CPE credit for preparing for and presenting a course shall be allowed only once a year for a course presented more than once in the same year by the same CPA.

(e) Authoring a Publication. CPE credit for published articles and books shall be given based on the number of contact hours the CPA spent writing the article or book. No more than 25 percent of a CPA's required CPE credits for a year shall be credits for published articles or books. An article written for a CPA's client or business newsletter is not applicable for this CPE credit.

(f) Instructing a College Course. CPE credit for instructing a graduate level college course shall be given based on the number of credit hours the college gives a student for successfully completing the course, using the calculation set forth in Paragraph (b) of this Rule. Credit shall not be given for instructing an undergraduate level course. In addition, no more than 50 percent of the CPE credits required for a year shall be credits for instructing a college course and, if CPE credit shall also be claimed under Paragraph (d) of this Rule, no more than 50 percent of the CPE credits required for a year shall be credits claimed under Paragraph (d) and this Paragraph. CPE credit for instructing a college course shall be allowed only once for a course presented more than once in the same year by the same CPA.

Authority G.S. 93-12(8b).

21 NCAC 08G .0410 PROFESSIONAL ETHICS AND CONDUCT CPE

(a) As part of the annual CPE requirement, all active CPAs shall complete CPE on professional ethics and conduct. They shall complete either two hours in a group study format or in a self-study format of a course on regulatory or behavioral professional ethics and conduct. This CPE shall be offered by a CPE sponsor registered with ~~the Board, or with~~ NASBA pursuant to 21 NCAC 08G .0403(a) ~~or (b).~~ .0403(b).

(b) A non-resident licensee whose primary office is in North Carolina must comply with Paragraph (a) of this Rule. All other non-resident licensees may satisfy Paragraph (a) of this Rule by completing the ethics requirements in the jurisdiction in which he or she is actively licensed as a CPA and works or resides. If there is no ethics CPE requirement in the jurisdiction where he or she is actively licensed and currently works or resides, he or she must comply with Paragraph (a) of this Rule.

Authority G.S. 93-12(8b).

SUBCHAPTER 08I - REVOCATION OF CERTIFICATES AND OTHER DISCIPLINARY ACTION

21 NCAC 08I .0104 MODIFICATION OF DISCIPLINE AND NEW CERTIFICATE

(a) A person or CPA firm that has been ~~disciplined permanently revoked~~ by the Board may apply to the Board for modification of the discipline at any time after ~~the effective date of the Board's decision imposing it; however, if any previous application has been made with respect to the same discipline, no additional application shall be considered before the lapse of one year following the Board's decision on that previous application. Provided, however, that an application to modify permanent revocation shall not be considered until after five years from the date of the original discipline, nor more often than three years after the Board's last decision on any prior application for modification.~~

(b) The application for modification of discipline or for a new certificate shall be in writing, shall set out and, as appropriate, shall demonstrate good cause for the relief sought. The application for an individual shall be accompanied by at least three supporting recommendations, made under oath, from CPAs

who have personal knowledge of the facts relating to the revocation and or discipline of the activities of the applicant since the discipline was imposed. The application for a CPA firm shall be accompanied by at least three supporting recommendations, made under oath, for each CPA partner, CPA member, or CPA shareholder from CPAs who have personal knowledge of the facts relating to the revocation and or discipline of the activities of the CPA partner, CPA member, or CPA shareholder since the discipline was imposed.

(c) "Good cause" as used in Paragraph (b) of this Rule means that the applicant is completely rehabilitated with respect to the conduct which was the basis of the discipline. Evidence demonstrating such rehabilitation shall include evidence:

- (1) that such person has not engaged in any conduct during the discipline period which, if that person had been licensed or registered during such period, would have constituted the basis for discipline pursuant to G.S. 93-12(9);
- (2) that, with respect to any criminal conviction which constituted any part of the previous discipline, the person has completed the sentence imposed; and
- (3) that, with respect to a court order, civil settlement, lien or other agreement, that restitution has been made to any aggrieved party.

(d) In determining good cause, the Board may consider all the applicant's activities since the disciplinary penalty was imposed, the offense for which the applicant was disciplined, the applicant's activities during the time the applicant was in good standing with the Board, the applicant's rehabilitative efforts, restitution to damaged parties in the matter for which the penalty was imposed, and the applicant's general reputation for truth and professional probity. For the purpose of this Paragraph, "applicant" shall, in the case of a CPA firm, include CPA partners, CPA members, or CPA shareholders.

(e) Any person who applies for a modification of discipline and for a new certificate after revocation shall, in addition to the other requirements of this Section, comply with all qualifications and requirements for initial certification which ~~exist~~ existed at the time of the original application.

(f) No application for a new certificate or for modification of discipline shall be considered while the applicant is serving a sentence for any criminal offense. Serving a sentence includes incarceration, probation (supervised or unsupervised), parole, or suspended sentence, any of which are imposed as a result of having been convicted or plead to a criminal charge.

(g) An application shall ordinarily be ruled upon by the Board on the basis of the recommendations and evidence submitted in support thereof. However, the Board may make additional inquiries of any person or persons, or request additional evidence it deems appropriate.

(h) As a condition for a new certificate or modification of discipline, the Board may impose terms and conditions it considers suitable.

Authority G.S. 55B-12; 93-2; 93-12(7a); 93-12(7b); 93-12(9).

SUBCHAPTER 08J - RENEWALS AND REGISTRATIONS

21 NCAC 08J .0105 INACTIVE STATUS: CHANGE OF STATUS

(a) A CPA may apply to the Board for change of status to ~~retired status or~~ inactive status provided the CPA meets the description of the appropriate inactive status as defined in 21 NCAC 08A .0301. Application for any status change may be made on the ~~annual certificate renewal form or another form~~ provided by the Board.

(b) A CPA who does not meet the description of inactive ~~or retired~~ as defined in 21 NCAC 08A .0301 may not be or remain on inactive ~~or retired~~ status.

(c) A CPA on ~~retired~~ inactive status may change to active status by:

- (1) paying the certificate renewal fee for the license year in which the application for change of status is received;
- (2) furnishing the Board with evidence of satisfactory completion of 40 hours of acceptable CPE courses during the 12-month period immediately preceding the application for change of status. Eight of the required hours must be credits derived from a course or examination in North Carolina accountancy statutes and rules (including the Code of Professional Ethics and Conduct contained therein) as set forth in 21 NCAC ~~08G .0401(a); 08F .0504;~~ and
- (3) furnishing three certificates of moral character and endorsements as to the eligibility signed by CPAs holding valid certificates granted by any state or territory of the United States or the District of Columbia.

~~(d) A CPA on retired status may request change to inactive status by application to the Board.~~

~~(e) Any individual on inactive status may change to active status by complying with the requirements of 21 NCAC 08J .0106(c).~~

Authority G.S. 93-12(8); 93-12(8b).

21 NCAC 08J .0106 FORFEITURE OF CERTIFICATE AND REISSUANCE

~~(a) A certificate holder who determines that the certificate of qualification issued by the Board is no longer needed or desired may request inactive status by application to the Board.~~

~~(b)(a)~~ A person who is ~~inactive or~~ has forfeited a certificate is no longer a CPA and thus is not subject to the renewal fee or CPE requirements contained in these Rules.

~~(c)(b)~~ A person who ~~desires to reinstate an inactive certificate or~~ reissue requests reissuance of a forfeited certificate shall make application and provide the following to the Board:

- (1) payment of the current certificate application fee;
- (2) three certificates of moral character and endorsements as to eligibility signed by CPAs holding valid certificates granted by any state

or territory of the United States or the District of Columbia; and

- (3) evidence of satisfactory completion of the CPE requirement described in 21 NCAC 08J .0105(c)(2).

~~(d)(c)~~ The certificate may be ~~reinstated or~~ reissued if determined by the Board that the person meets the requirements as listed in Paragraph ~~(e)(b)~~ of this Rule.

Authority G.S. 93-12(5); 93-12(8a); 93-12(8b).

21 NCAC 08J .0107 MAILING ADDRESSES OF CERTIFICATE HOLDERS AND CPA FIRMS

All certificate holders and CPA firms shall notify the Board in writing within 30 days of any change in ~~address home address and phone number, CPA firm address and phone number or business, business location and phone number, and email address.~~

Authority G.S. 55B-12; 93-12(7b)(5); 93-12(9).

SUBCHAPTER 08M - STATE QUALITY REVIEW PROGRAM

SECTION .0100 - GENERAL SQR REQUIREMENTS

21 NCAC 08M .0105 PEER REVIEW REQUIREMENTS

(a) A CPA or CPA firm providing any of the following services to the public shall participate in a peer review program:

- (1) audits;
- (2) reviews of financial statements;
- (3) compilations of financial statements; and
- (4) agreed-upon ~~procedures.~~ procedures or engagement to be performed in accordance with the Statements on Standards for Attestation Engagements.

(b) A CPA or CPA firm not providing any of the services listed in Paragraph (a) of this Rule is exempt from peer review until the issuance of the first report provided to a client. A CPA or CPA firm shall register with the peer review program as listed in Paragraph (d) of this Rule within 30 days of the issuance of the first report provided to a client.

(c) A CPA, a new CPA firm or a CPA firm exempt from peer review now providing any of the services in Paragraph (a) of this Rule shall furnish to the peer review program selected financial statements, corresponding work papers, and any additional information or documentation required for the peer review program within 24 18 months of the issuance of the first report provided to a client.

(d) Participation in and completion of one of the following peer review programs is required:

- (1) AICPA Peer Review Program; or
- (2) Any other peer review program found to be substantially equivalent to Subparagraph (1) of this Paragraph in advance by the Board.

(e) CPA firms shall not rearrange their structure or act in any manner with the intent to avoid participation in peer review.

(f) A CPA firm which does not have offices in North Carolina and which has provided any services as listed in G.S. 93-10(c)(3) to North Carolina clients is required to participate in a peer review program.

(g) Subsequent peer reviews of a CPA firm are due three years and six months from the year end of the 12 month period of the first peer review unless granted an extension by the peer review program.

Authority G.S. 93-12(7b); 93-12(8c).

SUBCHAPTER 08N - PROFESSIONAL ETHICS AND CONDUCT

SECTION .0200 - RULES APPLICABLE TO ALL CPAS

21 NCAC 08N .0202 DECEPTIVE CONDUCT PROHIBITED

(a) Deception Defined. A CPA shall not engage in deceptive conduct. Deception includes fraud or misrepresentation and representations or omissions which a CPA either knows or should know have a capacity or tendency to deceive. Deceptive conduct is prohibited whether or not anyone has been actually deceived.

(b) Prohibited Deception. Prohibited conduct under this Section includes but is not limited to deception in:

- (1) obtaining or maintaining employment;
- (2) obtaining or keeping clients;
- (3) obtaining or maintaining certification, ~~retired~~ inactive status, or exemption from peer review;
- (4) reporting CPE credits;
- (5) certifying the character or experience of exam or certificate applicants;
- (6) implying abilities not supported by education, professional attainments, or licensing recognition;
- (7) asserting that services or products sold in connection with use of the CPA title are of a particular quality or standard when they are not;
- (8) creating false or unjustified expectations of favorable results;
- (9) using or permitting another to use the CPA title in a form of business not permitted by the accountancy laws or rules;
- (10) permitting anyone not certified in this state (including one licensed in another state) to unlawfully use the CPA title in this state or to unlawfully operate as a CPA firm in this state; or
- (11) falsifying a review, report, or any required program or checklist of any peer review program.

Authority G.S. 55B-12; 57C-2-01; 93-12(9).

21 NCAC 08N .0203 DISCREDITABLE CONDUCT PROHIBITED

(a) Discreditable Conduct. A CPA shall not engage in conduct discreditable to the accounting profession.

(b) Prohibited Discreditable Conduct. Discreditable conduct includes but is not limited to:

- (1) acts that reflect adversely on the CPA's honesty, integrity, trustworthiness, good moral character, or fitness as a CPA in other respects;
- (2) stating or implying an ability to improperly influence a governmental agency or official;
- (3) failing to comply with any order issued by the Board; ~~or~~
- (4) failing to fulfill the terms of a peer review engagement ~~contract~~; contract;
- (5) misrepresentation in reporting CPE credits; or
- (6) entering into any settlement or other resolution of a dispute that purports to keep its contents confidential from the Board.

Authority G.S. 55B-12; 57C-2-01; 93-12(9).

21 NCAC 08N .0208 REPORTING CONVICTIONS, JUDGMENTS, AND DISCIPLINARY ACTIONS

(a) Criminal Actions. A CPA shall notify the Board within 30 days of any charge or arrest or conviction or finding of guilt of, pleading of *nolo contendere*, or receiving a prayer for judgment continued to any criminal offense.

(b) Civil Actions. A CPA shall notify the Board within 30 days of any judgment or settlement in a civil suit, bankruptcy action, administrative proceeding, or binding arbitration, the basis of which is grounded upon an allegation of professional negligence, gross negligence, dishonesty, fraud, misrepresentation, incompetence, or violation of any federal or state tax law and which was brought against either the CPA or a North Carolina office of a CPA firm of which the CPA was a managing partner.

(c) Settlements. A CPA shall notify the Board within 30 days of any settlement in lieu of a civil suit or criminal charge which is grounded upon an allegation of professional negligence, gross negligence, dishonesty, fraud, misrepresentation, incompetence, or violation of any federal, state, or local law. Notification is required regardless of any confidentiality clause in the settlement.

(d) Investigations. A CPA shall notify the Board within 30 days of any inquiry or investigation by the Internal Revenue Service (IRS) or any state department of revenue Criminal Investigation Divisions pertaining to any personal or business tax matters.

(e) Liens. A CPA shall notify the Board within 30 days of the filing of any liens by the Internal Revenue Service (IRS) or any state department of revenue regarding the apparent failure to pay or failure to pay any amounts due any tax matters.

Authority G.S. 55B-12; 57C-2-01; 93-12(9).

SECTION .0300 - RULES APPLICABLE TO ALL CPAS WHO USE THE CPA TITLE IN OFFERING OR RENDERING PRODUCTS OR SERVICES TO CLIENTS

21 NCAC 08N .0302 FORMS OF PRACTICE

(a) Authorized Forms of Practice. A CPA who uses CPA in or with the name of the business or offers or renders attest or assurance services in the public practice of accountancy to clients shall do so only through a registered sole proprietorship, partnership, Professional Corporation, Professional Limited Liability Company, or Registered Limited Liability Partnership.

(b) Authorized Ownership. A CPA firm may have an ownership of up to 49 percent by non-CPAs. A CPA firm shall have ownership of at least 51 percent and be controlled in law and fact by holders of valid CPA certificates who have the unrestricted privilege to use the CPA title and to practice public accountancy in a jurisdiction and at least one of whom shall be licensed by this Board.

(c) CPA Firm Registration Required. A CPA shall not offer or render professional services through a CPA firm which is in violation of the registration requirements of 21 NCAC 08J .0108, 08J .0110, or 08M .0105.

(d) Supervision of CPA Firms. Every North Carolina office of a CPA firm registered in North Carolina shall be actively and locally supervised by a designated actively licensed North Carolina CPA whose primary responsibility and a corresponding amount of time shall be work performed in that office.

(e) CPA Firm Requirements for CPA Ownership. A CPA firm and its designated supervising CPA is accountable for the following in regard to a CPA owner:

- (1) A CPA owner shall be a natural person or a general partnership or a limited liability partnership directly owned by natural persons.
- (2) A CPA owner shall actively participate in the business of the CPA ~~firm~~ firm as his or her principal occupation.

- (3) A CPA owner who, prior to January 1, 2006, is not actively participating in the CPA firm may continue as an owner until such time as his or her ownership is terminated.

(f) CPA Firm Requirements for Non-CPA Ownership. A CPA firm and its designated supervising CPA partner is accountable for the following in regard to a non-CPA owner:

- (1) a non-CPA owner shall be a natural person or a general partnership or limited liability partnership directly owned by natural persons;
- (2) a non-CPA owner shall actively participate in the business of the firm ~~or an affiliated entity~~ as his or her principal occupation;
- (3) a non-CPA owner shall comply with all applicable accountancy statutes and the rules;
- (4) a non-CPA owner shall be of good moral character and shall be dismissed and disqualified from ownership for any conduct that, if committed by a licensee, would result in a discipline pursuant to G.S. 93-12(9);
- (5) a non-CPA owner shall report his or her name, home address, phone number, social security number and Federal Tax ID number (if any) on the CPA firm's registration; and
- (6) a non-CPA owner's name may not be used in the name of the CPA firm or held out to clients or the public that implies the non-CPA owner is a CPA.

Authority G.S. 55B-12; 57C-2-01; 93-12(9).

APPROVED RULES

*This Section includes a listing of rules approved by the Rules Review Commission followed by the full text of those rules. The rules that have been approved by the RRC in a form different from that originally noticed in the Register or when no notice was required to be published in the Register are identified by an * in the listing of approved rules. Statutory Reference: G.S. 150B-21.17.*

Rules approved by the Rules Review Commission at its meeting on July 18, 2013.

**REGISTER CITATION TO THE
NOTICE OF TEXT****INFORMATION TECHNOLOGY SERVICES, OFFICE OF**

| | | | | | |
|--|----|------|-----|--------|-----------|
| <u>Forms, Terms and Conditions</u> | 09 | NCAC | 06A | .0101* | 27:12 NCR |
| <u>Definitions</u> | 09 | NCAC | 06A | .0102* | 27:12 NCR |
| <u>Benchmark and the Board of Awards</u> | 09 | NCAC | 06A | .0103* | 27:12 NCR |
| <u>Procedure</u> | 09 | NCAC | 06B | .0101* | 27:12 NCR |
| <u>Verbal Requests</u> | 09 | NCAC | 06B | .0102* | 27:12 NCR |
| <u>Confidentiality of Solicitation Documents</u> | 09 | NCAC | 06B | .0103* | 27:12 NCR |
| <u>Development of IT Solicitation Documents and...</u> | 09 | NCAC | 06B | .0201* | 27:12 NCR |
| <u>Need</u> | 09 | NCAC | 06B | .0202* | 27:12 NCR |
| <u>Development of Specifications</u> | 09 | NCAC | 06B | .0203 | 27:12 NCR |
| <u>Articles for Special Purposes</u> | 09 | NCAC | 06B | .0204* | 27:12 NCR |
| <u>Submission for Adoption</u> | 09 | NCAC | 06B | .0205 | 27:12 NCR |
| <u>Copies of Specifications</u> | 09 | NCAC | 06B | .0206 | 27:12 NCR |
| <u>Confidentiality</u> | 09 | NCAC | 06B | .0207 | 27:12 NCR |
| <u>Procurement Procedures</u> | 09 | NCAC | 06B | .0301* | 27:12 NCR |
| <u>Methods of Source Selection</u> | 09 | NCAC | 06B | .0302* | 27:12 NCR |
| <u>Electronic Offers</u> | 09 | NCAC | 06B | .0303* | 27:12 NCR |
| <u>Recall of Offers</u> | 09 | NCAC | 06B | .0304 | 27:12 NCR |
| <u>Public Opening</u> | 09 | NCAC | 06B | .0305* | 27:12 NCR |
| <u>Late Offers</u> | 09 | NCAC | 06B | .0306* | 27:12 NCR |
| <u>Clerical Errors and Clarifications</u> | 09 | NCAC | 06B | .0307* | 27:12 NCR |
| <u>Extension of Offer Validity</u> | 09 | NCAC | 06B | .0308 | 27:12 NCR |
| <u>Evaluation</u> | 09 | NCAC | 06B | .0309* | 27:12 NCR |
| <u>Notification of Award</u> | 09 | NCAC | 06B | .0310 | 27:12 NCR |
| <u>Lack of Competition</u> | 09 | NCAC | 06B | .0311 | 27:12 NCR |
| <u>Solicitation Documents</u> | 09 | NCAC | 06B | .0312 | 27:12 NCR |
| <u>Division of Commodities and Service Needs</u> | 09 | NCAC | 06B | .0313* | 27:12 NCR |
| <u>Advertisement and Notice</u> | 09 | NCAC | 06B | .0314* | 27:12 NCR |
| <u>Mandatory Conferences/Site Visits</u> | 09 | NCAC | 06B | .0315* | 27:12 NCR |
| <u>Negotiation</u> | 09 | NCAC | 06B | .0316* | 27:12 NCR |
| <u>Rejection of Offers</u> | 09 | NCAC | 06B | .0401* | 27:12 NCR |
| <u>Public Record</u> | 09 | NCAC | 06B | .0402 | 27:12 NCR |
| <u>Negotiation</u> | 09 | NCAC | 06B | .0403 | 27:12 NCR |
| <u>Notice of Rejection</u> | 09 | NCAC | 06B | .0404 | 27:12 NCR |
| <u>Debriefing Offerors</u> | 09 | NCAC | 06B | .0405* | 27:12 NCR |
| <u>Responsibility</u> | 09 | NCAC | 06B | .0501* | 27:12 NCR |
| <u>Inspection</u> | 09 | NCAC | 06B | .0502* | 27:12 NCR |
| <u>Samples</u> | 09 | NCAC | 06B | .0503* | 27:12 NCR |

APPROVED RULES

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|---|----|------|-----|--------|-----------|
| <u>Modifications of Contract Specifications</u> | 09 | NCAC | 06B | .0504* | 27:12 NCR |
| <u>Report of Discrepancy</u> | 09 | NCAC | 06B | .0505* | 27:12 NCR |
| <u>Enforcement</u> | 09 | NCAC | 06B | .0601 | 27:12 NCR |
| <u>Report to ITS</u> | 09 | NCAC | 06B | .0602* | 27:12 NCR |
| <u>Responsibility of Purchasing Agency</u> | 09 | NCAC | 06B | .0603* | 27:12 NCR |
| <u>Use and Description</u> | 09 | NCAC | 06B | .0701* | 27:12 NCR |
| <u>Determining Factors</u> | 09 | NCAC | 06B | .0702* | 27:12 NCR |
| <u>Extension of Contract Termination Dates</u> | 09 | NCAC | 06B | .0703* | 27:12 NCR |
| <u>Use</u> | 09 | NCAC | 06B | .0801* | 27:12 NCR |
| <u>Conditions for Limited or Waived Competition</u> | 09 | NCAC | 06B | .0901* | 27:12 NCR |
| <u>Approval and Documentation</u> | 09 | NCAC | 06B | .0902* | 27:12 NCR |
| <u>Confidentiality</u> | 09 | NCAC | 06B | .1001* | 27:12 NCR |
| <u>Payment Plans</u> | 09 | NCAC | 06B | .1002* | 27:12 NCR |
| <u>Change in Corporate Structure or Assignment</u> | 09 | NCAC | 06B | .1003* | 27:12 NCR |
| <u>Purchasing from or through Agency Employees</u> | 09 | NCAC | 06B | .1004* | 27:12 NCR |
| <u>Anticompetitive, Deceptive, and Fraudulent Practices</u> | 09 | NCAC | 06B | .1005* | 27:12 NCR |
| <u>Cooperative Purchasing</u> | 09 | NCAC | 06B | .1006 | 27:12 NCR |
| <u>Board of Awards</u> | 09 | NCAC | 06B | .1008 | 27:12 NCR |
| <u>Right to Hearing</u> | 09 | NCAC | 06B | .1101* | 27:12 NCR |
| <u>Protest Procedures for Award of Contracts</u> | 09 | NCAC | 06B | .1102* | 27:12 NCR |
| <u>Request for Hearing</u> | 09 | NCAC | 06B | .1103* | 27:12 NCR |
| <u>Definitions</u> | 09 | NCAC | 06B | .1104* | 27:12 NCR |
| <u>General Provisions</u> | 09 | NCAC | 06B | .1105* | 27:12 NCR |
| <u>Order for Prehearing Statements</u> | 09 | NCAC | 06B | .1106* | 27:12 NCR |
| <u>Duties of the Hearing Officer</u> | 09 | NCAC | 06B | .1107* | 27:12 NCR |
| <u>Consent Order, Settlement, Stipulation</u> | 09 | NCAC | 06B | .1108 | 27:12 NCR |
| <u>Settlement Conference</u> | 09 | NCAC | 06B | .1109* | 27:12 NCR |
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| <u>Discovery</u> | 09 | NCAC | 06B | .1111* | 27:12 NCR |
| <u>Consolidation of Cases</u> | 09 | NCAC | 06B | .1112* | 27:12 NCR |
| <u>Sanctions</u> | 09 | NCAC | 06B | .1114 | 27:12 NCR |
| <u>Motions</u> | 09 | NCAC | 06B | .1115* | 27:12 NCR |
| <u>Continuances</u> | 09 | NCAC | 06B | .1117* | 27:12 NCR |
| <u>Rights and Responsibilities of Parties</u> | 09 | NCAC | 06B | .1118* | 27:12 NCR |
| <u>Evidence</u> | 09 | NCAC | 06B | .1120* | 27:12 NCR |
| <u>Final Agency Decision; Official Record</u> | 09 | NCAC | 06B | .1121* | 27:12 NCR |
| <u>Declaratory Rulings</u> | 09 | NCAC | 06B | .1201* | 27:12 NCR |
| <u>Requests for Declaratory Rulings</u> | 09 | NCAC | 06B | .1202* | 27:12 NCR |
| <u>Response to a Request for a Declaratory Ruling</u> | 09 | NCAC | 06B | .1203* | 27:12 NCR |
| <u>Effect of a Declaratory Ruling</u> | 09 | NCAC | 06B | .1204* | 27:12 NCR |
| <u>Record of Ruling</u> | 09 | NCAC | 06B | .1205* | 27:12 NCR |
| <u>Default Proceedings; Disqualification; and Debarment</u> | 09 | NCAC | 06B | .1206* | 27:12 NCR |
| <u>Faithful Performance</u> | 09 | NCAC | 06B | .1207* | 27:12 NCR |
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| <u>Emergency Situations or Pressing Need</u> | 09 | NCAC | 06B | .1302* | 27:12 NCR |
| <u>Special Delegations</u> | 09 | NCAC | 06B | .1303* | 27:12 NCR |

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|---------------------------------|----|------|-----|--------|-----------|
| <u>General Delegations</u> | 09 | NCAC | 06B | .1304* | 27:12 NCR |
| <u>Compliance Reviews</u> | 09 | NCAC | 06B | .1305* | 27:12 NCR |
| <u>Procurement File Records</u> | 09 | NCAC | 06B | .1402* | 27:12 NCR |

The following rule is subject to the next Legislative Session. (See G.S. 150B-21.3)

ENVIRONMENTAL MANAGEMENT COMMISSION

| | | | | | |
|--|-----|------|-----|--------|-----------|
| <u>Mitigation Program Requirements for Protection and...</u> | 15A | NCAC | 02B | .0295* | 27:14 NCR |
|--|-----|------|-----|--------|-----------|

TITLE 09 – OFFICE OF THE GOVERNOR

09 NCAC 06A .0101 FORMS, TERMS AND CONDITIONS

In these Rules the State Chief Information Officer (State CIO) shall prescribe forms, terms and conditions and advertisement requirements for acquiring goods and services related to information technology (IT) for use by purchasing agencies. The forms, terms and conditions, and advertisement requirements shall be established taking into consideration market volatility, trends and conditions, legal requirements, and any other factors determined to be in the State's best interest. These shall be made available to all agencies via the State's designated IT procurement website.

*History Note: Authority G.S. 147-33.76(b1); 147-33.77(f); 147-33.82; 147-33.95(f);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06A .0102 DEFINITIONS

For the purpose of this Chapter,

- (1) "Agency/Agencies" is defined as an entity enumerated in G.S. 147-33.81(6).
- (2) "Best value procurement" is defined as a procurement process with the objective of reducing the total cost of ownership. The particular procurement methods used are selected so as to result in the best value for the State in terms of the function to be performed or delivered. Competitive best value procurement allows for the use of alternate competitive purchasing techniques in addition to low price analysis in the selection of supply sources.
- (3) "Clarification" is defined as communication between the State and an offeror that may occur after receipt of an offer for the purpose of eliminating irregularities, informalities, or apparent clerical mistakes in an offer. A clarification may also be used to allow the State's reasonable interpretation of an offer or offers or to facilitate the State's evaluation of all offers. Clarification shall not be used to cure material deficiencies or to negotiate.

- (4) "Commodity" is defined as tangible or moveable goods, equipment, materials or supplies.
- (5) "Competition" in purchasing exists when the available market for the goods or services to be acquired consists of more than one supplier who is technically qualified and willing to submit an offer.
- (6) "Competitive range" is defined as the range of all of the most highly ranked offers as established in the solicitation and as determined by the purchasing agency during evaluation of offers.
- (7) "Deficiency" is defined as either a failure to meet a stated requirement or a combination of weaknesses in an offer that increases the risk of unsuccessful contract performance.
- (8) "Emergency situations" are defined as circumstances that endanger lives, property, or the continuation of a vital program, as determined by the purchasing agency head, and that can be rectified only by immediate purchases or rental of goods or services.
- (9) "General delegation" is defined as the authority delegated to the purchasing agency for the procurement of information technology goods and services. The State CIO may issue general delegations and special delegations as provided in Rules 06B .1303 and 06B .1304. Information technology is defined in G.S. 147-33.81(2).
- (10) "Goods" are defined as information technology commodities including equipment, materials, or supplies.
- (11) "Negotiation" is defined as oral or written communications in a waived, limited, or open competitive procurement between the State and offeror(s) undertaken with the intent of allowing offerors to revise their offers. Revisions may apply to price, schedule, technical requirements, or other terms of the proposed contract. Negotiations are specific to each offer and shall be conducted to maximize the State's ability to obtain best value based on the evaluation factors set forth in the solicitation. The State may reward technical

- solutions exceeding mandatory minimums with higher evaluations or negotiate with offerors for increased performance beyond mandatory minimums.
- (12) "Offer" is defined as a bid or proposal submitted in response to any solicitation document utilizing "Best Value" procurement methodology including Invitation for Bids (IFB), Request for Proposals (RFP), Request for Quotations (RFQ), negotiation, or other acquisition processes, as well as responses to solution-based solicitations and government-vendor partnerships.
- (13) "Packaged software," or "commercial off the shelf software" (COTS) is an information technology commodity and is defined as software used regularly for other than government purposes and is sold, licensed, or leased to the general public or commercial enterprises at a vendor's catalog prices.
- (14) "Pressing need" is defined as a need arising from unforeseen causes including delay by contractors, delay in transportation, breakdown in machinery, or unanticipated volume of work, and which can be satisfied only by immediate purchase (or rental) of equipment, supplies, materials, or contractual services.
- (15) "Price" is defined as the amount paid by the State to a vendor for a good or service.
- (16) "Procurement" is defined as the process of acquiring goods or services.
- (17) "Progressive award" is defined as an award of portions of a definite quantity requirement to more than one contractor. Each portion is for a definite quantity and the sum of the portions is the total quantity procured. A progressive award may be in the purchasing agency's best interest when the awards to more than one offeror for different amounts of the same item are needed to obtain the total quantity or the time or times of delivery required.
- (18) "Purchasing agency," or purchaser, is defined as the agency that issues the purchase order and thereby awards a contract.
- (19) "Responsible offeror" is defined as an offeror who demonstrates in its offer that it has the capability to perform fully the requirements of the solicitation.
- (20) "Responsive offer" is defined as an offer that conforms to the solicitation in all material respects.
- (21) "Sealed offer" is defined as an offer that remains unopened until the public opening time stated in the solicitation. Offers are typically submitted sealed to meet this requirement, but electronic submission is permitted if the purchasing agency has the capability to maintain the confidentiality of the offer until the scheduled public opening time.
- (22) "Service" is defined as any work performed to meet any demand or need for information technology requiring specialized knowledge, experience, expertise, professional qualifications, or similar capabilities for any aspect of information technology. This includes performance, review, analysis, development, integration, installation, or advice in formulating or implementing improvements in programs or services.
- (23) "Small purchase" is defined as the purchase of goods and services where the expenditure of public funds is within the purchasing agency's delegated authority.
- (24) "Solicitation document" is defined as a written or electronic Invitation for Bid (IFB), Request for Quote (RFQ), Request for Proposal (RFP) or Request for Information (RFI) document or other such documents approved under Rule 06B .0201 expressly used to solicit, invite offers, or request information regarding the acquisition of goods and services.
- (25) "State Chief Information Officer" (State CIO) is the person appointed to manage and administer the Office of Information Technology Services (ITS), and as used herein shall include the State CIO or the State CIO's designee.
- (26) "State CIO approval, limitation or determination," as used herein, is the judgment applied to the particular factual basis for the procurement decision under the rule or rules, utilizing the knowledge and qualifications of the office, the needs of the State, and information provided by the agencies involved.
- (27) "Tabulation" is defined as a list of offeror(s) submitting offer(s) in response to a particular solicitation.
- (28) "Total cost of ownership" is defined as a summation of all purchase, operating, and related costs for the projected lifetime of a good or a service.
- (29) "Weakness" is defined as a flaw in the offer that increases the risk of unsuccessful contract performance.

*History Note: Authority G.S. 143-135.9; 147-33.82; 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06A .0103 BENCHMARK AND THE BOARD OF AWARDS

(a) When the dollar value of a contract for the purchase, lease, or lease/purchase of information technology goods exceeds the benchmark established by the Secretary of Administration, the contract shall be presented to the Board of Awards for review.

(b) The State CIO shall also report to the Board emergency purchases over the benchmark.

(c) The State CIO shall review the Board's recommendation (award, cancellation, approval, negotiation, etc.) and may do one of the following:

- (1) concur with the recommendation of the board by awarding contracts or approving other recommended action; or
- (2) take other action as the State CIO deems necessary and as permitted by these Rules.

(d) The State CIO may elect to proceed with award of a contract without recommendation by the Board in cases of emergency or in the event that the Board is not available to review the recommendation for award.

(e) Presentation of a contract exceeding the benchmark is not required for the following procurements: exemption by statute, by rule, by special delegation pursuant to Rule .1303 of this Subchapter, or where one agency is buying from another agency or through the state surplus property agency or the state agency for federal surplus property.

History Note: Authority G.S. 143-52.1; 147-33.76(b1); 147-33.101(a);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013; March 1, 2001.

09 NCAC 06B .0101 AGENCY REQUESTS FOR AUTHORIZATION

(a) The purchasing agency shall request authorization for procurement action exceeding its delegated authority from the State CIO by means of electronic or written requests, except in cases where a purchase is allowed by rule or other authority (e.g., emergency situations).

(b) Verbal requests from a purchasing agency for authorization of procurement action exceeding delegated authority may be accepted by ITS in emergency situations. Electronic or written confirmation from the purchasing agency must follow any such request.

History Note: Authority G.S. 147-33.76(b1); 147-33.95(b);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013.

09 NCAC 06B .0102 VERBAL REQUESTS

History Note: Authority G.S. 147-33.76(b1); 147-33.95(b);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Repealed Eff. September 1, 2013.

09 NCAC 06B .0103 CONFIDENTIALITY OF SOLICITATION DOCUMENTS

(a) In order to preserve fairness and encourage competitiveness, all information and documentation in whatever form, (e.g., electronic, written, and verbal forms) relative to the development of a solicitation for a proposed procurement shall be withheld from public inspection until award from that solicitation, unless the purchasing agency abandons or cancels the solicitation and

indicates in its procurement records that it does not intend to rebid the solicitation or continue the procurement action.

(b) The purchasing agency may release such portions of the material as it deems necessary in order to develop a solicitation under Rule .0201 of this Subchapter or to debrief certain vendors as provided in Rule .0405 of this Subchapter.

History Note: Authority G.S. 147-33.76(b1); 147-33.95(a);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013.

09 NCAC 06B .0201 DEVELOPMENT OF IT SOLICITATION DOCUMENTS AND SPECIFICATIONS

(a) There shall be one or more types of IT solicitation documents that include specifications established by the State CIO or any other agency as statutorily authorized.

(b) The State CIO shall establish, develop, and maintain IT solicitation documents and specifications that are current and intended for general or repeated use and publish these forms on its website or other locations available to the purchasing agency (also see 09 NCAC 06B .0302).

(c) Other types of solicitation specifications that manage specific business needs may be originated by the purchasing agency and either approved or modified as necessary by ITS to manage the State's information technology effectively. A purchasing agency submitting other types of specifications or solicitations must demonstrate how such specifications or solicitations meets its respective business needs and whether other information technologies are commercially available to satisfy those needs.

History Note: Authority G.S. 147-33.76(b1); 147-33.95(b);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013.

09 NCAC 06B .0202 NEED

The State CIO may inquire into the need for and level of quality of goods or services requested by a purchasing agency in its solicitation document. After consultation with the purchasing agency, the State CIO may authorize or modify the level of specification to manage overall direction of the State's information technology programs or services, or to comply with 09 NCAC 06B .0301, Procurement Procedures, or other rules.

History Note: Authority G.S. 147-33.76(b1); 147-33.95(b);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013.

09 NCAC 06B .0203 DEVELOPMENT OF SPECIFICATIONS

History Note: Authority G.S. 147-33.95(b); 147-33.103(b);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Repealed Eff. September 1, 2013.

09 NCAC 06B .0204 ARTICLES FOR SPECIAL PURPOSES

Where articles are to be used:

- (1) for educational or training purposes;
- (2) by persons with disabilities;
- (3) for test and evaluation or research purposes; or
- (4) for any other special purpose deemed necessary by the State CIO, consideration may be given to the suitability of such articles in the preparation of procurement documents, including solicitation specifications, evaluation of offers, requests for limited or waiver of competition, and the final award of contracts. The State CIO shall consult with the purchasing agency prior to making modification of any information or recommendation submitted by that agency.

History Note: Authority G.S. 147-33.76(b1); 147-33.95(b); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Amended Eff. September 1, 2013.

**09 NCAC 06B .0205 SUBMISSION FOR ADOPTION
09 NCAC 06B .0206 COPIES OF SPECIFICATIONS
09 NCAC 06B .0207 CONFIDENTIALITY**

History Note: Authority G.S. 147-33.95(b); 147-33.103(b); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Repealed Eff. September 1, 2013.

09 NCAC 06B .0301 PROCUREMENT PROCEDURES

- (a) The procurement process of requesting or inviting an offer(s) shall be managed by the purchasing agency, including use of standard solicitation document language and terms and conditions established by the State CIO. If an emergency situation or pressing need exists, the procurement process requesting or inviting an offer(s) shall also be managed by the purchasing agency, including the standard terms and conditions issued by the State CIO, unless circumstances prohibit their use.
- (b) All information technology purchases involving the expenditure of state funds by the purchasing agency shall be competitively bid in conformity with the "Best Value" information technology procurement requirements in G.S. 143-135.9 and Rule .0302 of this Section. Exemptions may be granted by the State CIO where limited competition, waiver of competition (See Rule .0901 of this Subchapter), special delegation (see Rules .1303 and .1304 of this Section), exemption, or an emergency purchase is permitted by rule. Purchasing agency procurements not included in a statewide term, convenience, enterprise contract, or master agreement established by the State CIO shall comply with the applicable general delegations and procedures (Rule .1304 of this Section):
- (c) Agency Purchases: The agency head, or designee, shall set forth in writing procedures for making purchases. For purchases where the total requirements for goods and services involve an expenditure of state funds that does not exceed the purchasing agency's general or special delegation established by the State

CIO, offers in conformity with G.S. 143-135.9 shall be solicited as follows:

- (1) The purchasing agency may advertise solicitations for offers to provide small purchases through the State's designated IT procurement website(s) or by an alternate method of advertising, as may be approved by the State CIO in accordance with Rule .0314 of this Section;
 - (2) The purchasing agency shall award contracts for purchases.
- (d) For purchases governed by statute, where the total requirements for goods and services involve an expenditure of State funds that exceeds the purchasing agency's general or special delegation established by the State CIO, offers in conformity with G.S. 143-135.9 shall be solicited as follows to encourage competition:
- (1) The purchasing agency shall issue documents soliciting, requesting or inviting offers, as published by ITS;
 - (2) The purchasing agency shall include in solicitation documents standard language, including general or standard terms and conditions for technology purchases as published by ITS and in conformance with Rule .0316 of this Section. If additional terms and conditions are used, they shall not conflict with standard terms and conditions published pursuant to 09 NCAC 06A .0101 unless prior written approval is obtained under Rule .0201 of this Subchapter; and
 - (3) The purchasing agency may also request from the State CIO, known vendor sources amenable to competing for award of various State procurements.
 - (4) For purchases exceeding an agency's general or special delegation, the purchasing agency shall submit drafts of solicitation documents to the State CIO for approval prior to proceeding with the procurement process. The State CIO shall then engage in a review and approval process of such solicitation documents to ensure that proposed and actual IT procurements are advantageous to the State:
 - (A) After completing review and evaluation of offers received, the purchasing agency may prepare and submit to the State CIO for review a draft recommendation for award;
 - (B) After completing review and evaluation of offers received, the purchasing agency shall submit to the State CIO a written, final recommendation for award, including a copy of all offers received and all supporting documentation with its recommendation;
 - (C) The State CIO shall then review and either approve the recommendation or

- direct modification to the recommended procurement action as deemed in the best interest of the State or as directed by the State CIO, (e.g., award, cancellation, rebid, negotiation with known sources of supply, etc.);
- (D) The State CIO shall notify the purchasing agency of any decision regarding that recommended procurement action; and
- (E) Upon receipt of the State CIO notification, the purchasing agency shall proceed with the respective procurement action as directed.
- (5) A contract term shall not be awarded for more than three years including extensions and renewals, without the prior approval of the State CIO, based on a determination that it is advantageous to the State.

History Note: Authority G.S. 143-135.9; 147-33.76(b1); 147-33.91; 147-33.95;
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .0302 METHODS OF SOURCE SELECTION

Purchases governed by general delegation or statute shall be solicited, and offers evaluated, in accordance with the following best value methods:

- (1) The purchasing agency shall use the following steps for best value procurements;
 - (a) The purchasing agency determines the appropriate best value bidding method through development of one of the solicitations set forth in Sub-item (1)(b) of this Rule;
 - (b) The following types of solicitations are available from the State CIO or other types as may be approved by the State CIO;
 - (i) Requests for Information (RFI), used for gathering information to prepare a solicitation for offers;
 - (ii) Invitations for Bid (IFB), used when the best value recommendation for award is based on the lowest priced or highest qualified and technically acceptable selection method;
 - (iii) Requests for Quotation are used to contract with a single vendor or a limited group of vendors for purchases of specific goods and services

- or small purchases of goods, or pursuant to a waiver of competition that satisfies Rule .0901 of this Subchapter;
- (iv) Requests for Proposal (RFP), used for purchases when the State needs to solicit solutions-based offers, where negotiations with one or more vendors may be needed, or when the best value recommendation for award is based on ranking all offers and will not be based solely on the lowest priced-technically acceptable source;
- (v) One-Step solicitation, used when both the technical step one offer and price step two offer are submitted at the same time;
- (vi) Two-Step solicitation, used when the technical step one offer and price step two offer are submitted and evaluated separately;
- (c) The purchasing agency shall develop, advertise, and publish its solicitation for offers in accordance with the rules of this Subchapter;
- (d) The purchasing agency shall hold any scheduled conferences or site visits in accordance with published solicitation terms;
- (e) The purchasing agency shall receive offers in response to its solicitation and it shall then conduct a public bid opening and prepare a tabulation of all offers received. For solicitations that allow for negotiation after receipt of offers, only the names of offerors shall be disclosed at the public bid opening or on the tabulation of offers received;
- (f) The purchasing agency's evaluation committee shall evaluate offers in accordance with the stated solicitation selection method and evaluation criteria. For solicitations that include a best value ranking process, the purchasing agency shall rank offers by using any consistent rating or scoring methodology, which may include adjectival, numerical, or ordinal rankings. The purchasing agency's evaluation shall document relative strengths, deficiencies,

weaknesses, and risks supporting its award recommendation. Best-Value evaluation shall include evaluating quality factors such as:

- (i) State's total cost of ownership, meaning summation of the State's total cost for acquiring, operating, maintaining, and supporting a product or service over its projected lifetime to include competitive price data; evaluation of the offeror's cost for actual and anticipated components comprising its quotation, as applicable; and value-added conditions or additional services included in the offer;
- (ii) Technical merit of the offer including as applicable, consideration for consistency and compatibility of the proposed solution with the State's strategic program direction; maximum facilitation of data exchange or systems integration; effectiveness of business solution and approach to solicitation's specific purpose or objective; delivery and implementation schedules; and guarantees, warranties, and return policies; and
- (iii) Probability of the offeror performing the work as stated in the solicitation on time, in a manner that accomplishes the stated intent and business objectives, and that maintains compliance with industry standards including, as applicable, consideration of the offeror's financial stability; program or industry experience; past performance with the State; expertise with similar projects, solutions, or technologies; its proven development methodologies and tools, innovative use of technologies; or key

personnel and depth of additional resources, compared to scope and intent of business need stated in the solicitation; *etc.*;

- (g) The purchasing agency may communicate with offerors after receipt of offers and in accordance with instructions, procedures and terms set forth in the solicitation as well as those procedures appropriate to the designated method of source selection. If negotiation is permitted in the solicitation, the purchasing agency may also allow offerors to submit best and final offers subsequent to negotiated changes in the initial offer or previous offer;
 - (h) The purchasing agency evaluation committee shall determine a final ranking of all offers under consideration using only the criteria set forth in the solicitation. The purchasing agency evaluation committee shall rank all responsive and responsible offerors from most advantageous to least advantageous to the State, and document such in its final award recommendation;
 - (i) Award must be made to the responsive and responsible offeror whose offer is determined to be the most advantageous and best value to the State, using all evaluation criteria set forth in the solicitation (*e.g.*, if the lowest price or highest qualified technically acceptable method is designated in the solicitation, then award must be made to the responsive and responsible offeror with the lowest price or highest qualified technically accepted method.
- (2) A trade off method of source selection may be utilized when it is in the best interest of the State to award a contract using a comparative evaluation of technical merit and costs. For a solicitation that designates the trade-off source selection method, the following shall apply:
- (a) All factors that will affect the contract award recommendation and the relative importance of each shall be stated as evaluation criteria in the published solicitation;
 - (b) The solicitation shall state the importance or numerical weight of all evaluation criteria including consideration of price and total cost of ownership;

- (c) Offers shall be ranked according to the evaluation criteria stated in the solicitation. The relative overall ranking of any offer may be adjusted up or down when considered with, or traded-off against, other non-price factors. For example, an offer with the lowest price when compared to other offers would receive the best ranking in the price evaluation category. However, if other non-price evaluation factors received low rankings, the overall ranking of the offer would be reduced;
 - (d) Clarifications are permitted;
 - (e) If permitted in the solicitation terms, the purchasing agency may also use negotiations, or other communications, after receipt of an offer.
- (3) The lowest priced or highest qualified technically acceptable source selection method may be used when best value is expected to result from selection of the highest qualified or technically acceptable offer with the lowest evaluated price. When this method is designated in a solicitation, the following shall apply:
- (a) The factors that establish the requirements for technical acceptability shall be set forth in the solicitation's evaluation criteria. Evaluation criteria shall specify that the award will be made on the basis of the lowest evaluated price or most highly qualified technically acceptable of those offers that meet or exceed the acceptability requirements for non-price factors;
 - (b) Trade-offs between price and non-price factors are not permitted;
 - (c) Proposals are evaluated for acceptability but are not ranked using the non-price factors.
 - (d) Clarifications are permitted;
 - (e) Negotiations are permitted with this selection method for purchases over the purchasing agency's general delegation, when so specified in the published solicitation. The purchasing agency may negotiate with a potential vendor(s) in an effort to acquire the quality of good or service needed at the best possible price, delivery, or terms and conditions.
- (4) Other competitive best value source selection methodologies may be used if they are determined to be advantageous to the state and are approved for use by the State CIO.

History Note: Authority G.S. 143-135.9; 147-33.76(b1); 147-33.91; 147-33.95; 147-33.101;
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .0303 ELECTRONIC OFFERS

The purchasing agency may accept offers submitted electronically in response to solicitation documents if such offers comply with these Rules and applicable laws. The purchasing agency's use of digital or electronic signatures must be consistent with applicable statutes and rules. The purchasing agency must authorize but may limit the use of electronic methods of conducting a procurement based on the State's best interests, as determined by the purchasing agency and approved by the State CIO if such methods comply with these Rules and information technology security policies established pursuant to G.S. 147-33.110 et seq.

History Note: Authority G.S. 66-58.5; 66-325; 147-33.95;
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .0304 RECALL OF OFFERS

An offeror may recall its offer by delivering a written request to withdraw prior to acceptance of any offer related to that procurement.

History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .0305 PUBLIC OPENING

(a) The purchasing agency shall publicly open and tabulate all offers at the time, date and place identified in the solicitation. The tabulation shall be made public at the time it is created unless otherwise provided by these Rules.

(b) At the time of opening, only the names of offerors and the goods or services offered shall be tabulated when negotiation after receipt of offers is authorized by the solicitation terms, unless otherwise provided by these Rules. The price offer(s) shall become available for public inspection at the time of the award.

(c) There shall be at least two purchasing agency employees present at the opening when "sealed offers" are required, and at least one purchasing agency employee present when electronic offers are required.

History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .0306 LATE OFFERS

Offers not received by the due date and time as specified in the solicitation shall not be considered.

History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .0307 CLERICAL ERRORS AND CLARIFICATIONS

When the purchasing agency determines that an offer appears to contain an obvious error or where a clerical error is suspected, the purchasing agency may investigate or act upon the circumstances. Any action taken shall not prejudice the rights of the public or other offerors. Where offers are submitted substantially in accordance with the solicitation terms but are not clear as to intent or some particular fact or where there are other ambiguities, the purchasing agency may seek and accept clarifications or may open communications as permitted by Rule .0302 of this Subchapter. Clarifications shall not be utilized to cure material deficiencies or to negotiate.

History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .0308 EXTENSION OF OFFER VALIDITY

When the purchasing agency determines it is in the State's best interest, the purchasing agency may request that offerors extend the date through which the offers are valid. Requests by the State for time extensions of offer validity will not result in change to the prices as stated in the original offer unless so specified in the request to extend or subsequently agreed to by the purchasing agency in writing.

History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .0309 EVALUATION

(a) In determining the award of contracts, the purchasing agency shall consider and evaluate responsive and responsible offers as provided by statute and applicable rules.

(b) Only persons in the purchasing agency who are assigned to evaluate the offers and accompanying information, or who are otherwise assigned to participate in the procurement process, or others whose participation may be determined necessary on the basis of subject matter expertise by the purchasing agency or State CIO in the procurement process shall possess offers, including any information submitted with the offers or any information related to evaluation of offers, for the purpose of concluding the award process.

(c) Clarification of offers or negotiation(s) with offerors, if desired, shall be requested by the purchasing agency in writing. An offeror's further participation in the evaluation process is not permitted except as approved by the State CIO for the purpose of concluding the evaluation or the award process.

(d) After award of the contract or when the need for the good or service is canceled, the complete procurement file (see Rule .1402 of this Subchapter) shall be available for public inspection

except as set forth in Rule .1001 of this Subchapter and except as provided by law; provided however, that when a solicitation document is canceled and the purchasing agency intends to reissue the solicitation, information that is confidential under Rule .0103 of this Subchapter and offers received prior to cancellation shall be withheld from public inspection until the re-issued solicitation results in a contract or termination of the procurement.

History Note: Authority G.S. 147-33.76(b1); 147-33.95(a);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

**09 NCAC 06B .0310 NOTIFICATION OF AWARD
 09 NCAC 06B .0311 LACK OF COMPETITION
 09 NCAC 06B .0312 SOLICITATION DOCUMENTS**

History Note: Authority G.S. 147-33.100; 147-33.103(b);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Repealed Eff. September 1, 2013.

09 NCAC 06B .0313 DIVISION OF COMMODITIES AND SERVICE NEEDS

Commodities or service needs shall not be divided to keep the expenditure under the purchasing agency's delegation to avoid following the appropriate procurement processes and applicable rules. In the case of similar and related items and groups of items, the dollar limits of delegated authority apply to the total cost of ownership rather than the cost of any single item.

History Note: Authority G.S. 147-135.9; 147-33.76(b1); 147-33.101;
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .0314 ADVERTISEMENT AND NOTICE

(a) Requirement to Advertise, Publish and Notify:

- (1) Solicitations: To maintain transparency and encourage competition for award of business, the purchasing agency shall advertise and publish solicitations for purchases exceeding the general delegation as established by the State CIO for no less than 10 calendar days, unless the State CIO waives the requirement for advertising;
- (2) Addenda or Changes: Any changes or addenda to a solicitation must be advertised and published with enough time to allow for reasonable consideration and possible incorporation of any changes into potentially competing vendors' response offers. Any changes or addenda to a solicitation must be advertised and published for no less than two business days from the scheduled offer due

- and opening date, unless the State CIO waives the requirement to advertise and publish changes or addenda to a solicitation;
- (3) Notices of Award: To maintain transparency and promote future competitiveness, the notice of award shall be advertised for no less than 30 calendar days, unless the State CIO waives the requirement to advertise, publish, and issue a notice of award;
- (4) Waiver of requirement to advertise and notify must fall under one of the following conditions in order for the State CIO to waive the requirement:
- (A) Acquisition of commodities or services that are subject to rapid price fluctuations or immediate acceptance;
 - (B) Emergency situations or pressing needs;
 - (C) Acquisition of goods or services needed for any ongoing job, task, or project;
 - (D) Acquisition of goods or services where performance or price competition is not available;
 - (E) Any determination that no useful purpose would be served by requiring such; or
 - (F) Exceptions identified under Rule .1303 of this Subchapter.
- (b) Required method for Advertising, Publishing, and Notifying: To maintain transparency and promote competitiveness:
- (1) Solicitations:
 - (A) The purchasing agency shall electronically advertise and continually publish solicitations via posting to the State's designated IT procurement website, unless a waiver of advertisement method is granted by the State CIO pursuant to waiver of competition under Rule .0901 of this Subchapter, for cooperative agreements under Rule .1006 of this Subchapter, or direct negotiation with vendors as permitted by Rule .0316 of this Subchapter;
 - (B) This Rule does not preclude a purchasing agency from soliciting offers by additional direct mailings or additional advertisement;
 - (C) Required advertisement and publication data shall include all relevant information pertaining to contacts and due dates, and the complete solicitation document and any attachments (*i.e.*, specifications; requirements; terms and conditions; price model; *etc.*);
 - (D) If a purchasing agency head (or his/her designee) determines that it is not feasible to electronically transmit (due to file size, *etc.*) a particular solicitation document or attachment(s) through the required method (*e.g.*, a procurement library, architecture reference documents, price model forms, *etc.*), then the purchasing agency must still electronically transmit a summary notice or advertisement through the designated IT procurement website. In such instance, the advertisement shall include the required information with the addition of a brief explanation for why the entire solicitation is not included, and shall instruct anyone inquiring about the solicitation to contact the purchasing agency for a copy of the actual solicitation document and any respective attachments.
 - (2) The required advertisement information shall include:
 - (A) Purchasing agency name and website reference, and designated IT procurement website reference;
 - (B) Assigned purchasing agency contact's name, telephone number, and electronic mail address;
 - (C) Location address for delivery/receipt of offers;
 - (D) Solicitation identification number or reference;
 - (E) Title (*i.e.*, scope or short description of the good or service solicited);
 - (F) Due date and time for solicitation clarifications or questions;
 - (G) Date, time, and location for opening of offers received;
 - (H) In addition to the specifications, offer terms and conditions, award terms and conditions, *etc.*, the solicitation document must furnish the due date and time; method of request, *e.g.*, regular mail, or electronically via e-mail or facsimile, *etc.*; and an address for receipt of requests for solicitation clarifications or questions; and
 - (I) Conference or site visit date, time and location; assigned meeting contact person and that contact person's telephone number and electronic mail address; and other relevant information relating to attendance. If no conference or site visit is scheduled, then this shall be stated in

- the advertisement and the solicitation document.
- (3) Addenda or Changes: The same advertisement method that is approved and followed for publishing a solicitation document must also be followed for publishing any respective addenda or changes to the solicitation and resulting notice of award, unless an exception is permitted Subparagraph (5) of this Paragraph.
- (4) Notices of Award:
- (A) To the extent practicable, the purchasing agency shall simultaneously issue an individual notice of award to all offerors responding to the respective solicitation and shall publish the notice of award via the approved method of advertisement for that solicitation and addendum Paragraph (a) of this Rule;
- (B) Notice of Award shall summarize the resulting contract award information including identification of the advertised solicitation; the awardee name and location; scope, start and end dates; authorized value through original end date; and renewal options.
- (5) Exceptions to Required Method:
- (A) When the purchasing agency (or its designee) deems there is a valid reason not to publish via the State's designated IT procurement website, the purchasing agency may request from ITS a waiver of the required method for advertising, publishing, and notifying;
- (B) Valid reasons to request a waiver to the required method include computer failure and networking difficulties;
- (C) The purchasing agency's request for waiver of required method shall include the rationale for requesting, a description of a proposed alternate method, length of time proposed for advertising, and explanation if the solicitation document and any attachments or addenda will not be included or published with the advertisement;
- (D) The purchasing agency's proposed alternate method to the State's designated IT procurement website must be via other medium widely distributed or commonly available to the public, such as publishing in a newspaper, *etc.*;

- (E) The rationale for requesting waiver of required advertising method, requested alternate method, and respective ITS approval, shall be documented and become part of the procurement file, open for public inspection after award.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

**09 NCAC 06B .0315 MANDATORY
CONFERENCES/SITE VISITS**

- (a) When a solicitation requires potential offerors to attend a mandatory conference or site visit, then the date, time, location, and other details relating to attendance shall be given in the solicitation document and in the advertisement.
- (b) If only one potential offeror attends the mandatory conference or mandatory site visit, the conference or site visit may be conducted, but the purchasing agency shall investigate, as much as is practicable, why only one potential offeror attended, and endeavor to ascertain whether there is any competition available. If it is determined that competition is available, time permitting, the purchasing agency may schedule another conference or site visit, if deemed to be to the advantage of the State. If it is determined that there is no competition available, then the procurement may be handled as a waiver as permitted by Rule .0901 of this Subchapter.
- (c) The purchasing agency shall document details of the conference or site visit as part of the official records required in Rule .1402 of this Subchapter.
- (d) Any and all questions or clarifications by a potential offeror regarding a solicitation document shall be addressed to the purchasing agency contact so designated in the solicitation. Any and all revisions to the solicitation document shall be made only by published addendum from the purchasing agency. Verbal communications from whatever source are of no force or effect.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .0316 NEGOTIATION

- (a) The purchasing agency shall conduct negotiations under its general delegation. Negotiations may also be conducted to establish contracts exceeding the purchasing agency's delegation, if the purchasing agency receives prior approval to negotiate from the State CIO as permitted by these Rules. Prior approval may be granted upon finding that the capabilities and subject matter knowledge of the agency, availability of knowledgeable personnel within the agency or ITS, use of non-state personnel, and costs of engaging additional resources demonstrate that the agency's negotiation will be more responsive, efficient, and cost-effective consistent with the requirements of best value procurement.

(b) If a purchasing agency deems negotiations to be advantageous to the State after receiving offers and then determines that soliciting offers again would serve no purpose, the purchasing agency may then conduct negotiations with sources of supply that appear to be capable of satisfying the purchasing agency's business needs. The purchasing agency's negotiation documentation shall include identification of issues or subjects of negotiation, the agency's risk assessment therefor, trade off principles as permitted by G.S. 143-135.9, and other matters directly arising from the solicitation or offer. Negotiations shall be finalized in writing and shall include standard language and terms and conditions issued by ITS, or such terms as may be established pursuant to Paragraphs (c) or (d) of this Rule. If the purchasing agency's negotiations are conducted with only one offeror, or if only one offeror responds to a request to negotiate, then the purchasing agency shall document the reasons for the lack of competition as part of the procurement record under Rule .1402 of this Subchapter.

(c) Purchasing agency negotiations may be conducted under Section .0900 of this Subchapter when conditions merit a limited or waiver of competition or in other situations that are advantageous to the State as determined by the State CIO.

(d) Modifications, waivers, or any other changes or amendments to a solicitation, including language and terms and conditions issued by the State CIO, made in the course of negotiations must be accompanied by:

- (1) Approval of the negotiating agency;
- (2) Requested approval from ITS;
- (3) Appropriate evaluation documentation reflecting trade-offs between price and non-price factors; and
- (4) Such other documentation as the State CIO may require to conform with Rule .1402 of this Subchapter.

(e) Negotiations shall not materially alter the intent or scope of the original solicitation document.

History Note: Authority G.S. 147-33.76(b1); Eff. September 1, 2013.

09 NCAC 06B .0401 REJECTION OF OFFERS

(a) Bases for rejection of an offer shall include, late offers; the purchasing agency's determination that the offer is unsatisfactory as to quantity, quality, delivery, price or service offered; the offeror's failure to comply with the intent or conditions of the solicitation document; the lack of competitiveness due to collusion or due to the knowledge that reasonably available competition was not received; error(s) in specifications or indication that revision(s) would be to the State's advantage; cancellation of, or changes in, the intended project or other determination that the commodity or service is no longer needed; limitation or lack of available funds; circumstances that prevent determination of the lowest priced or highest qualified technically acceptable offer or the best value offer; or any determination that rejection would be in the best interest of the State.

(b) Unsigned offers shall be rejected by the purchasing agency.

(c) The purchasing agency shall reject late offers and shall not consider modification of offers or withdrawals of offers unless

these would have been timely except for the action or inaction of the agency personnel serving the procurement process.

History Note: Authority G.S. 147-33.76(b1); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Amended Eff. September 1, 2013.

**09 NCAC 06B .0402 PUBLIC RECORD
09 NCAC 06B .0403 NEGOTIATION**

History Note: Authority G.S. 147-33.103(b); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Repealed Eff. September 1, 2013.

09 NCAC 06B .0404 NOTICE OF REJECTION

(a) The purchasing agency shall not be required to provide notice of rejection of offers prior to approval and award of a contract.

(b) When a competitive range is established by the purchasing agency's evaluation committee, and offers are not included in such range, the purchasing agency may provide notice to an offeror that its offer is excluded, consistent with this Rule and as established in the solicitation.

(c) The purchasing agency may grant requests for debriefings as provided herein, consistent with this Rule and as may be established in solicitation documents.

History Note: Authority G.S. 147-33.76(b1); Eff. September 1, 2013.

09 NCAC 06B .0405 DEBRIEFING OFFERORS

(a) Pre- or post-award-debriefings of successful and unsuccessful offerors may be completed by personal meeting or by written or electronic communication (*e.g.*, telephone, email, *etc.*).

(b) Debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, debriefing shall not reveal any information not then available for public inspection or properly designated as confidential in accordance with Rule .1001 of this Subchapter, the N.C. Public Records Law, or any other applicable laws.

(c) If debriefing is authorized by terms of the solicitation:

- (1) The purchasing agency shall implement the debriefing process as follows;
 - (A) Include an official summary of the debriefing in the record, per Rule .1402 of this Subchapter, by the protest-period due-date;
 - (B) To the maximum extent practicable, schedule a debriefing within five business days after receipt of an offeror's written request for a debriefing;
 - (C) If requested, grant at its discretion, rejected offeror(s) a delayed debriefing for any good cause shown;

- (2) Accommodation of a competing offeror request for delayed debriefing does not extend the due dates for filing protests.
- (3) All competing offerors may request a debriefing by submission of a written request to the purchasing agency not more than three business days from notice of award date.
- (4) Offeror may, if notified that it is not included in the competitive range:
 - (A) Request a pre-award debriefing by delivering such request to the purchasing agency not more than three business days after the notice of rejection date; or
 - (B) Request a post-award debriefing by delivering a request for such not more than three business days after the later of the notice of rejection date or notice of the award date.
- (5) Debriefing shall include review of the committee's evaluation of vendor's proposal/offer per terms of the solicitation, including:
 - (A) Any weaknesses, deficiencies, or risks to the purchasing agency, identified in evaluation of the offeror's proposal;
 - (B) Evaluated cost or price (including unit prices) and the State's total cost of ownership;
 - (C) Evaluated vendor responsibility to proposal, including past performance information, *etc.*, as applicable;
 - (D) Evaluated vendor responsiveness and the technical merit of its proposal;
 - (E) Responses to relevant questions from the vendor about whether source selection procedures, applicable regulations, or other applicable authorities, were followed.
- (6) If debriefing is post-award, the information must include the items listed in Subparagraph (c)(4) of this Rule and may also include:
 - (A) Overall ranking of all offerors; and
 - (B) A summary of the evaluation and rationale for award to the successful offeror.

History Note: Authority G.S. 147-33.76(b1); Eff. September 1, 2013.

09 NCAC 06B .0501 RESPONSIBILITY

The purchasing agency shall inspect all materials, supplies, and equipment upon delivery to verify compliance with the contract requirements and specifications. The purchasing agency shall also be responsible for verifying that services as provided comply with the terms of the contract.

History Note: Authority G.S. 147-33.76(b1);

*Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .0502 INSPECTION

The State CIO may inspect any items, or deliverables or monitor performance to ensure that contractor compliance with contract specifications and terms are met. The purchasing agency must ensure that goods or services purchased comply with applicable codes, statutes, local ordinances, policies and safety requirements.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .0503 SAMPLES

When samples are required in response to a solicitation document, the purchasing agency may test those samples or have them tested at other state or private sector testing facilities. Samples shall not be sent to laboratories outside an agency unless it is determined by an agency that these facilities have the capability, time, and expertise needed.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .0504 MODIFICATIONS TO CONTRACT SPECIFICATIONS

When the purchasing agency determines it to be in the State's best interest, it may authorize revisions to a contract specification, including any cost adjustment associated with any such revision, as part of contract administration. If an increase in cost results in the total contract value being more than the purchasing agency's delegation, then the purchasing agency shall obtain prior written approval for a special delegation from ITS pursuant to Rule 06B .1304, regardless of what agency initially awarded the contract.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .0505 REPORT OF DISCREPANCY

Where delivered goods or services fail to meet the specifications or contract requirements, the discrepancy shall be resolved by the purchasing agency.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .0601 ENFORCEMENT

The purchasing agency shall enforce the contractual guarantee or warranty applying to the goods or services purchased.

History Note: Authority G.S. 147-33.76(b1);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013.

09 NCAC 06B .0602 REPORT TO ITS

The purchasing agency shall report to the State CIO any difficulties in obtaining satisfactory performance including service as provided in a guarantee or warranty.

History Note: Authority G.S. 147-33.76(b1);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013.

09 NCAC 06B .0603 RESPONSIBILITY OF PURCHASING AGENCY

The purchasing agency must notify the vendor when latent or other defects are discovered. In the event the vendor fails to remedy the condition reported, the purchasing agency shall report the matter to ITS.

History Note: Authority G.S. 147-33.76(b1);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013.

09 NCAC 06B .0701 CONTRACTS ESTABLISHED BY ITS

(a) In determining whether a good or service will be included in an agency specific contract, the agency and the State CIO shall consider available statewide term and convenience contracts and such factors as volume, whether the good or service is necessary for an IT project, nature of the good or service, repetitiveness of use, relative stability of prices, and delivery or transportation costs.

(b) Term Contracts

- (1) A "term contract" is a binding agreement between the purchaser and seller to buy and sell IT goods or services for a specific period of time at prices established by contract;
- (2) A statewide term contract consolidates normal, anticipated requirements of all State purchasing agencies into one agreement and shall be awarded by the State CIO. No purchasing agency may purchase IT goods or services included in a statewide term contract from any other source unless authorized by the State CIO;
- (3) If an agency documents to the State CIO a need to establish an agency specific contract in lieu of a statewide term contract or an expenditure not covered by a statewide term contract for which the expenditure during the life of the contract exceeds the agency's

general delegation the purchasing agency, with the State CIO's approval, may issue a solicitation document for the purpose of awarding an agency specific contract for use by the purchasing agency in accordance with the determining factors set forth in this Rule.

(c) Convenience Contracts

- (1) A statewide IT "convenience contract" is an agreement awarded by the State CIO for an indefinite quantity of goods or services that may be used by a State purchasing agency. Convenience contracts are not mandatory-use agreements;
- (2) If an agency elects not to purchase the goods or services it requires from an established convenience contract, then that agency must comply with Rule .0301 of this Subchapter.

(d) A "master IT agreement" is an agreement between a vendor and the State characterized by one or more of the following:

- (1) Goods or services are, or may be, procured from resellers, value added resellers (VARs), original equipment manufacturers (OEMs), or others who represent the master agreement vendor;
- (2) Goods or services are proprietary intellectual property of the master agreement vendor; and
- (3) Master agreements are established without competitive bidding.

(e) Master agreements may result in agency or statewide term or convenience contracts.

(f) Solicitations and vendor offers may modify terms of a master agreement if the State's best interests are served and if such is allowed via the terms of the solicitation.

(g) Master agreement terms and conditions may be negotiated pursuant to Rule .0316 of this Subchapter.

History Note: Authority G.S. 147-33.76(b1);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013.

09 NCAC 06B .0702 DETERMINING FACTORS

History Note: Authority G.S. 147-33.76(b1);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Amended Eff. September 1, 2013.

09 NCAC 06B .0703 EXTENSION OF CONTRACT TERMINATION DATES

When in the best interest of the State, offerors may be requested to extend the scheduled termination dates of contracts. Such extensions shall not result in a change in the prices stated in the original contract unless agreed to by the agency in writing. Extensions that result in a cumulative contract value exceeding an agency's delegation must be submitted to ITS for special delegation approval pursuant to Rule .1303 of this Subchapter.

History Note: Authority G.S. 147-33.76(b1);

*Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .0801 USE

(a) Partial, progressive or multiple awards may be made when it is advantageous to the State.

(b) Notwithstanding the necessity for awards to more than one supplier, such awards shall be limited to the number of suppliers deemed necessary to satisfy the intended requirements. Quantities shall not be divided among offerors on definite quantity requirements unless and except as provided in the solicitation and unless such division is determined to be in the best interest of the State.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .0901 CONDITIONS FOR LIMITED OR WAIVED COMPETITION

(a) Under conditions listed in this Rule, and otherwise if deemed to be in the public interest by the State CIO, competition may be limited or waived where a factual basis demonstrates support of one or more of the conditions set forth in Paragraph (b) of this Rule. If the procurement is within a purchasing agency's general delegation, then the purchasing agency may waive competition in conformance with this Rule. If the procurement is greater than the agency's delegation, requests for limited or waived competition shall be submitted to the State CIO for approval.

(b) Competition may be limited or waived under the following conditions:

- (1) competition is not available;
- (2) a needed product or service is available from only one source of supply;
- (3) emergency action is indicated;
- (4) competition has been solicited but no responsive offers have been received;
- (5) standardization or compatibility is the overriding consideration;
- (6) a donation stipulates the source of supply;
- (7) personal or particular professional services are required;
- (8) a product or service is needed for a person with disabilities and there are overriding considerations for its use;
- (9) additional products or services are needed to complete an ongoing job or task;
- (10) a particular product or service is desired for educational, training, experimental, developmental or research work;
- (11) equipment is already installed, connected and in service, and it is determined advantageous to purchase it;
- (12) items are subject to rapid price fluctuation or immediate acceptance;

- (13) there is evidence of resale price maintenance or other control of prices or collusion on the part of persons or entities that thwarts normal competitive procedures unless otherwise prohibited by law;
- (14) a purchase is being made and a price is available from a previous contract;
- (15) the requirement is for an authorized cooperative project with another governmental unit(s) or a charitable non-profit organization(s); or
- (16) a used item is available on short notice and subject to prior sale.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .0902 APPROVAL AND DOCUMENTATION

Although competition may be limited or waived pursuant to Rule .0901 of this Subchapter, the use of competition is required wherever an exception is not approved. After a limitation or waiver of competition is approved as provided in Rule .0901(a) of this Subchapter, negotiations with a potential vendor(s) in an effort to acquire the quality of good or service needed at the best possible price, delivery, terms and conditions, may be conducted.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1001 CONFIDENTIALITY

(a) The offeror may designate information as a trade secret pursuant to G.S. 132-1.2 and may otherwise designate information as confidential as provided by law, citing the applicable statute on which the claim of confidentiality is made (e.g., offers and supporting documents meeting the criteria of North Carolina's Trade Secrets Protection Act requirements, etc.). Offerors shall identify each page containing confidential information in boldface at the top and bottom; e.g., "CONFIDENTIAL". Price(s) presented in response to a solicitation shall not be deemed confidential.

(b) To promote maximum competition and to protect the public competitive procedure from being used to obtain information that would normally not be available otherwise, the purchasing agency shall maintain the confidentiality of those portions of an offer properly designated as confidential.

*History Note: Authority G.S. 132-1.2; 147-33.76(b1); 147-33.95(a);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1002 PAYMENT PLANS

Purchase contracts may provide for payment over a period of time. Such instances shall be justified in the procurement record, kept to a minimum and shall include approval from the agency head for payment provisions when payments will be made over a period of time. Agency heads and governing boards of an agency shall ensure that the agency complies with statutory and State fiscal requirements.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1003 CHANGE IN CORPORATE STRUCTURE OR ASSIGNMENT

A vendor shall not assign a state contract without prior written approval from the purchasing agency. In cases where the vendor seeks to assign its contract prior to the State's written approval of an assignment, the vendor assignor shall affirm in writing to the State that the assignee is fully capable of performing all obligations of the vendor under the contract. In cases where vendors who have been awarded contracts are involved in corporate consolidations, acquisitions, or mergers, the purchasing agency may negotiate agreements for the transfer of contractual obligations and the continuance of contracts within the framework of the new corporate structures.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1004 PURCHASING FROM OR THROUGH AGENCY EMPLOYEES

Written approval of the State CIO is required before an agency purchases goods or services from or through an agency employee. In deciding whether to grant approval, the State CIO shall consider the type of item or service needed, the prevailing market conditions, whether competition is available, the cost involved, and the effects of doing business with the employee.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1005 ANTICOMPETITIVE, DECEPTIVE, AND FRAUDULENT PRACTICES

(a) A purchasing agency shall act to prevent the continuance of anticompetitive, deceptive, or fraudulent practices. Anticompetitive practices include actions involving offerors that restrain trade or commerce or eliminate competition.

(b) Anticompetitive, deceptive, or fraudulent practices may be evidenced by one or more of the following:

- (1) Conspiracy (in restraint of trade or commerce);
- (2) Combination bidding (in restraint of trade or commerce);

- (3) Price fixing (which may include reliance upon an industry price list);
- (4) Collusion;
- (5) Identical bidding;
- (6) Agreements to:
 - (A) Rotate offers;
 - (B) Share the profits with an offeror who is not the low offeror;
 - (C) Sublet work in advance of bidding as a means of preventing competition;
 - (D) Refrain from bidding;
 - (E) Submit prearranged offers;
 - (F) Submit complementary offers;
 - (G) Set up territories to restrict competition;
 - (H) Alternate bidding; or
 - (I) Any other unlawful act in restraint of trade or commerce.

(c) Agency actions to discourage or prevent the continuance of anticompetitive, deceptive, or fraudulent practices may include the following:

- (1) Rejecting the offending offeror's offer;
- (2) Awarding a bid to an offeror with a cost or technical proposal that is evaluated lower than the offending offeror's proposal; and
- (3) Recommending that the State CIO suspend an offeror from doing business with the State;

(d) The purchasing agency shall report evidence of anticompetitive, deceptive or fraudulent practices to the Attorney General's office and any other appropriate law enforcement authority.

*History Note: Authority G.S. 75-1, et seq.; 133-24, et seq.; 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1006 COOPERATIVE PURCHASING

When an agency participates in a cooperative project with another governmental entity or with a non-profit organization, goods and services necessary for the project shall be procured according to the Rules in this Chapter. If the interest of the State would be better served by one of the following procurement methods, the State CIO may authorize procurement by:

- (1) Making or authorizing acquisition on behalf of such governmental entity or non-profit organization;
- (2) Authorizing acquisition on the State's behalf under the provisions of another state or another governmental entity, provided due consideration is given by the State CIO to the differences in purchasing rules, regulations, and procedures of the contracting entity; or
- (3) Authorizing acquisition on the State's behalf under provisions of the U.S. General Services Administration Supply Schedule 70 and Consolidated Schedule for Information Technology purchases.

History Note: Authority G.S. 147-33.76(b1); 147-33.95(b)(2)(a);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. September 1, 2013.

09 NCAC 06B .1008 BOARD OF AWARDS

History Note: Authority G.S. 143-52.1; 147-33.76(b1); 147-33.95; 147-33.101;
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. March 1, 2001;
Repealed Eff. September 1, 2013. (See Rule 06A .0103).

09 NCAC 06B .1101 RIGHT TO HEARING

Whenever ITS or the State CIO acts in such a way as to affect the rights, duties, or privileges of a party, that party may request a hearing in accordance with this Section and G.S. 150B, Article 3A.

History Note: Authority G.S. 150B-38;
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. March 1, 2001;
Recodified from 09 NCAC 06B .1010 Eff. March 19, 2008;
Amended Eff. September 1, 2013.

09 NCAC 06B .1102 PROTEST PROCEDURES FOR AWARD OF CONTRACTS

(a) To ensure fairness to all offerors and to promote open competition, the purchasing agency shall respond to an offeror's protest over IT contract awards.

(b) This Rule applies to IT contracts with an estimated value of twenty-five thousand dollars (\$25,000) or more. The purchasing agency shall establish procedures to address protests by offerors where the award value is less than twenty-five thousand dollars (\$25,000).

(c) When an offeror protests a contract awarded by an agency of twenty-five thousand dollars (\$25,000) or more in value, the agency and the offeror shall comply with the following:

- (1) The offeror shall deliver a written request for a protest meeting to the agency head or his designee within 15 calendar days from the date of contract award. The agency head shall furnish a copy of the written request to the State CIO within 10 calendar days of receipt. The offeror's request shall contain specific reasons and any supporting documentation regarding why there is a concern with the award. If the request does not contain this information or the agency head determines that a meeting would serve no purpose, then the agency head, within 10 calendar days from the date of receipt, may respond in writing to the offeror and refuse the protest meeting request. A copy of the agency head's letter shall be forwarded to the State CIO.

- (2) If the protest meeting is granted, the agency head shall give written notice to the State CIO and any awarded vendor of the date and time of the protest meeting. The agency shall give notice to the awarded vendor and the State CIO stating whether any purchase order or performance has been suspended or terminated. The agency head shall schedule the meeting within 30 calendar days after receipt of the letter, unless a later date is accepted by the protesting party and the agency. Within 10 calendar days from the date of the protest meeting, the agency head shall respond to the offeror in writing with an agency decision. A copy of the agency head's letter shall be forwarded to the State CIO.

- (3) If a protest is determined to be valid by the State CIO then the following outcomes may occur:

- (A) The award and issued purchase order shall be canceled and the solicitation for offers to contract is not re-bid;
- (B) The award and issued purchase order shall be canceled and the solicitation for offers to contract is re-bid;
- (C) The award and issued purchase order shall be canceled and the contract shall be awarded to the next lowest priced, technically competent, qualified offeror, if that offeror agrees to still honor its submitted bid.

- (d) When an offeror protests a contract awarded by the State CIO that is twenty-five thousand dollars (\$25,000) or more in value, the State CIO and the offeror shall comply with the following:

- (1) The offeror shall deliver a written request for a protest meeting to the State CIO within 15 calendar days from the date of contract award. The offeror's request shall contain specific reasons and any supporting documentation regarding the offeror's concern with the award. If the request does not contain this information or the State CIO determines that a meeting would serve no purpose, then the State CIO, within 10 calendar days from the date of receipt of the offeror's protest, may respond in writing to the offeror and refuse the protest meeting request. A copy of the State CIO's letter shall be forwarded to the designated hearing officer.
- (2) If the protest meeting is granted, the State CIO shall attempt to schedule the meeting within 30 calendar days after receipt of the offeror's protest unless a later date is accepted by the protesting party and the State CIO. Within 10 calendar days from the date of the protest meeting, the State CIO shall respond to the offeror in writing with a decision. A copy of

the decision shall be forwarded to the designated hearing officer.

(e) When an offeror protests a statewide term or convenience contract or master agreement established by the State CIO, the State CIO and the offeror shall comply with the following:

- (1) The offeror shall deliver a written request for a protest meeting to the State CIO within 15 calendar days from the date of the contract award. The offeror's request shall contain specific reasons and any supporting documentation regarding the offeror's concern with the award. If the request does not contain this information or the State CIO determines that a meeting would serve no purpose, the State CIO, within 10 calendar days from the date of receipt of the offeror's request shall respond in writing to the offeror and refuse the protest meeting request. A copy of the State CIO's letter shall be forwarded to the designated hearing officer.

- (2) If the protest meeting is granted, the State CIO shall give written notice to the designated hearing officer and any awarded vendor of the date and time of the protest meeting. Notice shall be given to the awarded vendor and the designated hearing officer stating whether any purchase order or performance has been suspended or terminated. The State CIO shall schedule the meeting within 30 calendar days after receipt of the offeror's protest unless a later date is accepted by the protesting party and the State CIO. Within 10 calendar days from the date of the protest meeting, the State CIO shall respond to the protesting offeror in writing with a decision. A copy of the decision shall be forwarded to the designated hearing officer.

(f) If a party desires further administrative review after receiving a decision under Paragraph (c), (d), or (e) of this Rule, the protesting party may, within 60 days from the date such decision is received, request a hearing and final decision by the State CIO in accordance with these Rules and Article 3A of G.S. 150B. When further administrative review involves a contract awarded by an agency that is twenty-five thousand dollars (\$25,000) or more in value, the agency shall be a party in any further review processes.

(g) The signature of an attorney or party on a protest constitutes a certification by the signer that the signer has read such document; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law; and that it is not interposed for any improper purpose such as to harass, cause unnecessary delay or a needless increase in the cost of the procurement or of the litigation. If a protest is determined to be frivolous or to have been filed without any substantial basis or reasonable expectation to believe that the protest was meritorious, the State CIO, upon motion or upon his own initiative, may impose any sanction available under the N.C.

Rules of Civil Procedure. Notification to the affected party shall be in writing.

History Note: Authority G.S. 147-33.76(b1); 150B-38; Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Amended Eff. March 1, 2001; Recodified from 09 NCAC 06B .1009 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1103 REQUEST FOR HEARING

(a) A request for an administrative hearing under Rule .1101 of this Section must be in writing and shall contain the following information:

- (1) name and address of the person requesting the hearing;
- (2) a concise statement of the departmental action being challenged;
- (3) a concise statement of the manner in which the petitioner is aggrieved; and
- (4) a clear and specific demand for a public hearing.

(b) A request for hearing shall be delivered to the State CIO, or ITS hearing officer, by U.S. Postal Service, commercial or private courier. A request for hearing shall be addressed to the attention of the State CIO or Hearing Officer, N.C. Office of Information Technology Services, P.O. Box 17209, Raleigh, North Carolina 27619-7209; or N.C. Office of Information Technology Services, 3700 Wake Forest Road, Raleigh, North Carolina, 27609.

History Note: Authority G.S. 147-33.76(b1); 150B-38(a); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Amended Eff. March 1, 2001; Recodified from 09 NCAC 06B .1011 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1104 DEFINITIONS

The definitions contained in G.S. 150B-2 are incorporated in this Section by reference. In addition to those definitions, the following definitions apply to this Section:

- (1) "File or filing" means to place or the placing of the paper or item to be filed into the care and custody of the hearing officer. All documents filed with the hearing officer, except exhibits, shall be in duplicate in letter size 8 1/2" by 11".
- (2) "Hearing officer" shall be the State CIO or appointee under G.S. 150B-40 as the presiding officer, or an administrative law judge assigned under G.S. 150B-40. The phrase "a majority of the agency," or "an agency" as specified in G.S. 150B-40 shall be interpreted in these Rules to mean the State CIO. The phrase "an agency member" or "member of an agency," if not applicable by its terms to the State CIO, shall not be applicable in these Rules.

- (3) "Service or serve" means, unless otherwise provided by law or Rule 4 of the North Carolina Rules of Civil Procedure, delivery by first class United States Postal Service mail or a licensed overnight express mail service, postage prepaid and addressed to the person required to be served at his or her last known address. A certificate of service by the person making the service shall be appended to every document requiring service under this Section. Service by mail or licensed overnight express mail is complete upon placing the item to be served, enclosed in a wrapper addressed to the person to be served, in an official depository of the United States Postal Service; or postage prepaid and wrapped in a wrapper addressed to the person to be served, to an agent of the overnight express mail service.

History Note: Authority G.S. 147-33.76(b1); 150B-40; Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Amended Eff. March 1, 2001; Recodified from 09 NCAC 06B .1012 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1105 GENERAL PROVISIONS

The following general provisions apply to this Section:

- (1) The Rules of Civil Procedure as contained in G.S. 1A-1 and the General Rules of Practice for the Superior and District Courts as authorized by G.S. 7A-34 and found in the Rules Volume of the North Carolina General Statutes apply in matters before the hearing officer unless another specific statute or rule provides otherwise.
- (2) ITS may supply, at the cost for copies, forms for use in contested cases.
- (3) Every document filed with the hearing officer shall be signed by the author of the document, and shall contain his name, address, telephone number, and North Carolina State Bar number if the author is an attorney. An original and one copy of each document shall be filed. In any proceeding referred to the Office of Administrative Hearings (OAH) pursuant to G.S. 150B-40, parties shall deliver a copy of each document filed with the OAH to the State CIO.
- (4) Hearings shall be conducted, as nearly as practical, in accordance with the practice in the Trial Division of the General Court of Justice.
- (5) This Section and copies of all matters adopted by reference in this Section are available from ITS at cost.
- (6) The rules of statutory construction contained in Chapter 12 of the General Statutes apply in the construction of this Section. The rules contained in this Section govern the conduct of

- (7) contested case hearings under Article 3A of Chapter 150B of the General Statutes.
- (7) Unless otherwise provided in a specific statute, time computations in contested cases under this Section are governed by G.S. 1A-1, Rule 6.
- (8) If the State CIO determines that a hearing would assist him or her in reaching a decision, he or she may schedule a hearing, notwithstanding the fact that no request for a hearing has been received. In such cases the State CIO's written documentation shall be treated as a request for hearing.
- (9) The hearing officer may designate legal counsel as an advisor on matters of law for the benefit of the hearing officer during the proceedings.

History Note: Authority G.S. 147-33.76(b1); 150B-38(h); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Amended Eff. March 1, 2001; Recodified from 09 NCAC 06B .1013 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1106 ORDER FOR PREHEARING STATEMENTS

The hearing officer may serve all parties with an order for prehearing statements together with, or after service of, the notice of hearing. Every party thus served shall, within 30 days after service, file the requested statements setting out the party's present position on the following:

- (1) The nature of the proceeding and the issues to be resolved;
- (2) A brief statement of the facts and reasons supporting the party's position on each matter in dispute;
- (3) A list of proposed witnesses with a brief description of their proposed testimony;
- (4) A description of the discovery, if any, the party will seek to conduct prior to the contested case hearing and an estimate of the time needed to complete discovery;
- (5) Venue considerations;
- (6) Estimation of length of the hearing;
- (7) The name, address, and telephone number of the party's attorney, if any; and
- (8) Other matters permitted under Article 3A of Chapter 150B.

The prehearing statement shall not be used to amend the original protest or to establish jurisdiction not previously established by the protest or request for hearing.

History Note: Authority G.S. 147-33.76(b1); 150B-38(h); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Recodified from 09 NCAC 06B .1014 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1107 DUTIES OF THE HEARING OFFICER

(a) In conjunction with the powers in this Section, in Article 3D of Chapter 147 of the General Statutes and in G.S. 150B, Article 3A the hearing officer shall perform the following duties, consistent with law and as recommendations to the State CIO, if the hearing officer is not the State CIO:

- (1) Hear and rule on motions;
- (2) Grant or deny continuances;
- (3) Issue orders regarding prehearing matters, including directing the appearance of the parties at a prehearing conference;
- (4) Examine witnesses when deemed to be necessary to make a complete record and to aid in the full development of material facts in the case;
- (5) Make preliminary, interlocutory, or other orders as deemed to be appropriate;
- (6) Recommend a summary disposition of the case or any part thereof when there is no genuine issue as to any material fact or recommend dismissal when the case or any part thereof has become moot or for other reasons; and
- (7) Apply sanctions in accordance with Rule .1114 of this Section.

(b) Recommended final agency decision. If an appointed hearing officer presides over any hearing, the hearing officer shall issue a written recommended final agency decision. The appointed hearing officer shall serve a copy of the recommended final agency decision upon all parties and the State CIO. Upon review of the recommended decision issued by the appointed hearing officer, the State CIO may adopt, modify or vacate the recommended decision and notify the parties. The State CIO shall make the final agency decision.

(c) Hearing conducted by the State CIO. In lieu of assigning a hearing officer to preside over any hearing, the State CIO may conduct the hearing. After the time for the filing of proposed findings of fact and conclusions of law by the parties expires, the State CIO shall issue a final agency decision.

(d) The recommended decision of the hearing officer, if any, and the decision of the State CIO shall be in writing and shall include findings of fact and conclusions of law. The report, decision or determination of the State CIO upon review shall be final unless further appeal is made to the courts under the provisions of Chapter 150B of the General Statutes.

History Note: Authority G.S. 147-33.76(b1); 150B-38(h); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Amended Eff. March 1, 2001; Recodified from 09 NCAC 06B .1015 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1108 CONSENT ORDER; SETTLEMENT; STIPULATION

Informal disposition may be made of a contested case or an issue in a contested case by stipulation, agreement, or consent order at any time during the proceedings. Parties may enter into such agreements on their own or may ask for a settlement conference

with the hearing officer to promote consensual disposition of the case. Any such disposition must be approved in writing by the State CIO.

History Note: Authority G.S. 147-33.76(b1); 150B-38(h); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Recodified from 09 NCAC 06B .1016 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1109 SETTLEMENT CONFERENCE

(a) A settlement conference is for the primary purpose of assisting the parties in resolving disputes and for the secondary purpose of narrowing the issues and preparing for hearing. Notice of the conference may be included in the pre-hearing conference notice or in a separate written order. The purpose of a settlement conference is to:

- (1) Explore any grounds upon which a contested case may be resolved without the need for a hearing; and
- (2) Pursue any other matters which will reduce the cost, save time, simplify the issues to be heard, or otherwise aid in the expeditious disposition of the matters to be addressed by the hearing.

(b) Unless the parties and the hearing officer agree, a unilateral request for a settlement conference does not constitute good cause for a continuance. The conference shall be conducted at a time and place agreeable to all parties and the hearing officer. It shall be conducted by telephone if any party would be required to travel more than 50 miles to attend, unless that party agrees to travel to the location set for the conference. If a telephone conference is scheduled, the parties must be available by telephone at the time of the conference.

(c) All parties shall attend or be represented at a settlement conference. Parties or their representatives shall be prepared to participate in settlement discussions.

(d) The parties shall discuss the possibility of settlement before a settlement conference if they believe that a reasonable basis for settlement exists.

(e) At the settlement conference, the parties shall be prepared to provide information and to discuss all matters required in Rule .1106 of this Section.

(f) If, following a settlement conference, a settlement has not been reached but the parties have reached an agreement on any facts or other issues, the hearing officer presiding over the settlement conference shall issue an order confirming and approving, if necessary, those matters agreed upon. The order is binding on the parties and on the hearing officer who is assigned to hear the case and subject to final approval by the State CIO if the hearing officer is not the State CIO.

History Note: Authority G.S. 147-33.76(b1); 150B-38(h); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Amended Eff. March 1, 2001; Recodified from 09 NCAC 06B .1017 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1110 PREHEARING CONFERENCE

(a) The purpose of the prehearing conference is:

- (1) to simplify the issues to be determined;
- (2) to obtain stipulations in regard to foundations for testimony or exhibits;
- (3) to obtain stipulations or other agreements as to the facts or the application of particular laws;
- (4) to consider the proposed witnesses for each party;
- (5) to identify and exchange documentary evidence intended to be introduced at the hearing;
- (6) to determine dates or schedules for the completion of any discovery;
- (7) to establish hearing dates and locations if not previously set;
- (8) to consider such other matters that may be necessary or advisable; and, if possible,
- (9) to reach a settlement without the necessity for further hearing. Any final settlement shall be set forth in a settlement agreement or consent order and made a part of the record.

(b) Upon the request of any party or upon the hearing officer's own motion, the hearing officer may hold a prehearing conference before a contested case hearing. The hearing officer may require the parties to file prehearing statements in accordance with Rule .1106 of this Section. A prehearing conference on the simplification of issues, amendments, stipulations, or other matters may be entered on the record and may be made the subject of an order by the hearing officer. Venue for purposes of a prehearing conference shall be determined in accordance with G.S. 150B-38(e).

History Note: Authority G.S. 147-33.76(b1); 150B-38(h); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Recodified from 09 NCAC 06B .1018 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1111 DISCOVERY

(a) Discovery methods are means designed to assist parties in preparing to meet their responsibilities and protect their rights during hearings without unduly delaying, burdening, or complicating the hearings process and with due regard to the rights and responsibilities of other parties and persons affected. Accordingly, parties shall exhaust all less formal opportunities to obtain discoverable material before utilizing this Rule.

(b) Any means of discovery available pursuant to the North Carolina Rules of Civil Procedure, G.S. 1A-1, is allowed. If the party from whom discovery is sought objects to the discovery, the party seeking the discovery may file a motion with the hearing officer to obtain an order compelling discovery. In the disposition of the motion, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues in controversy warrant the discovery. In ruling on a motion for discovery, the hearing officer shall recognize all privileges recognized at law.

(c) When a party serves another party with a request for discovery, that request need not be filed with the hearing officer but shall be served upon all parties.

(d) The parties shall immediately commence to exchange information voluntarily, to seek access as provided by law to public documents, and to exhaust other informal means of obtaining discoverable material.

(e) Unless otherwise ordered, all discovery shall be completed no later than the first day of the hearing. The hearing officer may shorten or lengthen the period for discovery and adjust hearing dates accordingly and, where necessary for a fair and impartial hearing, allow discovery during the pendency of the hearing.

(f) Unless otherwise ordered, no later than 15 days after receipt of a notice requesting discovery, the receiving party shall:

- (1) Move for relief from the request;
- (2) Provide the requested information, material or access; or
- (3) Offer a schedule for reasonable compliance with the request.

(g) Sanctions for failure of a party to comply with an order of the hearing officer made pursuant to this Rule shall be as provided for by G.S. 1A-1(37), to the extent that a hearing officer may impose such sanctions, and Rule .1114 of this Section.

History Note: Authority G.S. 147-33.76(b1); 150B-38(h); Temporary Adoption Eff. January 1, 2000; Eff. August 1, 2000; Recodified from 09 NCAC 06B .1020 Eff. March 19, 2008; Amended Eff. September 1, 2013.

09 NCAC 06B .1112 CONSOLIDATION OF CASES

(a) The hearing officer may order a joint hearing of any matters at issue in contested cases involving common questions of law or fact or multiple hearings involving the same or related parties, or may order the cases consolidated or make other orders to reduce costs or delay in the hearings.

(b) A party requesting consolidation shall serve a motion for consolidation on all parties to the cases to be consolidated and shall file the original with the hearing officer. Any party objecting to the motion shall serve and file its objections within five days after service of the petition for consolidation.

(c) Upon determining whether cases shall be consolidated, the hearing officer shall serve a written order on all parties that contains a description of the cases for consolidation and the reasons for the decision.

(d) Nothing contained in this Rule prohibits the parties from stipulating and agreeing to a consolidation, which shall be granted upon submittal of a written stipulation, signed by every party, to the hearing officer.

(e) Following receipt of a notice of or order for consolidation, any party may move for severance by serving a motion on all other parties and filing it with the hearing officer at least seven days before the first scheduled hearing date. If the hearing officer finds that the consolidation will prejudice any party, he shall order the severance or other relief that will prevent the prejudice from occurring.

History Note: Authority G.S. 147-33.76(b1); 150B-38(h);

*Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1019 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1114 SANCTIONS

(a) If a party fails to appear at a hearing or fails to comply with an interlocutory order of the hearing officer, the hearing officer may:

- (1) Find that the allegations of or the issues set out in the notice of hearing or other pleading may be taken as true or deemed to be proved without further evidence;
- (2) Dismiss or grant the motion or petition;
- (3) Suppress a claim or defense; or
- (4) Exclude evidence.

(b) In the event that any party, attorney at law, or other representative of a party fails to comply with a subpoena, engages in behavior that obstructs the orderly conduct of proceedings, or would constitute contempt if done in the General Court of Justice, the hearing officer may enter a show cause order returnable in Superior Court for contempt proceedings in accordance with G.S. 150B-40(c)(6).

(c) If a witness fails to comply with a subpoena, the hearing officer may enter a show cause order returnable in Superior Court for contempt proceedings in accordance with G.S. 150B-40(c)(6).

*History Note: Authority G.S. 150B-38(h);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1022 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1115 MOTIONS

(a) Unless otherwise required or permitted by these Rules, any party may file any motion which would be permitted under the Rules of Civil Procedure as though the contested case was a matter pending in a civil trial court. Motions practice in contested cases before the hearings officer pursuant to G.S. 150B, Article 3A, shall be governed by Rule 6 of the Rules of Civil Procedure and the General Rules of Practice for the Superior and District Courts of North Carolina.

(b) The opposing party may file such response as is permitted by the Rules of Civil Procedure to any such motion within the time permitted by the Rules of Civil Procedure.

(c) The hearing officer shall rule on any correctly filed motion. The hearing officer may rule on any motion with or without oral argument. The hearing officer shall notify the parties of the location, date, and time for oral argument if, in the hearing officer's discretion, oral argument is necessary for a full and complete record. The notice shall indicate whether the argument is to be conducted in person or by conference call.

*History Note: Authority G.S. 150B-38(h);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1023 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1117 CONTINUANCES

(a) A request for a continuance of a hearing shall be granted upon a showing of good cause. Unless time does not permit, a request for a continuance of a hearing shall be made in writing to the hearing officer and shall be served upon all parties of record. In determining whether good cause exists, due regard shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance. A request for a continuance filed within five days before a hearing shall be denied unless the reason for the request could not have been ascertained earlier.

(b) During a hearing, if it appears in the interest of justice that further testimony should be received and sufficient time does not remain to conclude the testimony, the hearing officer shall either order the additional testimony taken by deposition or continue the hearing to a future date for which oral notice on the record is sufficient.

(c) A continuance shall not be granted if granting it would prevent the case from being concluded within any statutory or regulatory deadline.

(d) As used in this Rule, "good cause" includes death or incapacitating illness of a party, representative, or attorney of a party; a court order requiring a continuance; lack of proper notice of the hearing; a substitution of the representative or attorney of a party if the substitution is shown to be required; a change in the parties or pleadings requiring postponement; and agreement for a continuance by all parties if either more time is necessary to complete mandatory preparation for the case, such as authorized discovery, and the parties and the hearing officer have agreed to a new hearing date or the parties have agreed to a settlement of the case that had been or is likely to be approved by the hearing officer.

(e) As used in this Rule, "good cause" does not include: intentional delay; unavailability of counsel or other representative because of engagement in another judicial or administrative proceeding unless all other members of the attorney's or representative's firm familiar with the case are similarly engaged; unavailability of a witness if the witness' testimony can be taken by deposition; or failure of the attorney or representative to properly utilize the statutory notice period to prepare for the hearing.

*History Note: Authority G.S. 150B-38(h);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1025 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1118 RIGHTS AND RESPONSIBILITIES OF PARTIES

(a) A party has the right to present evidence, rebuttal testimony, and argument with respect to issues of fact, law and policy; and to cross-examine witnesses, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence.

(b) A party shall have all evidence to be presented, both oral and written, available on the date for hearing. Requests for subpoenas, depositions, or continuances shall be made within a reasonable time after their needs become evident to the

requesting party. In cases when the hearing time is expected to exceed one day, the parties shall be prepared to present their evidence at the date and time ordered by the hearing officer or agreed upon at a prehearing conference.

(c) The hearing officer shall send copies of all orders or decisions to all parties simultaneously. Any party sending a letter, exhibit, brief, memorandum, or other document to the hearing officer shall simultaneously send a copy to all other parties.

(d) All parties have the continuing responsibility to notify the hearing officer of their current addresses and telephone numbers.

(e) If a party has notified other parties of that party's representation by an attorney, all communications shall be directed to that attorney.

(f) With the approval of the hearing officer, any person may offer testimony or other evidence relevant to the case. Any nonparty offering testimony or other evidence may be questioned by parties to the case and by the hearing officer.

(g) Before issuing a recommended decision to the State CIO, the hearing officer may order any party to submit proposed findings of fact and written arguments. Before issuing a final decision in a contested case which has been assigned by the State CIO to a person other than the State CIO as described in G.S. 150B-40(e) and these Rules, the State CIO shall order parties to submit proposed findings of fact and written arguments.

*History Note: Authority G.S. 150B-38(h);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1026 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1120 EVIDENCE

(a) The North Carolina Rules of Evidence as found in G.S. Chapter 8C govern in all contested case proceedings, except as provided otherwise in this Section and G.S. 150B-41.

(b) The hearing officer shall admit all evidence that has probative value. Irrelevant, incompetent, immaterial, or unduly repetitious evidence shall be excluded. The hearing officer may, in his discretion, exclude any evidence if its probative value is substantially outweighed by the risk that its admission will require undue consumption of time or create substantial danger of undue prejudice or confusion.

(c) Contemporaneous objections by a party or a party's attorney are not required in the course of a hearing to preserve the right to object to the consideration of evidence by the hearing officer in reaching a decision or by the court upon judicial review.

(d) All evidence to be considered in the case, including all records and documents or true and accurate photocopies thereof, shall be offered and made a part of the record in the case. Except as provided in Paragraph (f) of this Rule, factual information or evidence that is not offered shall not be considered in the determination of the case. Documentary evidence incorporated by reference may be admitted only if the materials so incorporated are available for examination by the parties.

(e) Documentary evidence in the form of copies or excerpts may be received in the discretion of the hearing officer or upon agreement of the parties. Copies of a document shall be received

to the same extent as the original document unless a question is raised about the accuracy or authenticity of the copy or, under the circumstances, it would be unfair to admit the copy instead of the original.

(f) The hearing officer shall take official notice of standards and policies that have been established by ITS pursuant to Article 3D of Chapter 147 of the General Statutes. The hearing officer may take official notice of additional facts or documents as requested by a party or within the specialized knowledge of the hearing officer by entering a statement of the noticed fact or document and its source into the record.

(g) When the State CIO takes official notice of evidence not in the record when making a final decision, the parties shall be afforded notice and a hearing to present arguments against the consideration of such evidence before a final decision is made.

*History Note: Authority G.S. 150B-38(h);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1028 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1121 FINAL AGENCY DECISION; OFFICIAL RECORD

(a) A copy of any decision or order shall be served as in the manner provided by G.S. 150B-42(a). The cost of the service, fees, and expenses for any witnesses or documents subpoenaed shall be paid in accordance with G.S. 150B-39(c) and G.S. 7A-314.

(b) The official record of a contested case is available for public inspection during the agency's business hours except for those portions, if any, that the hearing officer ordered sealed as consistent with applicable law.

(c) The hearing officer may, consistent with law, order part or all of an official record sealed.

(d) The official record shall be prepared in accordance with G.S. 150B-42.

(e) Contested case hearings shall be recorded either by a recording system or a court reporter using stenomask or stenotype.

(f) Costs for a court reporter's services including transcript costs and other copying costs incurred shall be charged to or apportioned equally among the party or parties requesting a transcript or copies of other records.

(g) A 24-hour hearing cancellation notice is required in all cases. The party or parties responsible for the cancellation shall be liable for any cancellation fees.

(h) Transcripts of proceedings during which oral evidence is presented shall be made only upon request of a party. Transcript costs shall include the cost of an original. An attorney requesting a transcript on behalf of a party is a guarantor of payment of the cost. Cost shall be determined under supervision of the hearing officer who may require an advance security deposit to cover the prospective cost. The security deposit shall be applied to the actual cost and any excess shall be returned to the party that submitted it.

(i) Copies of tapes or other transcript media used (e.g., CDs) are available upon written request at a cost of five dollars (\$5.00) per tape or CD.

(j) Copies of the hearing audio recordings, or non-ITS certified transcripts from those audio recordings are not part of the official record.

*History Note: Authority G.S. 150B-38(h);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. March 1, 2001;
Recodified from 09 NCAC 06B .1029 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1201 DECLARATORY RULINGS

- (a) Any request for a determination regarding the application of a relevant rule, statute or standard established by the State CIO to a specific factual situation must be directed to the State CIO. The request for a ruling will follow the Rules of this Section and applicable statutes. A declaratory ruling proceeding may include written submissions, an oral hearing, or other procedure as may be appropriate in the circumstances of the particular request.
- (b) Declaratory rulings pursuant to G.S. 150B-4 shall be issued by the State CIO only on the validity of a relevant rule or standard or on the applicability of a rule or order of the State CIO to stipulated facts. A declaratory ruling shall not be issued on a matter requiring an evidentiary proceeding.
- (c) As used in this Section, "standard" shall refer to and include such standards, policies and procedures adopted by the State CIO pursuant to authority found in Article 3D of Chapter 147 of the N.C. General Statutes.
- (d) The petitioner must possess such an interest in the question to be ruled on that the petitioner's need to have such a ruling in order to comply with statutory requirements, ITS rules, or standards shall be apparent from the petition and shall be explained therein.

*History Note: Authority G.S. 147, Article 3D; 150B, Article 4;
Eff. September 1, 2013.*

09 NCAC 06B .1202 REQUESTS FOR DECLARATORY RULINGS

- (a) Requests for a declaratory ruling shall be in writing, dated and verified by the person submitting the same.
- (b) The request shall contain:
 - (1) The petitioner's name, address and telephone number;
 - (2) The rule or statute, or both, referred to;
 - (3) A statement of facts supporting the petitioner's request for a declaratory ruling;
 - (4) The petitioner's option, a statement of any legal authorities, in support of the interpretation given the statute or rule by the petitioner;
 - (5) A concise statement of the manner in which the petitioner is aggrieved by the rule, statute, or standard, or its potential application to the petitioner;
 - (6) A statement of the practices or procedures likely to be affected by the requested

declaratory ruling and the persons likely to be affected by the ruling.

- (7) A draft of the declaratory ruling sought by the petitioner, if a specified outcome is sought by the petitioner; and
- (8) A statement of whether the petitioner desires to present oral argument.

*History Note: Authority G.S. 150B-104;
Eff. September 1, 2013.*

09 NCAC 06B .1203 RESPONSE TO A REQUEST FOR A DECLARATORY RULING

- (a) The State CIO shall consider the request within 30 days of receipt. The State CIO shall issue a ruling except:
 - (1) When the State CIO finds that the person making the request is not a "person aggrieved," as defined in G.S. 150B-2(6);
 - (2) When the State CIO finds, in a request concerning the validity of a rule, that the rulemaking record shows that the agency considered all factors identified by the petitioner as specific or relevant when the rule in question was adopted;
 - (3) When the State CIO finds that the person requesting the ruling is not directly or indirectly affected substantially in his person, property, or public office or employment by the rule, statute, or order of the department which is the subject of the request;
 - (4) When the petition does not state with enough specificity the factual situation involved, or the question is presented in such a manner that the State CIO cannot determine what the question is, or that the State CIO cannot respond with a specific ruling that will be binding on all parties;
 - (5) When the State CIO has made a determination in a similar contested case, or where the factual context being raised for a declaratory ruling was specifically considered upon the adoption of the rule or directive being questioned, as evidenced by the rulemaking record; or
 - (6) Where the subject matter of the request is involved in pending litigation or contested case in any state or federal court in North Carolina.
- (b) The State CIO shall, not later than the 30th day after receiving such a request, deposit in the United States mail, postage prepaid, a written statement addressed to the person making the request and setting forth the ruling on the merits of the request for a declaratory ruling, or setting forth the reason the ruling was not made, as the case may be. The State CIO may rule at any meeting convened to consider the request, or defer the ruling until a later date, but not later than the 30th day after the request for a ruling is received. The State CIO may gather additional information, may give notice to other persons and may permit such other persons to submit information or

arguments under such conditions as are set forth in any notice given to the requesting party.

(c) Whenever the State CIO believes for good cause that the issuance of a declaratory ruling is undesirable, he may refuse to do so. When good cause for refusing to issue a declaratory ruling is deemed to exist, the State CIO shall notify the petitioner of his decision in writing, stating reasons for the denial of a declaratory ruling.

(d) The State CIO shall consider a request to make a declaratory ruling on the validity of a rule only when the petitioner shows that circumstances are so changed since adoption of the rule that such a ruling would be warranted, or that the rule-making record for the rule evidences a failure by the agency to consider facts presented in the petition at the time of adoption of the rule. The petitioner shall state in his request the consequences of a failure to issue a ruling.

*History Note: Authority G.S. 150B-4;
Eff. September 1, 2013.*

09 NCAC 06B .1204 EFFECT OF A DECLARATORY RULING

For purposes of this Section, a declaratory ruling shall be deemed to be in effect until:

- (1) The statute or rule interpreted by the declaratory ruling is amended or repealed;
- (2) The State CIO changes the declaratory ruling prospectively; or
- (3) Any court sets aside the ruling.

*History Note: Authority G.S. 150B-4;
Eff. September 1, 2013.*

09 NCAC 06B .1205 RECORD OF RULING

A record of all declaratory rule making proceedings shall be maintained at the State CIO's office and shall be available for public inspection during business hours.

*History Note: Authority G.S. 150B-4;
Eff. September 1, 2013.*

09 NCAC 06B .1206 DEFAULT PROCEEDINGS; DISQUALIFICATION; AND DEBARMENT

(a) Disqualification: The purchasing agency may find a vendor in default of contract for failing to perform in accordance with the contract requirements, terms and conditions. If a vendor is found in default of contract, the purchasing agency may take action, immediate if necessary, to purchase the needed goods or services on the open market and charge any additional cost for the goods or services and expense for doing so to the defaulting vendor. If an agency other than ITS finds a vendor in default, such action and the circumstances shall be reported by the agency to ITS in writing. This does not limit any other remedies that may be available to the state or agency.

(b) Causes for Debarment or Suspension: The causes for debarment or suspension include the following:

- (1) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private

contract or subcontract, or in the performance of such contract or subcontract;

- (2) conviction under State or federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a state vendor;
- (3) conviction under State or federal antitrust statutes arising out of the submission of bids or proposals;
- (4) deliberate failure without good cause to perform a contract in accordance with the specifications or within the time limit provided in the contract: and
- (5) for violation of the State Government Ethics Act or the Lobbying laws set forth in G.S. 138A-1 et seq., and GS 120C-1 et seq. respectively.

(c) Effect of Debarment: Upon finding cause to debar a vendor, The State CIO may remove the vendor from any distribution lists that may be utilized and prohibit award of any contract to the debarred vendor for a period not to exceed one year.

(d) Notice: The State CIO shall notify any vendor of the disqualification or debarment in writing.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1030 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1207 PERFORMANCE ASSURANCE

A contract may include terms ensuring a vendor's performance such as:

- (1) A bond, or similar assurance, may be required of the vendor at the vendor's expense;
- (2) Liquidated damages;
- (3) A percentage of the contract value held as a retainage; and
- (4) Withholding final payment contingent on acceptance of the final deliverable.

*History Note: Authority G.S. 147-33.72C; 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1031 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1301 EXEMPTIONS

(a) The following are exemptions to the State CIO review and approval for purchases that exceed an agency's delegated authority.

- (1) Services provided by individuals through direct employment contracts with the state;
- (2) Non-severable services that are merely incidental to the purchase of supplies,

- materials, or equipment such as installation services;
- (3) Personal services provided by a professional individual (person) on a temporary or occasional basis;
- (4) Services provided directly by an agency of the state, federal or local government, or their employees when performing the service as part of their normal governmental function; and
- (5) Information technology subscriptions for printed materials or online technology information news services. Such services do not include software, or software services, licensed by subscription or delivered online.

(b) In addition to products and services noted in Paragraph (a) of this Rule, the State CIO may exempt other products and services from purchase through the State CIO provided that the State CIO determines no price or quality advantage would be gained by handling a particular acquisition through the State CIO.

(c) As used in this Rule, direct employment contract means an agreement for services under Paragraph (a) made by the person and an agency of the State.

*History Note: Authority G.S. 147-33.95(f);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1101 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1302 EMERGENCY SITUATIONS OR PRESSING NEED

- (a) An agency may make purchases of goods or services in the open market in cases of emergency or pressing need.
- (b) When emergency or pressing need action is necessary, and the estimated expenditure is over the purchasing agency's delegation, prior verbal approval shall be obtained from the State CIO unless the purchase must be made outside of business hours, during holidays or when state offices are otherwise closed. Subsequently, if the expenditure is over the purchasing agency's delegation, an explanation of the emergency or pressing need purchase shall be reported in writing to the State CIO. The State CIO shall report such purchases of goods that exceed the benchmark in 09 NCAC 06A .0103 to the Board of Awards as a matter of record.

*History Note: Authority G.S. 143-52.1; 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1102 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1303 SPECIAL DELEGATIONS

- (a) The State CIO may approve an increase in an agency's general delegation in accordance with Rule .1304 of this Section. The resulting delegation shall be a special delegation. Every such delegation shall be in writing and made a matter of record.

(b) The State CIO may require an award recommendation pursuant to a special delegation to be sent to ITS for review of the purchasing agency's determination of the successful vendor.

(c) ITS shall review special delegations annually to ascertain whether such delegations remain suitable for the agency in accordance with Rule .1304 of this Section.

*History Note: Authority G.S. 147-33.95(f);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1103 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1304 GENERAL DELEGATIONS

(a) The general purchasing delegation for a purchasing agency shall be twenty-five thousand dollars (\$25,000) unless specific authorization is given by the State CIO.

(b) The State CIO may suspend, rescind, lower or raise this general delegation for a specific agency, up to the benchmark established under Rule 09 NCAC 06A .0103 upon consideration of the agency's overall capabilities, including staff resources, organizational structure, training, purchasing compliance reviews, electronic communication capabilities, and audit reports.

(c) If an agency wishes to obtain an increase in its general delegation, it shall submit a request in writing, outlining its overall capabilities, to the State CIO for the State CIO's consideration.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Amended Eff. March 1, 2001;
Recodified from 09 NCAC 06B .1104 Eff. March 19, 2008;
Amended Eff. September 1, 2013.*

09 NCAC 06B .1305 COMPLIANCE REVIEWS

(a) The State CIO may conduct compliance reviews on purchasing practices at any purchasing agencies. The purpose of the compliance review shall be for determining if an agency is complying with IT purchasing statutes and rules. A copy of the compliance report shall be provided to the agency head, the State Auditor, and the State Budget Officer.

(b) Staff designated by the State CIO may request the purchasing agency's purchasing records for the purpose of the compliance review. The purchasing agency shall cooperate with such staff, providing them with all requested records, adequate office space for conducting the review if performed at the agency's location and agency purchasing staff for discussion of purchase transactions. The State CIO shall not require of the agency any more than is needed to complete the review.

(c) The State CIO shall provide to each agency, upon request, ITS' assistance in educational training for the agency's staff to better acquaint them with State purchasing statutes and rules.

*History Note: Authority G.S. 147-33.76(b1);
Temporary Adoption Eff. January 1, 2000;
Eff. August 1, 2000;
Recodified from 09 NCAC 06B .1105 Eff. March 19, 2008;*

Amended Eff. September 1, 2013.

09 NCAC 06B .1402 PROCUREMENT FILE RECORDS

(a) The purchasing agency shall identify each paper or electronic contract record individually so it can be located and referenced.

(b) The purchasing agency shall document all purchase transactions. As applicable, each paper or electronic procurement file shall include the following records:

- (1) Requisition;
- (2) Approval to proceed with acquisition;
- (3) Each original executed offer if in writing, or written documentation of verbal offer received;
- (4) Documentation supporting whether each offeror is responsive and responsible to terms of the solicitation, the use of a competitive range selection and rejection of offerors for negotiations, best and final offers (BAFO), award, or cancellation or other disposition of the solicitation as may be applicable;
- (5) Worksheets/evaluations of individual offers;
- (6) Vendor distribution list or proof of fulfilling advertisement requirements, and any conditions and approval for waiver to advertise, publish, and notify any part of a procurement action;
- (7) Written justification for limitation or waiver of competition, or emergency purchase, or waiver of any rule during the solicitation process;
- (8) Tabulation of offers received;
- (9) State CIO approval of award recommendation;
- (10) Purchase order or other payment verification;
- (11) Reason(s) for receiving only one offer in response to a solicitation;
- (12) Summary of vendor debriefing, if any;
- (13) Signed contracts or agency acceptance of offer(s);
- (14) Board of Awards' decision records; and
- (15) Protest documents.

(c) After award of contract, all material in the procurement file, except non-public information, shall be made available for inspection in accordance with the Public Records Law, G.S. 132-1 et seq.

History Note: Authority G.S. 147-33.95(f);

Temporary Adoption Eff. January 1, 2000;

Eff. August 1, 2000;

Recodified from 09 NCAC 06B .1202 Eff. March 19, 2008;

Amended Eff. September 1, 2013.

15A NCAC 02B .0295 MITIGATION PROGRAM REQUIREMENTS FOR PROTECTION AND MAINTENANCE OF RIPARIAN BUFFERS

(a) **PURPOSE.** The purpose of this Rule is to set forth the mitigation requirements that apply to applicants listed in Subparagraphs (1) and (2) of this Paragraph and to set forth requirements for buffer mitigation providers. Buffer mitigation is required when one of the following applies:

- (1) The applicant has received an authorization certificate for impacts that cannot be avoided or practicably minimized pursuant to 15A NCAC 02B .0233, 15A NCAC 02B .0243, 15A NCAC 02B .0250, 15A NCAC 02B .0259, 15A NCAC 02B .0267 or 15A NCAC 02B .0607; or
- (2) The applicant has received a variance pursuant to 15A NCAC 02B .0233, 15A NCAC 02B .0243, 15A NCAC 02B .0250, 15A NCAC 02B .0259, 15A NCAC 02B .0267 or 15A NCAC 02B .0607 and is required to perform mitigation as a condition of a variance approval.

(b) **DEFINITIONS.** For the purpose of this Rule, these terms shall be defined as follows:

- (1) "Authority" means either the Division or a local government that has been delegated or designated to implement the riparian buffer program.
- (2) "Division" means the Division of Water Quality of the North Carolina Department of Environment and Natural Resources.
- (3) "Enhancement Site" means a riparian zone site characterized by conditions between that of a restoration site and a preservation site such that the planting of woody stems (*i.e.*, shrubs or saplings) will maximize nutrient removal and other buffer functions.
- (4) "Hydrologic Area" means the Watershed Boundary Dataset (WBD), located at <http://data.nconemap.com/geportal/catalog/search/resource/details.page?uuid={16A42F31-6DC7-4EC3-88A9-03E6B7D55653}> using the eight-digit Hydrologic Unit Code (HUC) prepared by the United States Geological Survey.
- (5) "Locational Ratio" means the mitigation ratio applied to the mitigation requirements based on the location of the mitigation site relative to the impact site as set forth in Paragraph (e).
- (6) "Monitoring period" means the length of time specified in the approved mitigation plan during which monitoring of vegetation success and other anticipated benefits to the adjacent water as listed in the authorization certification is done.
- (7) "Non-wasting endowment" means a fund that generates enough interest to cover the cost of the long term monitoring and maintenance.

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- (8) "Off-site" means an area that is not located on the same parcel of land as the impact site.
- (9) "On-site" means an area located on the same parcel of land as the impact site.
- (10) "Outer Coastal Plain" means the portion of the state shown as the Middle Atlantic Coastal Plain (63) on Griffith, *et al.* (2002) "Ecoregions of North and South Carolina." Reston, VA, United States Geological Survey.
- (11) "Physiographic province" means one of the four Level III ecoregions shown on Griffith, *et al.* (2002) "Ecoregions of North and South Carolina". Reston, VA, United States Geological Survey.
- (12) "Preservation Site" means riparian zone sites that are characterized by a natural forest consisting of the forest strata and diversity of species appropriate for the physiographic province.
- (13) "Restoration Site" means riparian zone sites that are characterized by an absence of trees and by a lack of dense growth of smaller woody stems (*i.e.*, shrubs or saplings) or sites that are characterized by scattered individual trees such that the tree canopy is less than 25% of the cover and by a lack of dense growth of smaller woody stems (*i.e.*, shrubs or saplings).
- (14) "Riparian wetland" means a wetland that is found in one or more of the following landscape positions: in a geomorphic floodplain; in a natural topographic crenulation; contiguous with an open water equal to or greater than 20 acres in size; or subject to tidal flow regimes excluding salt/brackish marsh wetlands.
- (15) "Urban" means an area that is designated as an urbanized area under the most recent federal decennial census or within the corporate limits of a municipality.
- (16) "Zonal Ratio" means the mitigation ratio applied to impact amounts in the respective zones of the riparian buffer as set forth in Paragraph (e).

(c) APPLICATION REQUIREMENTS, MITIGATION SITE REQUIREMENTS AND MITIGATION OPTIONS. Any applicant who seeks approval to impact riparian buffers covered under this Rule who is required by Paragraph (a) shall submit to the Division a written mitigation proposal that calculates the required area of mitigation and describes the area and location of each type of proposed mitigation. The applicant shall not impact buffers until the Division has approved the mitigation plan by issuance of written authorization. For all options except payment of a fee under Paragraphs (h) or (i) of this Rule, the proposal shall include a commitment to provide a conservation easement or similar legal protection mechanism to ensure perpetual stewardship that protects the mitigation site's nutrient removal and other water quality functions, a commitment to provide a non-wasting endowment or other financial mechanism for perpetual stewardship and protection, and a commitment to

provide a completion bond that is payable to the Division sufficient to ensure that land or easement purchase, construction, monitoring and maintenance are completed. For each mitigation site, the Division shall identify functional criteria to measure the anticipated benefits of the mitigation to the adjacent water. The Division shall issue a mitigation determination that specifies the area, type and location of mitigation and the water quality benefits to be provided by the mitigation site. The mitigation determination issued according to this Rule shall be included as an attachment to the authorization certification. The applicant may propose any of the following types of mitigation and shall provide a written demonstration of practicality that takes into account the relative cost and availability of potential options, as well as information addressing all requirements associated with the option proposed:

- (1) Applicant provided on-site or off-site riparian buffer restoration, enhancement or preservation pursuant to Paragraph (g) of this Rule;
- (2) Payment of a compensatory mitigation fee to a mitigation bank if buffer credits are available pursuant to Paragraph (h) of this Rule or payment of a compensatory mitigation fee to the Riparian Buffer Restoration Fund pursuant to Paragraph (i) of this Rule. Payment must conform to the requirements of G.S. 143-214.20;
- (3) Donation of real property or of an interest in real property pursuant to Paragraph (j) of this Rule; or
- (4) Alternative buffer mitigation options pursuant to Paragraph (k) of this Rule.

(d) AREA OF IMPACT. The authority shall determine the area of impact in square feet to each zone of the proposed riparian buffer impact by adding the following:

- (1) The area of the footprint of the use impacting the riparian buffer;
- (2) The area of the boundary of any clearing and grading activities within the riparian buffer necessary to accommodate the use;
- (3) The area of any ongoing maintenance corridors within the riparian buffer associated with the use; and
- (4) The authority shall deduct from this total the area of any wetlands that are subject to and compliant with riparian wetland mitigation requirements under 15A NCAC 02H .0506 and are located within the proposed riparian buffer impact area.

(e) AREA OF MITIGATION BASED ON ZONAL AND LOCATIONAL MITIGATION RATIOS. The authority shall determine the required area of mitigation for each zone by applying each of the following ratios to the area of impact calculated under Paragraph (d) of this Rule with a 3:1 ratio for Zone 1 and 1.5:1 ratio for Zone 2, except that the required area of mitigation for impacts proposed within the Goose Creek watershed is 3:1 for the entire buffer and the Catawba River watershed is 2:1 for Zone 1 and 1.5:1 for Zone 2, and:

- (1) In addition to the ratios listed above in this Paragraph, the applicant or mitigation provider must use the following locational ratios as applicable based on location of the proposed mitigation site relative to that of the proposed impact site. Mitigation options shall be available to applicants as follows:
 - (A) On-site mitigation is 0.75:1 except within the Randleman Lake watershed which is 1:1;
 - (B) Within the 12-digit HUC is 0.75:1 except within the Randleman Lake watershed which is 1:1;
 - (C) Within the eight-digit HUC is 1:1 except as provided in Paragraph (f) of this Rule;
 - (D) In the adjacent eight-digit HUC is 2:1 except as provided in Paragraph (f) of this Rule.

For use of Part (e)(1)(D) of this Rule, the applicant shall describe why buffer mitigation within the 8 digit HUC is not practical for the project; and

- (2) Donation of property shall satisfy all the conditions of Paragraph (j) of this Rule.

(f) **GEOGRAPHIC RESTRICTIONS ON LOCATION OF MITIGATION.** Mitigation shall be performed in the same river basin in which the impact is located with the following additional specifications:

- (1) In the following cases, mitigation shall be performed in the same watershed in which the impact is located:
 - (A) Falls Lake Watershed;
 - (B) Goose Creek Watershed;
 - (C) Randleman Lake Water Supply Watershed;
 - (D) Each subwatershed of the Jordan Lake watershed, as defined in Rule 15A NCAC 02B .0262; and
 - (E) Other watersheds as specified in riparian buffer protection rules adopted by the Commission.
- (2) Buffer mitigation for impacts within watersheds with riparian buffer rules that also have federally listed threatened or endangered aquatic species may be done within other watersheds with the same federally listed threatened or endangered aquatic species as long as the impacts are in the same river basin and same physiographic province as the mitigation site.

(g) **RIPARIAN BUFFER RESTORATION OR ENHANCEMENT.** Division staff shall make an on-site determination as to whether a potential mitigation site qualifies as a restoration or enhancement site based on the applicable definition in Paragraph (b) of this Rule. Persons who choose to meet their mitigation requirement through riparian buffer restoration or enhancement shall meet the following requirements:

- (1) The restoration area is equal to the required area of mitigation determined pursuant to Paragraph (e) of this Rule.
- (2) The enhancement area is three times larger than the required area of mitigation determined pursuant to Paragraph (e) of this Rule.
- (3) The location of the restoration or enhancement shall comply with the requirements of Paragraphs (e) and (f) of this Rule and:
 - (A) For the Catawba River mainstem below Lake James, the width of the riparian buffer shall begin at the top of the bank and extend landward a distance of 50 feet, measured horizontally on a line perpendicular to a vertical line marking the edge of the top of the bank. For the mainstem lakes located on the Catawba River mainstem, the width of the riparian buffer shall begin at the most landward limit of the full pond level and extend landward a distance of 50 feet, measured horizontally on a line perpendicular to a vertical line marking the edge of the full pond level. Buffer mitigation in the Catawba watershed may be done along the lake shoreline as well as along intermittent and perennial stream channels throughout the watershed;
 - (B) For the Goose Creek Watershed the riparian buffer restoration or enhancement site shall have a minimum width of 50 feet as measured horizontally on a line perpendicular to a vertical line marking the edge of the top of the bank and may include restoration or enhancement of existing riparian areas, restoration or enhancement of streamside areas along first order ephemeral streams that discharge or outlet into intermittent or perennial streams, and preservation of the streamside area along first order ephemeral streams that discharge or outlet into intermittent or perennial streams at a 5:1 ratio as long as there is also an amount of restoration or enhancement equivalent to the amount of permitted impact.
- (4) The mitigation site shall provide diffuse flow across the entire buffer width. Any existing impervious cover or stormwater conveyances such as ditches, pipes or drain tiles shall be eliminated and the flow converted to diffuse flow.

- (5) The applicant or mitigation provider shall submit a restoration or enhancement plan for written approval by the Division. The restoration or enhancement plan shall demonstrate compliance with the requirements of Subparagraphs (1) through (3) of this Paragraph and shall contain the following in addition to elements required in Paragraph (c) of this Rule:
 - (A) A map of the proposed restoration or enhancement site;
 - (B) A vegetation plan that shall include a minimum of five native hardwood tree species or five native hardwood tree and native shrub species, where no one species is greater than 50% of planted stems, planted at a density sufficient to provide 260 stems per acre at the completion of monitoring. The Division may approve alternative planting plans upon consideration of factors including site wetness and plant availability to meet the requirements of this Part;
 - (C) A grading plan (if applicable). The site shall be graded in a manner to ensure diffuse flow through the entire riparian buffer;
 - (D) A schedule for implementation including a fertilization and herbicide plan that will include protective measures to ensure that fertilizer and herbicide is not deposited downstream from the site and will be applied per manufacturers guidelines. Herbicides used must be certified by EPA for use in or near aquatics sites and must be applied in accordance with the manufacturers' instructions; and
 - (E) A monitoring plan including monitoring of vegetative success and other anticipated benefits to the adjacent water as listed in the Authorization Certification.
 - (6) Within one year after the Division has approved the restoration or enhancement plan, the applicant or mitigation provider shall present documentation to the Division that the riparian buffer has been restored or enhanced unless the Division agrees in writing to a longer time period due to the necessity for a longer construction period.
 - (7) The mitigation area shall be placed under a perpetual conservation easement or similar legal protection mechanism to provide for protection of the property's nutrient removal and other water quality functions.
 - (8) The applicant or mitigation provider shall submit written annual reports for a period of five years after the restoration or enhancement showing that the trees or trees and shrub species planted are meeting success criteria and that diffuse flow through the riparian buffer has been maintained. The applicant shall replace trees or shrubs and restore diffuse flow if needed during that five-year period. Additional years of monitoring may be required if the objectives under Paragraph (g) have not been achieved at the end of the five-year monitoring period, and
 - (9) A completion bond that is payable to the Division sufficient to ensure that land purchase, construction, monitoring and maintenance are completed. A non-wasting endowment or other financial mechanism for perpetual maintenance and protection must be provided.
- (h) **PURCHASE OF BUFFER MITIGATION CREDITS FROM A PRIVATE OR PUBLIC MITIGATION BANK.** Applicants who choose to satisfy some or all of their mitigation determination by purchasing mitigation credits from a private or public mitigation bank shall meet the following requirements:
- (1) The mitigation bank from which credits are purchased is listed on the Division's webpage (<http://portal.ncdenr.org/web/wq/swp/ws/401>) and shall have available riparian buffer credits;
 - (2) The mitigation bank from which credits are purchased shall be located as described in Paragraphs (e) and (f) of this Rule; and
 - (3) After receiving a mitigation acceptance letter from the mitigation provider, proof of payment for the credits shall be provided to the Department prior to any activity that results in the removal or degradation of the protected riparian buffer.
- (i) **PAYMENT TO THE RIPARIAN BUFFER RESTORATION FUND.** Applicants who choose to satisfy some or all of their mitigation determination by paying a compensatory mitigation fee to the Riparian Buffer Restoration Fund shall meet the requirements of 15A NCAC 02B .0269 (Riparian Buffer Mitigation Fees to the NC Ecosystem Enhancement Program). Payment made to the NC Ecosystem Enhancement Program (the Program) shall be contingent upon acceptance of the payment to the Program. The financial, temporal and technical ability of the Program to satisfy the mitigation request shall be considered to determine whether the Program shall accept or deny the request.
- (j) **DONATION OF PROPERTY.** Applicants who choose to satisfy their mitigation determination by donating real property or an interest in real property in lieu of payment shall meet the following requirements:
- (1) The donation of real property interests may be used to either partially or fully satisfy the payment of a compensatory mitigation fee to the Riparian Buffer Restoration Fund pursuant to Paragraph (i) of this Rule. The value of the

- property interest shall be determined by an appraisal performed in accordance with Part (j)(4)(D) of this Rule. The donation shall satisfy the mitigation determination if the appraised value of the donated property interest is equal to or greater than the required fee. If the appraised value of the donated property interest is less than the required fee calculated pursuant to 15A NCAC 02B .0269, the applicant shall pay the remaining balance due.
- (2) The donation of a conservation easement or similar legal protection mechanism that includes a non-wasting endowment or other financial mechanism for perpetual maintenance and protection to satisfy compensatory mitigation requirements shall be accepted only if it is granted in perpetuity.
- (3) Donation of real property interests to satisfy the mitigation determination shall be accepted only if such property meets all of the following requirements:
- (A) The property shall contain riparian areas that are in need of restoration or enhancement rather than preservation;
 - (B) For the Neuse and Tar-Pamlico basins, the Catawba River mainstem below Lake James, and the Randleman and Jordan watersheds, the restorable riparian buffer on the property shall begin at the top of the bank and extend landward a distance of 50 feet, measured horizontally on a line perpendicular to a vertical line marking the edge of the top of the bank. For the mainstem lakes located on the Catawba River mainstem, the width of the riparian buffer shall begin at the most landward limit of the full pond level and extend landward a distance of 50 feet, measured horizontally on a line perpendicular to a vertical line marking the edge of the full pond level. A minimum distance of less than 50 feet may be allowed only for projects in accordance with Part (k)(2)(D) of this Rule;
 - (C) The size of the restorable riparian buffer on the property to be donated shall equal or exceed the acreage of riparian buffer required to be mitigated under the mitigation responsibility determined pursuant to Paragraph (e) of this Rule. If the size of the restorable riparian buffer on the property to be donated is less than the acreage of riparian buffer required to be mitigated under the mitigation responsibility determined pursuant to Paragraph (e), then the applicant shall satisfy the remaining balance by Subparagraph (c)(1) or (2) or a combination of (c)(1) and (2) of this Rule;
 - (D) The property shall not have any impervious cover or stormwater conveyances such as ditches, pipes or drain tiles. If impervious cover or stormwater conveyances exist, they shall be eliminated and the flow converted to diffuse flow;
 - (E) The property shall be suitable to be successfully restored, based on existing hydrology, soils, and vegetation;
 - (F) The estimated cost of restoring and maintaining the property shall not exceed the value of the property minus site identification and land acquisition costs unless the applicant supplies financial assurance acceptable to the Division for restoration and maintenance of the buffer;
 - (G) The property shall not contain any building, structure, object, site, or district that is listed in the National Register of Historic Places established pursuant to Public Law 89-665, 16 U.S.C. 470 as amended;
 - (H) The property shall not contain any hazardous substance or solid waste such that water quality could be adversely impacted, unless the hazardous substance or solid waste can be properly remediated before the interest is transferred;
 - (I) The property shall not contain structures or materials that present health or safety concerns to the general public. If wells, septic, water or sewer connections exist, they shall be filled, remediated or closed at owner's expense in accordance with state and local health and safety regulations before the interest is transferred. Sewer connections in Zone 2 may be allowed for projects in accordance with Part (k)(2)(E) of this Rule;
 - (J) The property and adjacent properties shall not have prior, current, or known future land use that would inhibit the function of the restoration effort;
 - (K) The property shall not have any encumbrances or conditions that are

- inconsistent with the requirements of this rule or purposes of the buffer rules;
- (L) Fee simple title to the property or a conservation easement in the property shall be donated to the State of North Carolina; and
 - (M) Upon completion of the buffer restoration or enhancement, the property or the easement shall be donated to a local land trust or to a local government or other state organization that will hold and enforce the conservation easement and its interests. The donation shall be accompanied by a non-wasting endowment or other financial mechanism for perpetual maintenance and protection sufficient to ensure perpetual long-term monitoring and maintenance, except that where a local government has donated a conservation easement and has entered into a binding intergovernmental agreement with the Division to manage and protect the property consistent with the terms of the conservation easement, such local government shall not be required to provide a non-wasting endowment.
- (4) At the expense of the applicant or donor, the following information shall be submitted to the Division with any proposal for donations or dedications of interest in real property:
- (A) Documentation that the property meets the requirements laid out in Subparagraph (j)(3) of this Rule;
 - (B) US Geological Survey 1:24,000 (7.5 minute) scale topographic map, county tax map, USDA Natural Resource Conservation Service County Soil Survey Map, and county road map showing the location of the property to be donated along with information on existing site conditions, vegetation types, presence of existing structures and easements;
 - (C) A current property survey performed in accordance with the procedures of the North Carolina Department of Administration, State Property Office as identified by the State Board of Registration for Professional Engineers and Land Surveyors in "Standards of Practice for Land Surveying in North Carolina." Copies may be obtained from the North Carolina State Board of Registration for Professional Engineers and Land Surveyors, 3620 Six Forks Road, Suite 300, Raleigh, North Carolina 27609;
 - (D) A current appraisal of the value of the property performed in accordance with the procedures of the North Carolina Department of Administration, State Property Office as identified by the Appraisal Board in the "Uniform Standards of Professional North Carolina Appraisal Practice." Copies may be obtained from the Appraisal Foundation, Publications Department, P.O. Box 96734, Washington, D.C. 20090-6734; and
 - (E) A title certificate.
- (k) **ALTERNATIVE BUFFER MITIGATION OPTIONS.** Some or all of a buffer mitigation requirement may be met through any of the alternative mitigation options described in this Paragraph. Any proposal for alternative mitigation shall meet, in addition to the requirements of Paragraphs (c), (e) and (f) of this Rule, the requirements set out in the Subparagraph addressing that option as well as the following requirements:
- (1) Any proposal for alternative mitigation shall be provided in writing to the Division and shall meet the following content and procedural requirements for approval by the Division:
 - (A) Demonstration of no practical alternative. The application shall describe why traditional buffer mitigation options are not practical for the project;
 - (B) Projects that have been constructed and are within the required monitoring period on the effective date of this Rule are eligible for use as alternative buffer mitigation. Projects that have completed monitoring and have been released by the Division on or before the effective date of this Rule are eligible for use as alternative buffer mitigation for a period of ten years from the effective date of this Rule;
 - (C) The mitigation area shall be placed under a perpetual conservation easement or similar legal protection mechanism to provide for protection of the property's nutrient removal and other water quality functions; and
 - (D) A completion bond that is payable to the Division sufficient to ensure that land purchase, construction, monitoring and maintenance are completed. A non-wasting endowment or other financial

- mechanism for perpetual maintenance and protection must be provided.
- (2) **ALTERNATIVE BUFFER MITIGATION – NON-STRUCTURAL, VEGETATIVE OPTIONS**
- (A) **Coastal Headwater Stream Mitigation.** Wooded buffers planted along Outer Coastal Plain headwater stream mitigation sites can be approved as riparian buffer mitigation as long as the site meets all applicable requirements of Paragraph (g) of this Rule. In addition, all success criteria including tree species, tree density, diffuse flow and stream success criteria specified by the Division in any required written approval of the site must be met. The area of the buffer shall be measured perpendicular to the length of the valley being restored. The area within the proposed buffer mitigation shall not also be used as wetland mitigation. Monitoring of the site must be for at least five years from the date of planting by providing annual reports for written DWQ approval;
- (B) **Buffer Mitigation on Non-Subject Streams.** Restoration or enhancement of buffers may be conducted on intermittent or perennial streams that are not subject to riparian buffer rules. These streams shall be confirmed as intermittent or perennial streams by Division staff or staff from a local delegated program using the Division publication, *Methodology for Identification of Intermittent and Perennial Streams and Their Origins* (v.4.11, 2010). The proposal shall meet all applicable requirements of Paragraph (g) of this Rule.
- Preservation of these stream buffers may be proposed in order to protect permanently the buffer from cutting, clearing, filling and grading and similar activities that would affect the functioning of the buffer. The preservation site shall protect at least a 50 foot wide forested riparian buffer and shall meet the requirements of Subparagraph (j)(2) and Parts (j)(3)(D), (G), (H), (I), (K) and (M) of this Rule. Preservation shall be proposed only when restoration or enhancement with an area at least equal to the footprint of the buffer impact has been proposed. The preservation area shall be five times larger than the required area of mitigation determined pursuant to Paragraph (e) of this Rule that is not satisfied through restoration or enhancement;
- (C) **Preservation of Buffers on Subject Streams.** Buffer preservation may be proposed in order to protect permanently the buffer from cutting, clearing, filling and grading and similar activities that would affect the functioning of the buffer above and beyond the protection afforded by the existing buffer rules on sites that meet the definition of a preservation site along streams, estuaries or ponds that are subject to buffer rules. The preservation site shall meet the requirements of Subparagraph (j)(2) and Part (j)(3)(D), (G), (H), (I), (K) and (M) of this Rule. Preservation shall be proposed only when restoration or enhancement with an area at least equal to the footprint of the buffer impact has been proposed. The preservation area shall be ten times larger in non-urban areas and three times larger in urban areas than the required area of mitigation determined pursuant to Paragraph (e) of this Rule that is not satisfied through restoration or enhancement. Reduced buffer mitigation credit can be given per Part (k)(2)(D) of this Rule in urban areas;
- (D) **Narrower buffers on urban streams.** Buffer restoration or enhancement with widths less than 50 feet may be proposed along urban streams. If buffer widths between 30 and 50 feet are proposed and on-site stormwater management is provided to control local sources of nutrients and other pollutants, then full buffer credit shall be awarded for the area of buffer restored or enhanced. A total of 75% of full credit shall be awarded for buffers between 20 and 30 feet wide if on-site stormwater management is provided to control local sources of nutrients and other pollutants. If on-site stormwater management is not provided, then 50% of full credit shall be provided for buffers between 30 and 50 feet wide and 25% of full credit for buffers between 20 and 30 feet wide. Buffers less than 20 feet

- wide shall receive no buffer credit regardless of whether on-site stormwater management is provided;
- (E) Sewer easement within the buffer. If the proposed mitigation site contains a sewer easement in Zone 1, that portion of the sewer easement within Zone 1 is not suitable for buffer mitigation. If the proposed mitigation site contains a sewer easement in Zone 2, the portion of the sewer easement in Zone 2 may be suitable for buffer mitigation if the applicant restores or enhances the forested buffer in Zone 1 adjacent to the sewer easement, the sewer easement is at least 30 feet wide, the sewer easement is required to be maintained in a condition which meets the vegetative requirements of the collection system permit, and diffuse flow is provided across the entire buffer width;
- (F) Enhancement of grazing areas adjacent to streams. Buffer credit at a 2:1 ratio shall be available for an applicant who proposes permanent exclusion of grazing livestock that otherwise degrade the stream and riparian zone through trampling, grazing or waste deposition by fencing the livestock out of the stream and its adjacent buffer. The applicant shall provide an enhancement plan to the standards identified in Paragraph (g). The applicant shall demonstrate that grazing was the predominant land use since the effective date of the applicable buffer rule.
- (3) **ALTERNATIVE BUFFER STORMWATER TREATMENT OPTIONS.**
- (A) For all structural options: Riparian buffer restoration or enhancement is required with an area at least equal to the footprint of the buffer impact, and the remaining mitigation resulting from the multipliers can be met through structural options;
- (B) Structural measures already required by other local, state or federal rule or permit cannot be used as alternative buffer mitigation, except to the extent such measure(s) exceed the requirements of such rule. Stormwater Best Management Practices (BMPs), including bioretention facilities, constructed wetlands, infiltration devices and sand filter are all potentially approvable (BMPs) for alternative buffer mitigation. Other BMPs may be approved only if they meet the nutrient removal levels outlined in Part (3)(C) of this Subparagraph. Existing or planned BMPs for a local, state or federal rule or permit may be retrofitted or expanded to improve their nutrient removal if this level of treatment would not be required by other local, state or federal rules. In this case, the predicted increase in nutrient removal may be counted toward alternative buffer mitigation;
- (C) Minimum treatment levels: Any structural BMP shall provide at least 30% total nitrogen and 35% total phosphorus removal as demonstrated by a scientific and engineering literature review as approved by the Division. The application shall demonstrate that the proposed alternative removes an equal or greater annual mass load of nutrients to surface waters as the buffer impact authorized in the authorization certificate or variance, following the calculation of impact and mitigation areas pursuant to Paragraphs (d) and (e) of this Rule. To estimate the rate of nutrient removal of the impacted buffer, the applicant shall use a method previously approved by the Division. Alternatively, the applicant may propose an alternative method of estimating the rate of nutrient removal for consideration and review by the Division;
- (D) All proposed structural BMPs shall follow the Division's 2009 Stormwater Best Management Practice Design Manual. If a specific proposed structural BMP is not addressed in this Manual, follow Chapter 20 in this Manual for approval;
- (E) An operation and maintenance plan is required to be approved by the Division for all structural options;
- (F) Continuous and perpetual maintenance is required for all structural options and shall follow the Division's 2009 Stormwater Best Management Practice Design Manual;
- (G) Annual reports shall be sent in writing to the Division of Water Quality concerning operation and

- maintenance of all structural options approved under this Rule;
- (H) Removal and replacement of structural options: If a structural option is proposed to be removed and cannot be replaced on site, then a structural or non-structural measure of equal or better nutrient removal capacity shall be constructed as a replacement with the location as specified by Paragraph (e) of this Rule;
- (I) Renovation or repair of structural options: If a structural option must be renovated or repaired, it shall be renovated to provide equal or better nutrient removal capacity as originally designed;
- (J) Structural options as well as their operation and maintenance are the responsibility of the landowner or easement holder unless the Division agrees in writing to operation and maintenance by another responsible party. Structural options shall be located in recorded drainage easements for the purposes of operation and maintenance and shall have recorded access easements to the nearest public right-of-way. These easements shall be granted in favor of the party responsible for operating and maintaining the structure, with a note that operation and maintenance is the responsibility of the landowner, easement holder or other responsible party; and
- (K) Bonding and endowment. A completion bond that is payable to the Division sufficient to ensure that land purchase, construction, monitoring and maintenance are completed and a non-wasting endowment or other financial mechanism for perpetual maintenance and protection must be provided.
- (4) **OTHER ALTERNATIVE BUFFER MITIGATION OPTIONS.** Other riparian buffer mitigation options may be considered by the Division on a case-by-case basis after 30-day public notice through the Division's Water Quality Certification Mailing List in accordance with 15A NCAC 02H .0503 as long as the options otherwise meet the requirements of this Rule. Division staff shall present recommendations to the Environmental Management Commission for a final decision with respect to any proposal for alternative buffer mitigation options not specified in this Rule.
- (1) **ACCOUNTING FOR BUFFER CREDIT, NUTRIENT OFFSET CREDIT AND STREAM MITIGATION CREDIT.** Buffer mitigation credit, nutrient offset credit, wetland mitigation credit and stream mitigation credit shall be accounted for in accordance with the following:
- (1) Buffer mitigation that is used for buffer mitigation credit cannot be used for nutrient offset credits;
 - (2) Buffer mitigation or nutrient offset credit cannot be generated within wetlands that provide wetland mitigation credit required by 15A NCAC 02H .0506; and
 - (3) Either buffer mitigation or nutrient offset credit may be generated on stream mitigation sites as long as the width of the restored or enhanced riparian buffer is at least 50 feet.

History Note: Authority 143-214.1; 143-214.5; 143-214.7; 143-214.20; 143-215.3(a)(1); S.L. 1998, c. 221; 143-215.6A; 143-215.6B; 143-215.6C; 143-215.8A; 143-215.8B; 143-282(c); 143B-282(d); S.L. 1999, c. 329, s. 7.1; S.L. 2001, c. 418, s. 4.(a); S.L. 2003, c. 340, s. 5; S.L. 2005-190; S.L. 2006-259; S.L. 2009-337; S.L. 2009-486;
Eff. Pending Legislative Review.

This Section contains information for the meeting of the Rules Review Commission on August 15 and September 19, 2013 at 1711 New Hope Church Road, RRC Commission Room, Raleigh, NC. Anyone wishing to submit written comment on any rule before the Commission should submit those comments to the RRC staff, the agency, and the individual Commissioners. Specific instructions and addresses may be obtained from the Rules Review Commission at 919-431-3000. Anyone wishing to address the Commission should notify the RRC staff and the agency no later than 5:00 p.m. of the 2nd business day before the meeting. Please refer to RRC rules codified in 26 NCAC 05.

RULES REVIEW COMMISSION MEMBERS

Appointed by Senate

Jeff Hyde
Margaret Currin
Jay Hemphill
Thomas Taylor
Faylene Whitaker

Appointed by House

Ralph A. Walker
Anna Baird Choi
Jeanette Doran
Garth K. Dunklin
Stephanie Simpson

COMMISSION COUNSEL

Joe DeLuca (919)431-3081
Amanda Reeder (919)431-3079

RULES REVIEW COMMISSION MEETING DATES

September 19, 2013 October 17, 2013
November 21, 2013 December 19, 2013

RULES REVIEW COMMISSION MEETING MINUTES

August 15, 2013

The Rules Review Commission met on Thursday, August 18, 2013, in the Commission Room at 1711 New Hope Church Road, Raleigh, North Carolina. Commissioners present were: Anna Baird Choi, Margaret Currin, Jeanette Doran, Jeff Hyde, Ralph Walker and Faylene Whitaker. Garth Dunklin joined via skype.

Staff members present were: Joe DeLuca and Amanda Reeder, Commission Counsel; Molly Masich, Dana Vojtko, Julie Brincefield and Tammara Chalmers.

The meeting was called to order at 10:03 a.m. with Vice-Chairman Currin presiding. She reminded the Commission members that they have a duty to avoid conflicts of interest and the appearances of conflicts as required by NCGS 138A-15(e).

New Commissioner Jeff Hyde was welcomed and introduced by Chairman Walker. He then administered the oath of office to the new Commissioner.

Vice-Chairman Currin read into the record the statement of economic interest for Jeff Hyde, which stated there was no actual conflict of interest or the potential for a conflict of interest.

APPROVAL OF MINUTES

Vice-Chairman Currin asked for any discussion, comments, or corrections concerning the minutes of the July 18, 2013 meeting. There were none and the minutes were approved as distributed.

FOLLOW-UP MATTERS

Private Protective Services Board

12 NCAC 07D .0104, .0115, .0203, .0301, .0302, .0401, .0501, .0601, .0807, .0907, .0909 – No action was taken on these rules.

Board of Barber Examiners

Prior to the review of the rules from the Board of Barber Examiners, Commissioner Choi recused herself and did not participate in any discussion or vote concerning these rules because the law firm where she is employed provides legal services to the Board.

21 NCAC 06A .0103, .0303; 06C .0907, 06F .0101, .0116; 06H .0101; 06I .0105; 06J .0101; 06K .0104; 06L .0103; .0114, .0118, .0119; 06M .0101, .0102; 06N .0104, .0105, .0108, .0109, .0112; 06Q .0101, .0103; 06S .0101 -

The Commission objected to the following rules from the board:

21 NCAC 06A .0301 and .0303 based on lack of authority. In the first rule the agency has no authority to require by rule that the executive director be a licensed barber. There is no authority to assign a management function to the director in the second rule without the governor's approval as required by G.S. 143B-10(j)(2). The Commission approved the repeal of these rules.

21 NCAC 06H .0101 based on ambiguity. In item (2) it is unclear what is meant by requiring that all students "are instructed alike." The Commission approved the rewritten rule.

21 NCAC 06L .0103 based on lack of authority. There is no authority to require that all equipment "must be manufactured specifically for barbering." The Commission approved the rewritten rule.

21 NCAC 06L .0118 based on ambiguity. The rule is unclear as to whom it applied, how the ratings were to be scored, where they were to be displayed and other minor points concerning the ratings. The Commission approved the rewritten rule.

21 NCAC 06L .0119 based on ambiguity. It is unclear as to what constitutes "well repaired" in (1), "general condition of the barber shop" in (2), and "good repair" in (3)(c). The Commission approved the rewritten rule.

21 NCAC 06M .0101 based on lack of authority. There is no authority to require that a barber inspector be a registered barber. Even if there were such authority, it is unclear what constitutes sufficient experience to be considered an "experienced barber". The Commission approved the repeal of this rule.

21 NCAC 06Q .0101 based on lack of authority. There is no authority to adopt rules that purport to apply to non-licensees who do not practice barbering. The Commission approved the rewritten rule.

21 NCAC 06Q .0103 was withdrawn by the agency.

The Commission approved the remaining rules.

Bain Jones with the Board addressed the Commission.

Board of Dental Examiners

Prior to the review of the rules from the Board of Dental Examiners, Commissioner Choi recused herself and did not participate in any discussion or vote concerning these rules because the law firm where she is employed provides legal services to the Board.

21 NCAC 16A .0104; 16B .0101, .0317, .1001, .1002; 16C .0101, .0301; 16G .0107, .0108; 16M .0101 – The Commission approved the re-written rules.

Hearing Aid Dealers and Fitters Board

21 NCAC 22F .0120, .0201, .0202, .0203, .0204, .0205, .0206, .0207, .0208, .0209 – The Commission approved the re-written rules.

LOG OF FILINGS

Vice-Chairman Currin presided over the review of the log of permanent rules.

Home Inspector Licensure Board

11 NCAC 08 .1110 was unanimously approved.

Environmental Management Commission

Both rules were unanimously approved.

Coastal Resources Commission

Both rules were unanimously approved.

Wildlife Resources Commission

Both rules were unanimously approved.

Hearing Aid Dealers and Fitters Board

All rules were unanimously approved with the following exception:

The Commission objected to 21 NCAC 22A .0503 based on ambiguity. The rule is unclear as to which applications the rule is referring to: applications for licensure or applications to take the exam. The rule is vague in setting out the deadline for an applicant to supplement and complete an application before it is denied or considered “abandoned by the board. The rule is vague in when to begin counting down the deadline. The rule is unclear whether a denial or “abandonment” occurs in every case or what the standards are for granting any deadline waivers.

The agency requested that the Commission waive Rule 26 NCAC 05 .0108 and review the rewritten rule at the meeting. The Commission voted to approve the waiver and voted to approve the rewritten rule.

Catherine Jorgensen with the agency addressed the Commission.

Vice-Chairman Currin excused herself from the meeting and Chairman Walker presided over the remainder of the meeting.

Building Code Council

All rules were unanimously approved.

G.S 150B-19.1(h) RRC CERTIFICATION

Criminal Justice Education Training and Standards Commission

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rules 12 NCAC 09B .0235 and .0236.

Commissioner Whitaker was not present during the vote for these rules.

The Commission certified that the agency adhered to the principles in G.S. 150B-19.1 for proposed rule 12 NCAC 09E .0105.

COMMISSION BUSINESS

Amanda Reeder and Molly Masich updated the Commission on H.B. 74.

Amanda Reeder updated the Commission on legislation being tracked by staff.

The meeting adjourned at 11:28 a.m.

The next scheduled meeting of the Commission is Thursday, September 19th at 10:00 a.m.

There is a digital recording of the entire meeting available from the Office of Administrative Hearings / Rules Division.

Respectfully Submitted,

Julie Brincefield
Editorial Assistant

Minutes approved by the Rules Review Commission:

Margaret Currin, Vice-Chair

Rules Review Commission

Meeting

Please **Print** Legibly

AUGUST 15, 2013

| Name | Agency |
|---------------------|-----------------|
| BARRY GUPTON | NCDDI - NCBCC |
| BAM JONES | NCBBB |
| Wayne Mixon | NCBBB |
| Joelle Burleson | NC DENR - DAQ |
| Patrick Knowlson | NC DENR - DAQ |
| Carolyn Bakewell | NC Dental Bd |
| Denise Stanford | NC HILB |
| Jennifer Everett | NC DENR |
| LACY PRESNELL | NC DENR |
| Susanna Davis | Williams Mullen |
| Catherine Jorgensen | NC HADFB |
| Trevor Allen | DSS CJETS |
| Brian Hayward | NC WRC |
| ERICA GARNER | NCWRC |
| Mike Hedden | NC HILB / NCDDI |
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LIST OF APPROVED PERMANENT RULES
August 15, 2013 Meeting**HOME INSPECTOR LICENSURE BOARD**

Electrical 11 NCAC 08 .1110

ENVIRONMENTAL MANAGEMENT COMMISSION

Prevention of Significant Deterioration 15A NCAC 02D .0530

Sources In Nonattainment Areas 15A NCAC 02D .0531

COASTAL RESOURCES COMMISSION

General Use Standards for Ocean Hazard Areas 15A NCAC 07H .0306

Technical Standards for Beach Fill Projects 15A NCAC 07H .0312

WILDLIFE RESOURCES COMMISSION

Beaufort County 15A NCAC 10F .0303

Perquimans County 15A NCAC 10F .0355

BARBER EXAMINERS, BOARD OF

Office Hours 21 NCAC 06A .0103

Executive Director 21 NCAC 06A .0301

Duties of Executive Director 21 NCAC 06A .0303

Disqualification 21 NCAC 06C .0907

Physical Structure 21 NCAC 06F .0101

Students with Criminal Records 21 NCAC 06F .0116

Duties and Responsibilities 21 NCAC 06H .0101

Apprentice Barber 21 NCAC 06I .0105

Registered Apprentice 21 NCAC 06J .0101

Out-of-State Applicants 21 NCAC 06K .0104

Equipment 21 NCAC 06L .0103

Policy Prohibiting Pets 21 NCAC 06L .0114

Sanitary Ratings and Posting of Ratings 21 NCAC 06L .0118

Systems of Grading Barber Shops 21 NCAC 06L .0119

Qualifications 21 NCAC 06M .0101

Duties and Responsibilities 21 NCAC 06M .0102

Form Bar-3 21 NCAC 06N .0104

Form Bar-4 21 NCAC 06N .0105

Form Bar-5 21 NCAC 06N .0106

Form Bar-7 21 NCAC 06N .0108

Form Bar-8 21 NCAC 06N .0109

Access to Forms 21 NCAC 06N .0112

Additional Grounds for Denial or Discipline 21 NCAC 06Q .0101

General Examination Instructions 21 NCAC 06S .0101

DENTAL EXAMINERS, BOARD OF

Location 21 NCAC 16A .0104

| | | |
|---|----|----------------|
| <u>Examination Required; Exemptions</u> | 21 | NCAC 16B .0101 |
| <u>Reexamination</u> | 21 | NCAC 16B .0317 |
| <u>Dental Licensure by Endorsement Based on Military Service</u> | 21 | NCAC 16B .1001 |
| <u>Dental Licensure by Endorsement Based on Status as Milita...</u> | 21 | NCAC 16B .1002 |
| <u>Licensure</u> | 21 | NCAC 16C .0101 |
| <u>Application for Licensure</u> | 21 | NCAC 16C .0301 |
| <u>Dental Hygiene License by Endorsement Based on Military S...</u> | 21 | NCAC 16G .0107 |
| <u>Dental Hygiene License by Endorsement Based on Status as ...</u> | 21 | NCAC 16G .0108 |
| <u>Dentists</u> | 21 | NCAC 16M .0101 |

HEARING AID DEALERS AND FITTERS BOARD

| | | |
|--|----|----------------|
| <u>Definitions and Interpretations</u> | 21 | NCAC 22A .0301 |
| <u>License</u> | 21 | NCAC 22A .0303 |
| <u>Registered Apprentice</u> | 21 | NCAC 22A .0307 |
| <u>Registered Applicant</u> | 21 | NCAC 22A .0308 |
| <u>Duly Made Applicant</u> | 21 | NCAC 22A .0309 |
| <u>One Full Year of Apprenticeship</u> | 21 | NCAC 22A .0310 |
| <u>Direct Supervision</u> | 21 | NCAC 22A .0311 |
| <u>Audiometer</u> | 21 | NCAC 22A .0312 |
| <u>Definitions and Interpretations</u> | 21 | NCAC 22A .0401 |
| <u>Fee Schedule</u> | 21 | NCAC 22A .0501 |
| <u>Submission of Applications and Fees</u> | 21 | NCAC 22A .0503 |
| <u>Communication of Results of Examinations</u> | 21 | NCAC 22F .0107 |
| <u>Continuing Education</u> | 21 | NCAC 22F .0120 |
| <u>Continuing Education Definitions</u> | 21 | NCAC 22F .0201 |
| <u>Annual Continuing Education Requirements</u> | 21 | NCAC 22F .0202 |
| <u>Content Categories</u> | 21 | NCAC 22F .0203 |
| <u>CE Program Application</u> | 21 | NCAC 22F .0204 |
| <u>Content Approval Process</u> | 21 | NCAC 22F .0205 |
| <u>Appeals and CE Program Modification</u> | 21 | NCAC 22F .0206 |
| <u>Recording CEU Credit</u> | 21 | NCAC 22F .0207 |
| <u>Self-Study</u> | 21 | NCAC 22F .0208 |
| <u>Continuing Education Records</u> | 21 | NCAC 22F .0209 |
| <u>Designation</u> | 21 | NCAC 22K .0101 |
| <u>Applicant for License</u> | 21 | NCAC 22K .0102 |
| <u>Application for Apprentice Registration Certification</u> | 21 | NCAC 22K .0103 |
| <u>Application for License Renewal</u> | 21 | NCAC 22K .0104 |
| <u>Access to Forms</u> | 21 | NCAC 22K .0105 |

BUILDING CODE COUNCIL

| | |
|---|---------|
| <u>2012 NC Fire Code/Dimensions Fire apparatus access</u> | 503.2.1 |
| <u>2012 NC Mechanical Code/Duct construction</u> | 603.4 |
| <u>2012 NC Plumbing Code/Water Closets, urinals, lavatories ...</u> | 405.3.1 |

LIST OF CERTIFIED RULES
August 15, 2013 Meeting

CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

| | |
|---|-------------------|
| <u>Basic Training - Juvenile Court Counselors and Chief Cour...</u> | 12 NCAC 09B .0235 |
| <u>Basic Training - Juvenile Justice Officers</u> | 12 NCAC 09B .0236 |
| <u>Minimum Training Specifications: Annual In-Service Training</u> | 12 NCAC 09E .0105 |

AGENDA
RULES REVIEW COMMISSION
Thursday, September 19, 2013 10:00 A.M.
1711 New Hope Church Rd., Raleigh, NC 27609

- I. Ethics reminder by the chair as set out in G.S. 138A-15(e)
 - II. Approval of the minutes from the last meeting
 - III. Follow-Up Matters:
 - A. Private Protective Services Board – 12 NCAC 07D .0104, .0115, .0203, .0301, .0302, .0401, .0501, .0601, .0807, .0901, .0909 (Reeder)
 - IV. Review of Log of Filings (Permanent Rules) for rules filed between July 23, 2013 and August 20, 2013
 - V. Review of Log of Filings (Temporary Rules) for any rule filed within 15 business days of the RRC Meeting
 - VI. G.S. 150B-19.1 Certification
 - VII. Commission Business
 - Next meeting: October 17, 2013
-

Commission Review
Log of Permanent Rule Filings
July 23, 2013 through August 20, 2013

RADIATION PROTECTION COMMISSION

The rules in Chapter 11 are from the Radiation Protection Commission and cover a broad and diverse range of applications including general provisions (.0100); registration of radiation machines, facilities and services (.0200); licensing of radioactive material (.0300); safety requirements for industrial radiography operations (.0500); use of x-rays in the healing arts (.0600 - .0700); requirements for analytical x-ray (x-ray diffraction or florescence analysis) equipment (.0800); requirements for particle accelerators (.0900); requirements for notices, instructions, reports, and inspections (.1000); fees (.1100); land disposal of radioactive waste (.1200); tanning facilities and equipment (.1400); requirements for obtaining licenses authorizing access to low-level radioactive waste disposal facilities (.1500); and standards for protection against radiation resulting from activities regulated by this Chapter (.1600).

| | |
|---|-------------------|
| <u>Definitions</u> | 15A NCAC 11 .0104 |
| <u>Amend/*</u> | |
| <u>Other Definitions</u> | 15A NCAC 11 .0105 |
| <u>Amend/*</u> | |
| <u>Incorporation By Reference</u> | 15A NCAC 11 .0117 |
| <u>Amend/*</u> | |
| <u>Purpose and Scope</u> | 15A NCAC 11 .0301 |
| <u>Amend/*</u> | |
| <u>Exempt Concentrations: Other Than Source</u> | 15A NCAC 11 .0303 |
| <u>Amend/*</u> | |

| | |
|--|-------------------|
| <u>Exempt Quantities: Other Than Source Material</u> Amend/* | 15A NCAC 11 .0304 |
| <u>Exempt Item Containing Other Than Source</u> Amend/* | 15A NCAC 11 .0305 |
| <u>General Licenses: Measuring Gauging: Controlling Devices</u> Amend/* | 15A NCAC 11 .0309 |
| <u>Specific Licenses: Filing Application and General Require...</u> Amend/* | 15A NCAC 11 .0317 |
| <u>Specific Licenses: General Requirements for Human Use</u> Amend/* | 15A NCAC 11 .0318 |
| <u>Specific Licenses: General Requirements for Human Use of ...</u> Amend/* | 15A NCAC 11 .0321 |
| <u>Specific Licenses: Human Use of Sealed Sources</u> Amend/* | 15A NCAC 11 .0322 |
| <u>Specific Licenses: Products with Exempt Concentrations</u> Repeal/* | 15A NCAC 11 .0325 |
| <u>Specific Licenses: Exempt Distribution</u> Repeal/* | 15A NCAC 11 .0326 |
| <u>Specific Licenses: Manufacture Devices to Persons Licensed</u> Amend/* | 15A NCAC 11 .0328 |
| <u>Specific Licenses-Manufacture of In Vitro Test Kits</u> Amend/* | 15A NCAC 11 .0331 |
| <u>Specific Licenses: Manufacture of Radiopharmaceuticals</u> Amend/* | 15A NCAC 11 .0333 |
| <u>Specific Licenses: Generators and Reagent Kits</u> Amend/* | 15A NCAC 11 .0334 |
| <u>Specific Terms and Conditions of Licenses</u> Amend/* | 15A NCAC 11 .0338 |
| <u>Emergency Plans</u> Amend/* | 15A NCAC 11 .0352 |
| <u>Release of Patients Containing Radiopharmaceuticals or Pe...</u> Amend/* | 15A NCAC 11 .0358 |
| <u>Medical Use of Unsealed Radioactive Material</u> Amend/* | 15A NCAC 11 .0361 |
| <u>Decay in Storage</u> Amend/* | 15A NCAC 11 .0362 |
| <u>Notifications and Reports to Individuals</u> Amend/* | 15A NCAC 11 .1004 |
| <u>Occupational Dose Limits for Adults</u> Amend/* | 15A NCAC 11 .1604 |
| <u>Labeling Requirements and Exemptions</u> Amend/* | 15A NCAC 11 .1626 |
| <u>Transfer for Disposal and Manifests</u> Amend/* | 15A NCAC 11 .1633 |
| <u>Reports of Planned Special Exposures</u> Amend/* | 15A NCAC 11 .1648 |

TRANSPORTATION, DEPARTMENT OF

The rules in Chapter 1 are departmental rules.

The rules in Subchapter 1B concern rulemaking procedures including general rulemaking (.0100); petitioning for

rulemaking (.0200); rulemaking hearings (.0300); declaratory rulings (.0400); and public inspection (.0500).

Inspection of Traffic Ordinances
Amend/*

19A NCAC 01B .0502

HEARING AID DEALERS AND FITTERS BOARD

The rules in Subchapter 22F concern general examination and license provisions.

Review of Examination
Amend/*

21 NCAC 22F .0108

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) 431-3000. 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

Beecher R. Gray
Selina Brooks
Melissa Owens Lassiter
Don Overby

Randall May
A. B. Elkins II
Joe Webster

| <u>AGENCY</u> | <u>CASE NUMBER</u> | <u>DATE</u> | <u>PUBLISHED DECISION REGISTER CITATION</u> |
|--|------------------------|-------------|---|
| <u>ALCOHOLIC BEVERAGE CONTROL COMMISSION</u> | | | |
| James Ivery Smith, Ivy Lee Armstrong v. ABC Commission | 11 ABC 08266 | 04/12/12 | |
| Trawick Enterprises LLC v. ABC Commission | 11 ABC 08901 | 05/11/12 | 27:01 NCR 39 |
| Dawson Street Mini Mart Lovell Glover v. ABC Commission | 11 ABC 12597 | 05/23/12 | |
| ABC Commission v. Christian Broome Hunt T/A Ricky's Sports Bar and Grill | 11 ABC 13161 | 05/03/12 | |
| Alabarati Brothers, LLC T/A Day N Nite Food Mart, v. ABC Commission | 11 ABC 13545 | 05/01/12 | |
| Playground LLC, T/A Playground v. ABC Commission | 11 ABC 14031 | 05/16/12 | 27:01 NCR 64 |
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| ABC Commission v. D's Drive Thru Inc. T/A D's Drive Thru | 12 ABC 00060 | 05/29/12 | |
| ABC Commission v. Choudhary, LLC T/A Speedway | 12 ABC 00721 | 05/01/12 | |
| ABC Commission v. Dos Perros Restaurant LLC T/A Dos Perros Restaurant | 12 ABC 05312 | 09/25/12 | |
| ABC Commission v. Bobby Warren Joyner T/A Hillsdale Club | 12 ABC 06153 | 11/06/12 | |
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| ABC Commission v. Fat Cats Grill and Oyster Bar Inc, T/A Fat Cats Grill and Oyster Bar | 12 ABC 08988 | 12/19/12 | |
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| ABC Commission v. Double Zero, LLC, T/A Bad Dog | 12 ABC 11398 | 04/08/13 | |
| ABC Commission v. Soledad Lopez de Avilez T/A Tienda Avilez | 13 ABC 00002 | 06/06/13 | |
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| George H. Jaggers, III v. Crime Victims Compensation Commission | 12 CPS 01693 | 11/01/12 | |
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| Harold Eugene Merritt v. State Highway Patrol | 12 CPS 07852 | 05/24/13 | |
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| Angela Clendenin King v. Office of Administrative Hearings NC Crime Victims Comp Commission | 13 CPS 11239 | 08/02/13 | |
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| Bright Haven Residential and Community Care d/b/a New Directions Group Home v. Division of Medical Assistance, DHHS | 10 DHR 00232 | 04/27/12 | |
| Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home, v. DHHS/Division of Health Service Regulation, Adult Care Licensure Section | 10 DHR 01666 | 05/18/12 | |
| Warren W Gold, Gold Care Inc. d/b/a Hill Forest Rest Home v. DHHS, Division of Health Service Regulation, Adult Care Licensure and Certification Section | 10 DHR 05801 | 05/18/12 | |
| Gold Care Inc. Licensee Hill Forest Rest Home Warren W. Gold v. DHHS, Adult Care Licensure Section | 10 DHR 05861 | 05/18/12 | |
| Robert T. Wilson v. DHHS, DHSR | 10 DHR 07700 | 01/29/13 | |
| Daniel J. Harrison v. DHHS Division of Health Service Regulation | 10 DHR 07883 | 04/12/13 | 28:02 NCR 73 |
| Mary Ann Barnes v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry | 11 DHR 6488 | 07/16/12 | |
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| Michael Timothy Smith, Jr. v. DHHS, Division of Health Service Regulation | 11 DHR 14184 | 08/01/12 | |
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| Trinity Child Care II & I v. DHHS, Division of Public Health, Child and Adult Care Food Program | 12 DHR 00861 | 04/20/12 | 27:04 NCR 518 |
| Dr. Karen J. Williams, LPC v. DHHS, Division of Medical Assistance | 12 DHR 00926 | 09/18/12 | |
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| Olar Underwood v. Division of Child Development and Early Education | 12 DHR 00990 | 10/22/12 | |
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| Larry Ratliff, Jr., Alena Ratliff, Larry Ratliff, Sr. v. DHHS, Division of Health Service Regulation, Health Care Personnel Registry | 13 DHR 09145 | 07/15/13 | |
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| Monalisa Victoria Freeman v. DHHS, Division of Health Service Regulation | 13 DHR 12328 | 07/31/13 | |
| Johnathan Bradley v. DHHS, Division of Health Service Regulation | 13 DHR 12685 | 08/02/13 | |
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| Athena Lynn Prevatte v. Sheriffs' Education and Training Standards Commission | 11 DOJ 13148 | 05/25/12 | 27:04 NCR 529 |
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| John Jay O'Neal v. Criminal Justice Education and Training Standards Commission | 11 DOJ 13158 | 07/06/12 | 27:07 NCR 749 |
| Charlesene Cotton v. Criminal Justice Education and Training Standards Commission | 11 DOJ 13159 | 06/05/12 | 27:04 NCR 538 |
| William James Becker v. Criminal Justice Education and Training Standards Commission | 11 DOJ 13160 | 08/16/12 | |

CONTESTED CASE DECISIONS

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| Steve Michael Galloway, Jr, Private Protective Services Board | 11 DOJ 14434 | 04/23/12 | |
| Justin Thomas Medlin v. Alarm Systems Licensing Board | 11 DOJ 14493 | 04/23/12 | |
| Argentina Rojas v. Department of Justice, Campus Police Officer Commission | 12 DOJ 00394 | 11/02/12 | |
| Bruce Clyde Shoe v. Private Protective Services Board | 12 DOJ 00556 | 09/26/12 | |
| Angela Louise Giles v. Private Protective Services Board | 12 DOJ 00557 | 04/18/12 | |
| Marshall Todd Martin v. Sheriffs' Education | 12 DOJ 00650 | 07/13/12 | |
| Frances Gentry Denton v. Sheriffs' Education and Training Standards Commission | 12 DOJ 00651 | 08/30/12 | |
| James Philip Davenport v. Criminal Justice Education and Training Standards Commission | 12 DOJ 00653 | 11/21/12 | |
| Alvin Louis Daniels v. Criminal Justice Education and Training Standards Commission | 12 DOJ 00654 | 08/17/12 | |
| Michael Wayne McFalling v. Private Protective Services Board | 12 DOJ 00814 | 05/21/12 | |
| Robert John Farmer v. Alarm Systems Licensing Board | 12 DOJ 00887 | 05/04/12 | |
| Ricky Lee Ruhlman v. Private Protective Services Board | 12 DOJ 01211 | 04/18/12 | |
| Leroy Wilson Jr., Private Protective Services Board | 12 DOJ 01293 | 04/18/12 | |
| Clyde Eric Lovette v. Alarm Systems Licensing Board | 12 DOJ 01498 | 05/02/12 | |
| Vincent Tyron Griffin v. Alarm Systems Licensing Board | 12 DOJ 01663 | 09/27/12 | |
| Andre Carl Banks Jr., v. Alarm Systems Licensing Board | 12 DOJ 01695 | 06/22/12 | |
| Ryan Patrick Brooks v. Private Protective Services Board | 12 DOJ 01696 | 06/05/12 | |
| Dustin Lee Chavis v. Private Protective Services Board | 12 DOJ 01697 | 06/01/12 | |
| Jeffrey Adam Hopson v. Sheriffs' Education and Training Standards Commission | 12 DOJ 01761 | 06/07/12 | |
| John Henry Ceaser v. Sheriffs' Education and Training Standards Commission | 12 DOJ 01762 | 06/18/12 | |
| Jerome Douglas Mayfield v. Private Protective Services Board | 12 DOJ 02381 | 06/15/12 | |
| Elijah K. Vogel v. Private Protective Services Board | 12 DOJ 02619 | 06/05/12 | |
| Timmy Dean Adams v. Department of Justice, Company Police Program | 12 DOJ 02778 | 12/21/12 | |
| Carlito Soler v. Alarm Systems Licensing Board | 12 DOJ 03457 | 09/26/12 | |
| Rodney Lyndolph Bland v. Criminal Justice Education and Training Standards Commission | 12 DOJ 03839 | 01/11/13 | |
| Sherman Montrell Devon McQueen v. Criminal Justice Education and Training and Standards Commission | 12 DOJ 03842 | 12/21/12 | |
| Matthew Brian Hayes v. Criminal Justice Education and Training Standards Commission | 12 DOJ 03843 | 11/27/12 | 27:22 NCR 2139 |
| Antonio Cornelius Hardy v. Criminal Justice Education and Training Standards Commission | 12 DOJ 03844 | 11/19/12 | 27:21 NCR 1994 |
| Jonathan Dryden Dunn v. Sheriffs' Education and Training Standards | 12 DOJ 03845 | 03/28/13 | |
| Barry Louis Christopher, Jr v. Private Protective Services Board | 12 DOJ 05041 | 08/27/12 | 27:15 NCR 1570 |
| Betina Hedwig Vredenburg v. Sheriffs' Education and Training Standards Commission | 12 DOJ 05140 | 11/09/12 | 27:21 NCR 2002 |
| Raymond Louis Soulet v. Sheriffs' Education and Training Standards Commission | 12 DOJ 05142 | 08/27/12 | |
| Dustin Wilson Grant v. Sheriffs' Education and Training Standards Commission | 12 DOJ 05145 | 10/25/12 | |
| Glenn Alvin Brand v. Sheriffs' Education and Training Standards Commission | 12 DOJ 05146 | 10/08/12 | |
| Shannon Wallace v. DHHS | 12 DOJ 05355 | 02/26/13 | |
| Lawrence W. Sitgraves v. Private Protective Services | 12 DOJ 06059 | 09/13/12 | |
| Collin Michael Berry v. Private Protective Services Board | 12 DOJ 06590 | 10/22/12 | |
| Tiffany Ann Misel v. Private Protective Services Board | 12 DOJ 06817 | 10/17/12 | |
| John Machouis v. Alarm Systems Licensing Board | 12 DOJ 07161 | 12/19/12 | |
| Christopher A. Field v. Private Protective Services Board | 12 DOJ 07548 | 12/19/12 | |
| Porschea Renee Williams v. Private Protective Services Board | 12 DOJ 07549 | 01/09/13 | |
| Ralph R. Hines v. Criminal Justice Education and Training Standards | 12 DOJ 07812 | 11/07/12 | |
| William Franklin Dietz v. Criminal Justice Education and Training Standards | 12 DOJ 08010 | 02/19/13 | |
| Elizabeth Crooks Goode v. Criminal Justice Education and Training Standards Commission | 12 DOJ 08014 | 12/14/12 | |
| Sabrina Richelle Wright v. Sheriffs' Education and Training Standards Commission | 12 DOJ 08048 | 01/16/13 | |
| Phillip Eugene Dendy v. Sheriffs' Education and Training Standards Commission | 12 DOJ 08049 | 01/18/13 | |
| Reginald E. James v. Private Protective Services Board | 12 DOJ 08195 | 12/20/12 | |
| Omega Young v. Private Protective Services Board | 12 DOJ 08261 | 12/17/12 | |
| Joseph T. Ferrara v. Private Protective Services Board | 12 DOJ 08309 | 01/11/13 | |
| Jovan Lamont Sears v. Private Protective Services Board | 12 DOJ 08447 | 12/20/12 | |
| Marilyn Cash Smalls v. Sheriffs' Education and Training Standards Commission | 12 DOJ 10188 | 04/29/13 | |
| Timothy Allen Bruton v. Criminal Justice Education and Training Standards Commission | 12 DOJ 10199 | 05/29/13 | |
| Brad Tisdale v. Criminal Justice Education Training Standards Commission | 12 DOJ 10203 | 05/06/13 | |
| Clinton Weatherbee Jr v. Criminal Justice Education and Training Standards Commission | 12 DOJ 10206 | 03/25/13 | |
| JonPaul D. Wallace v. Private Protective Services Board | 13 DOJ 02422 | 04/26/13 | |
| Jerome Douglas Mayfield v. Private Protective Services Board | 13 DOJ 04393 | 04/26/13 | |
| Cameron Imhotep Clinkscale v. Private Protective Services Board | 13 DOJ 05095 | 04/26/13 | |
| Eddie Hugh Hardison v. Private Protective Services Board | 13 DOJ 08765 | 04/02/13 | |
| LaMarcus Jarrel Outing v. Criminal Justice Education and Training Standards Commission | 13 DOJ 11932 | 08/07/13 | |

DEPARTMENT OF STATE TREASURER

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| Dwaine C. Coley v. Department of State Treasurer | 10 DST 00233 | 04/05/13 | 28:02 NCR 81 |
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| Ella Joyner v. Department of State Treasurer Retirement System Division | 11 DST 02437 | 07/12/12 | 27:07 NCR 758 |
| William R. Tate v. Department of Treasurer, Retirement System Division | 11 DST 04675 | 09/07/12 | 27:15 NCR 1574 |
| Brenda C. Hemphill v. Department of Treasurer, Retirement System Division | 11 DST 10252 | 09/26/12 | |
| Russell E. Greene v. Department of State Treasurer Retirement Systems Division | 11 DST 10875 | 06/14/12 | 27:04 NCR 543 |
| James A Layton v. Department of State Treasurer | 11 DST 12958 | 11/30/12 | |
| Marsha W Lilly, Robert L Hinton v. Retirement System | 12 DST 01108 | 05/22/12 | |

STATE BOARD OF EDUCATION

| | | | |
|---|--------------|----------|----------------|
| Louis A. Hrebar v. State Board of Education | 11 EDC 01445 | 07/27/12 | |
| Delene Huggins v. Department of Public Instruction | 11 EDC 08899 | 06/28/12 | |
| Myra F. Moore v. NC Board of Education | 11 EDC 11927 | 05/01/12 | |
| Dwayne White v. Department of Public Instruction, NC State Board of Education | 11 EDC 11864 | 07/18/12 | 27:07 NCR 769 |
| Jeffery Sloan v. NCDPI | 11 EDC 14077 | 11/09/12 | 27:21 NCR 1974 |

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| Lia C Long v. DPI | 12 EDC 00805 | 10/18/13 | 27:16 NCR 1716 |
| North Carolina Learns Inc. d/b/a North Carolina Virtual Academy | 12 EDC 01801 | 05/18/12 | |
| Katherine Kwesell Harris v. Public Schools, Board of Education | 12 EDC 06520 | 09/05/12 | |
| Bonnie Aleman v. State Board of Education, Department of Public Instruction | 12 EDC 07293 | 06/14/13 | |
| Emma Seward v. Department of Public Instruction | 12 EDC 07438 | 07/17/13 | |
| Jodi Esper v. Department of Public Instruction | 12 EDC 10259 | 06/04/13 | |
| Wanda McLaughlin v. State Board of Education | 12 EDC 12410 | 03/27/13 | |

DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

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| Pamlico-Tar River Foundation, NC Coastal Federation, Environmental Defense Fund, and Sierra Club v. DENR, Division of Water Quality and PCS Phosphate Company, Inc | 09 EHR 1839 | 04/26/12 | 27:01 NCR 87 |
| ALCHEM Inc., v. NCDENR | 10 EHR 00296 | 02/05/13 | |
| Don Hillebrand v. County of Watauga County Health Dept | 10 EHR 00933 | 05/10/12 | |
| ALCHEM Inc., v. NCDENR | 10 EHR 05463 | 02/05/13 | |
| House of Raeford Farms, Inc., v. DENR | 10 EHR 05508 | 05/31/12 | 27:01 NCR 99 |
| Lacy H Caple DDS v. Division of Radiation Protection Bennifer Pate | 11 EHR 11454 | 05/09/12 | |
| Friends of the Green Swamp and Blue Ridge Environmental Defense League, Inc v. DENR Division of Waste Management and Waste Management of the Carolinas, Inc., d/b/a Waste Management of Wilmington | 11 EHR 12185 | 08/08/12 | 27:12 NCR 1224 |
| Holmes Development & Realty, LLC, and H.L. Homes v. DENR – Land Quality Section (Re: LQS 11-018) | 11 EHR 13208 | 06/29/12 | 27:07 NCR 774 |
| Ik Kim IT and K Enterprise v. DENR | 11 EHR 13910 | 11/06/12 | |
| Edward Dale Parker v. DENR | 11 EHR 14390 | 02/22/13 | |
| Janezic Building Group LLC v. Orange County | 12 EHR 01104 | 12/03/12 | 27:21 NCR 2008 |
| Save Mart of Duplin LLC v. DENR | 12 EHR 02328 | 07/25/12 | |
| James D. Halsey v. DENR, Division of Environmental Health | 13 HER 10216 | 06/05/13 | |

DIVISION OF EMPLOYMENT SECURITY

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| Dwight Marvin Wright v. Department of Commerce, Division of Employment Security | 12 ESC 05042 | 07/27/12 | |
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DEPARTMENT OF INSURANCE

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|--|--------------|----------|--|
| Susan E. Montgomery Lee v. State Health Plan; Blue Cross Blue Shield | 12 INS 10145 | 03/25/13 | |
| Jean Kirkland and John Ritchie v. State Health Plan | 12 INS 11957 | 04/11/13 | |

MISCELLANEOUS

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|--|--------------|----------|----------------|
| Richard Lee Taylor v. City of Charlotte | 11 MIS 14140 | 05/15/12 | |
| Lloyd M Anthony v. New Hanover County Sheriff Office | 12 MIS 01803 | 06/07/12 | |
| Jackie Poole, Jamyan Brooks v. Orange County | 12 MIS 02379 | 11/09/12 | 27:21 NCR 2016 |

OFFICE OF STATE PERSONNEL

| | | | |
|--|--------------|----------|---------------|
| Amanda Thaxton v. State Ethics Commission | 09 OSP 03754 | 09/20/12 | |
| Dorothy H. Williams v. DHHS, Central Regional Hospital | 10 OSP 5424 | 03/28/12 | 27:01 NCR 119 |

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| Stephen R. West v. The University of North Carolina at Chapel Hill | 10 OSP 01567 | 11/26/12 | 27:21 NCR 1959 |
| Larry F. Murphy v. Employment Security Commission of North Carolina | 10 OSP 03213 | 06/04/12 | |
| Walter Bruce Williams v. Dept. of Crime Control and Public Safety Butner Public Safety Division | 10 OSP 03551 | 04/23/12 | 27:01 NCR 148 |
| Teresa J. Barrett v. DENR | 10 OSP 04754 | 10/22/12 | 27:16 NCR 1726 |
| Daniel Chase Parrott v. Crime Control and Public Safety, Butner Public Safety Division | 10 OSP 04792 | 05/30/12 | |
| Steven M Mukumgu v. DAG | 10 OSP 05199 | 08/07/12 | |
| Beatrice T. Jackson v. Durham County Health Department | 11 OSP 3835 | 06/08/12 | |
| Brenda D. Triplett v. DOC | 11 OSP 4605 | 03/20/12 | 27:06 NCR 669 |
| Tommie J. Porter v. DOC | 11 OSP 5352 | 06/05/12 | 27:06 NCR 678 |
| Fortae McWilliams v. DOC | 11 OSP 06236 | 05/30/12 | 27:06 NCR 684 |
| Kimberly F. Loflin v. DOT, DMV | 11 OSP 06762 | 07/10/12 | |
| John Hardin Swain v. DOC, Hyde Correctional Inst. | 11 OSP 07956 | 04/23/12 | 27:06 NCR 693 |
| John Fargher v. DOT | 11 OSP 08111 | 04/18/12 | |
| Maria Isabel Prudencio-Arias v. UNC at Chapel Hill | 11 OSP 09374 | 03/28/13 | 28:02 NCR 99 |
| Gerald Price v. Department of Agriculture & Consumer Services, Standards Division | 11 OSP 09588 | 02/27/13 | 28:02 NCR 139 |
| Tammy Cagle v. Swain County, Department of Social Services | 11 OSP 10307 | 09/26/12 | 27:16 NCR 1747 |
| Doris Wearing v. Polk Correctional Inst. Mr. Solomon Superintendent | 11 OSP 11023 | 10/19/12 | |
| Fredericka Florentina Demmings v. County of Durham | 11 OSP 11498 | 06/12/12 | |
| Derrick A Proctor v. Crime Control and Public Safety, State Capital Police Division | 11 OSP 11499 | 12/06/12 | |
| David B. Stone v. Department of Cultural Resources | 11 OSP 11926 | 08/10/12 | 27:12 NCR 1245 |
| Pattie Hollingsworth v. Fayetteville State University | 11 OSP 12152 | 02/27/13 | |
| William C. Spender v. Dept. of Agriculture & Consumer Services, Veterinary Division | 11 OSP 12479 | 04/27/12 | |
| Terrence McDonald v. NCSU | 11 OSP 12682 | 05/21/12 | |
| Terrence McDonald v. DHHS, Emery Milliken | 11 OSP 12683 | 05/18/12 | |
| Phyllis Campbell v. DOC | 11 OSP 13381 | 08/27/12 | 27:15 NCR 1579 |
| Raeford Quick v. DOC | 11 OSP 14436 | 05/22/12 | |
| Tawana McLaurin v. DOC | 12 OSP 00116 | 08/21/12 | |
| Marva G. Scott v. Edgecombe County Social Services Board (Larry Woodley, Fate Taylor, Ernest Taylor, Viola Harris and Evelyn Johnson), Edgecombe County Commissioners and Edgecombe county manager, Lorenzo Carmon | 12 OSP 00430 | 12/20/12 | 27:22 NCR 2152 |
| Thomas B. Warren v. DAG, Forest Services Division | 12 OSP 00615 | 11/27/12 | |
| Bon-Jerald Jacobs v. Pitt County Department of Social Services | 12 OSP 00634 | 06/12/12 | |
| Sherry Baker v. Department of Public Safety | 12 OSP 00841 | 10/09/12 | |
| Diane Farrington v. Chapel Hill-Carrboro City Schools | 12 OSP 01300 | 07/12/12 | |
| Cynthia Moats v. Harnett County Health Dept | 12 OSP 01536 | 08/10/12 | |
| Natalie Wallace-Gomes v. Winston-Salem State University | 12 OSP 01627 | 05/15/12 | |
| Clark D. Whitlow v. UNC-Chapel Hill | 12 OSP 01740 | 06/12/12 | |
| Jeffrey L Wardick, v. Employment Securities Commission of NC | 12 OSP 02027 | 07/17/12 | |
| Ricco Donnell Boyd v. NC A&T University | 12 OSP 02219 | 01/31/13 | |
| Larry C. Goldston v. UNC-Chapel Hill | 12 OSP 02222 | 09/26/12 | 27:16 NCR 1754 |
| Larry Batton v. Dept of Public Safety | 12 OSP 02320 | 02/18/13 | |
| Sandra Kay Tillman v. County of Moore Department of Social Services, John L. Benton, Director | 12 OSP 02433 | 07/29/13 | |
| Sheila Bradley v. Community College System Sandhills Community College | 12 OSP 02473 | 06/06/12 | |
| Brenda S. Sessoms v. Department of Public Safety | 12 OSP 02507 | 07/25/12 | |
| Donnette J Amaro v. Onslow County Department of Social Services | 12 OSP 02578 | 11/21/12 | |
| Ronald Gilliard v. N.C. Alcoholic Law Enforcement | 12 OSP 02618 | 09/26/12 | |
| Kimberly Hinton v. DOT | 12 OSP 02848 | 10/05/12 | |
| James B. Bushardt III v. DENR, Division of Water Quality | 12 OSP 02872 | 02/19/13 | |
| Natalie Wallace-Gomes v. Winston Salem State University | 12 OSP 02950 | 08/01/12 | |
| Norlishia Y. Pridgeon v. Department of Public Safety, Division of Adult Correction and Department of Corrections | 12 OSP 03150 | 08/02/13 | |
| Jaymar v. Department of Corrections, Central Prison | 12 OSP 03381 | 07/20/12 | |
| Ronald Wayne Crabtree Jr., v. Butner Public Safety | 12 OSP 03846 | 10/09/12 | |
| Natalie Wallace-Gomes v. Winston Salem State University | 12 OSP 03910 | 10/22/12 | |
| Natalie Wallace-Gomes v. Winston Salem State University | 12 OSP 04107 | 10/22/12 | |
| Michelle Houser v. Department of Public Safety, Division of Prisons | 12 OSP 04826 | 09/26/12 | |
| Audrey Melissa Tate v. Department of Public Safety, Division of Juvenile Justice | 12 OSP 05182 | 08/03/12 | |
| Jonathan Ashley Stephenson v. UNC-Chapel Hill | 12 OSP 05223 | 01/15/13 | |
| Charles E. Rouse v. DMV, Dist Sup Stacey Wooten | 12 OSP 05315 | 09/05/12 | |
| Edwards Robert Esslinger v. DPI | 12 OSP 05459 | 09/12/12 | |
| Barry L. Pruett v. DMV, Driver and Vehicle Services | 12 OSP 05785 | 09/11/12 | |

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| Joseph Sandy v. UNC Chapel Hill | 12 OSP 06152 | 09/05/12 | |
| Natalie Wallace-Gomes v. Winston Salem State University | 12 OSP 06309 | 10/22/12 | |
| Paul Jeffrey Treadway v. Department of Public Safety, Division of Adult Supervision | 12 OSP 06634 | 12/18/12 | |
| Phillip W Smith v. Department of Commerce, Division of Employment Security | 12 OSP 06821 | 09/20/12 | |
| Asia T. Bush v. DOT | 12 OSP 06980 | 04/23/13 | 28:03 NCR 293 |
| Bonnie S. Rardin v. Craven Correctional Institution, Department of Public Safety | 12 OSP 07443 | 04/19/13 | |
| Shirley M. Parker v. Department of Public Safety Caledonia Correctional Institution | 12 OSP 07617 | 04/04/13 | |
| Christopher Rashad Pippins v. PCS BOE PCS Facility Services | 12 OSP 07744 | 10/18/12 | |
| Wanda Edwards v. UNC School of Dentistry | 12 OSP 07851 | 01/09/13 | |
| Gary C. Clement v. DHHS | 12 OSP 08105 | 11/14/12 | |
| Oswald Woode v. DHHS, Central Regional Hospital | 12 OSP 08664 | 01/09/13 | |
| Gary C. Clement v. DHHS | 12 OSP 09581 | 01/04/13 | |
| Judy Knox v. UNC at Charlotte | 12 OSP 10856 | 07/11/13 | |

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| Jeffrey Wayne Ellis v. North Carolina A & T University | 13 OSP 09564 | 08/08/13 | |
| Alphonsus U. Nwadike v. DHHS, Central Regional Hospital (Butner) | 13 OSP 10977 | 07/15/13 | |
| Kevin D. Terry v. State of NC Office of State Controller | 13 OSP 11088 | 07/15/13 | |
| Lionel James Randolph v. NC Office of State Personnel | 13 OSP 11170 | 07/15/13 | |
| Cynthia C. Goodwin v. Department of Revenue | 13 OSP 11232 | 08/02/13 | |
| Natalie Wallace-Gomes v. Winston-Salem State University | 13 OSP 11293 | 08/13/13 | |
| Stephanie K. Willis v. Montgomery County Board of Education | 13 OSP 13012 | 08/07/13 | |

DEPARTMENT OF REVENUE

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|---|--------------|----------|--|
| Jerry Lamont Lindsey v. Department of Revenue | 11 REV 1914 | 07/25/12 | |
| Thomas E Gust v. Department of Revenue | 11 REV 13557 | 08/15/12 | |
| James Cooper III Sui Juris v. Department of Revenue | 11 REV 13792 | 11/14/12 | |

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| Brian Daniel Reeves v. Department of Revenue | 12 REV 01539 | 06/04/12 | |
| David Roser v. Department of Revenue | 12 REV 01694 | 09/10/12 | |
| Ronnie Lee Nixon v. Department of Revenue | 12 REV 01881 | 10/03/12 | |
| William S. Hall v. Department of Revenue | 12 REV 04115 | 08/27/12 | |
| Noah D. Sheffield v. Department of Revenue | 12 REV 07074 | 11/14/12 | |
| Jenny M. Sheffield v. Department of Revenue | 12 REV 07075 | 11/14/12 | |
| Jesus A. Cabrera v. Department of Revenue | 12 REV 08968 | 01/03/13 | |
| Sybil Hyman Bunn v. Department of Revenue | 12 REV 08973 | 05/06/13 | |

OFFICE OF SECRETARY OF STATE

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| Michael Anthony Farrow-Bey v. Department of Secretary of State | 12 SOS 07865 | 12/14/12 | |
| Jennifer Lynn Pierce-Founder Share Our Shoes v. Secretary of State's Office | 12 SOS 01653 | 07/11/12 | |
| Bethany Thompson v. Department of the Secretary of State | 12 SOS 11648 | 05/02/13 | |

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| Holley Shumate Knapp v. Ann Wall, General Counsel Department of the Secretary | 13 SOS 09039 | 05/23/13 | |
| Trvuun B. Alston v. Department of the Secretary of State | 13 SOS 10113 | 07/08/13 | |

UNC HOSPITALS

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|---|--------------|----------|--|
| Onyedika C Nwaebube v. UNC Hospitals | 12 UNC 01110 | 06/25/12 | |
| Nephatiya Wade v. UNC Hospitals Chapel Hill NC | 12 UNC 01209 | 07/17/12 | |
| Fredia R Wall v. UNC Physicians & Associates | 12 UNC 02256 | 10/04/12 | |
| Carolyn A. Green v. UNC Hospitals | 12 UNC 02259 | 09/19/12 | |
| Annie E. Jarrett v. UNC Hospitals | 12 UNC 03716 | 10/09/12 | |
| Vikki J Goings v. UNC Hospital | 12 UNC 04109 | 09/18/12 | |
| Elonnie Alston v. UNC Hospitals | 12 UNC 04551 | 09/11/12 | |
| Diara Z Andrews v. UNC Hospitals | 12 UNC 04827 | 08/15/12 | |
| David Ryan Pierce v. UNC Hospitals, Patient Account Services, SODCA | 12 UNC 05306 | 03/20/13 | |
| Shonte Hayes v. UNC P&A | 12 UNC 05746 | 09/10/12 | |
| Tracy A. Spaine (Currier) v. UNC Hospitals | 12 UNC 06822 | 11/06/12 | |

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| Jason Paylor v. UNC Hospitals Patient Accounts | 13 UNC 12636 | 07/26/13 | |
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WILDLIFE RESOURCES COMMISSION

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| People for the Ethical Treatment of Animals, Inc., v. NC Wildlife Resources Commission | 12 WRC 07077 | 11/13/12 | 27:22 NCR 2165 |
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STATE OF NORTH CAROLINA

COUNTY OF ROBESON

Filed

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR07215/07216/07217

FUTURE INNOVATIONS, LLC AND
DAVID F. CURTIS,
Petitioners,
v.
NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES AND
THE DIVISION OF HEALTH SERVICE
REGULATION, MENTAL HEALTH
LICENSURE SECTION
Respondents.

FINAL DECISION

THIS MATTER came on for hearing before the undersigned, Beecher R. Gray, Administrative Law Judge, on March 25 and 26, 2013 in Raleigh, North Carolina. Petitioner, having obtained and incorporated certain comments from Respondent, filed a Proposed Decision on April 8, 2013.

APPEARANCES

For Petitioner: Robert A. Leandro
Parker Poe Adams & Bernstein
150 Fayetteville Street
Suite 1400
Raleigh, North Carolina 27601

For Respondent Joseph Elder
Assistant Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

APPLICABLE LAW

The statutory law applicable to this contested case is N.C. Gen. Stat. Chapter 150B, Article 3, the North Carolina Administrative Procedure Act and N.C. Gen. Stat. Chapter 122C, Articles 1, 2, and 3, the North Carolina Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985. The administrative regulations applicable to this contested case are 10A NCAC 27 D and 10A NCAC 27G.

BURDEN OF PROOF

As Petitioner, Future Innovations, Inc. has the burden of proof by the preponderance of the evidence. *See* N.C. Gen. Stat. § 150B-34(a); *see also Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2006).

ISSUES

Whether Respondent acted in violation of N.C. Gen. Stat. § 150B-23 when it issued a Type A1 Penalty of \$6,000.00 to Future Innovations, suspended new admissions to the facility, and issued a Notice of Intent to Revoke Future Innovation's License.

EXHIBITS

P. Ex.s ("P. Exs.") A through N and P through Z were admitted into evidence. These exhibits are:

- A. Type A1 Administrative Penalty Letter – July 31, 2012
- B. Suspension of Admissions Letter – July 31, 2012
- C. Complaint and Follow-up Survey – July 31, 2012
- D. Intent to Revoke License Letter – July 31, 2012
- E. Resident K.K. Person Centered Profile
- F. Clinical Impression and Court Summary for Recipient K.K.
- G. Roberson County Sheriff's Incidents Investigation Reports – August 2, 2012
- H. Roberson County Department of Social Services Letter - August 9, 2012
- I. Incident Statements
- J. Department Client Identification Form
- K. Resident D.B. August 2, 2012 Follow-up Incident Statement
- L. Resident M.B. August 2, 2012 Follow-up Incident Statement
- M. Resident J.E. August 2, 2012 Follow-up Incident Statement
- N. Academic School Records and Activity Records through July 2012
- P. Future Innovations July 10, 2012 Plumbing Receipt
- Q. Water Temperature Logs – July 2012
- R. Future Innovations Group Therapy Notes
- S. K.K. Aggressive Behavior Report
- T. D.B. Therapy Notes
- U. Medication Record
- V. July 12, 2009 Investigation Interview Report – Irish Smith
- W. Plan of Correction/Protection and Supporting Documents submitted to Agency by Future Innovations.
- X. North Carolina Provider Penalty Tracking Form for Future Innovations
- Y. Resident C.N. Therapy Notes
- Z. N.C. Gen. Stat. § 131, Article 6.

Respondents' Exhibits ("R. Exs") 5 through 14 were admitted into evidence. These exhibits are:

5. License for Future Innovations
6. Person Centered Profile for Client 3
7. Person Centered Profile for Client 5
8. Person Centered Profile for Client 7
9. Person Centered Profile for Client 8
10. Medication Review Sheet for Client 3
11. Medication Review Sheet for Client 5
12. Medication Review Sheet for Client 8
13. Incident Report dated 7/11/12
14. Statements from facility investigation of 7/9/12 incident

WITNESSES

At the hearing the following witness testimony was received:

For Petitioner:

1. David Curtis – Owner and Operator
2. Lee Cooper – Facility Manager
3. Marcus Gales – Assistant Facility Manager
4. Octavia George – Facility Qualified Professional
5. Quamil Frazier - Resident
6. Keyshawn Marrow - Resident

For Respondent:

1. Emily Stanley - Surveyor
2. Wendy Boone – Team Leader
3. Michiele Eliot – Branch Manager
4. Stephanie Alexander - Section Chief

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to, the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other creditable evidence in the case.

The Parties

1. Petitioner Future Innovations, Inc., ("Future Innovations" or "Petitioner") provides Level IV Intensive Residential Mental Health Services to children and adolescent males at its facility (the "Facility") located in Fairmont, Robeson County, North Carolina. Future Innovations is licensed under the authority of N.C. Gen. Stat. § 122C and has been in operations for over five years.
2. Respondent, the North Carolina Department of Health and Human Services, Division of Health Service Regulations, Mental Health Licensure Section (the "Licensure Section" or "Respondent") is an administrative agency operating under the laws of North Carolina and oversees the licensing of residential mental health facilities under the Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985, N.C. Gen. Stat. § 122C.
3. The parties received notice of hearing by certified mail more than 15 days prior to the hearing, and each stipulated on the record that notice was proper.

Contested Action

4. On July 10 and 11, 2012, a Licensure Section survey team consisting of Emily Stanley and Keith Hughes conducted an unannounced complaint and follow-up survey of the Future Innovations facility.
5. On July 31, 2012, the Licensure Section provided Future Innovations with its survey findings. (P. Ex. C)
6. The Licensure Section Survey contained several allegations that Future Innovations had violated statutory and regulatory requirements for residential mental health facilities. (See generally P. Ex. C)
7. As a result of the survey findings, on July 31, 2012, the Licensure Section provided notice to Future Innovations that it was: (1) issuing the Facility a Type A1 monetary penalty of \$6,000.00; (2) suspending new admissions to the Facility; and (3) provided notice that it intended to revoke Future Innovations License. (P. Exs. A, B, and D)

Assessment and Treatment Plan Allegations

8. The survey findings allege that Future Innovations failed to comply with 10A NCAC 27G .0205 by failing to provide substance abuse therapy for two of the six individuals reviewed. (P. Ex. C, pp. 1-4)
9. 10A NCAC 27G .0205 states that a provider must assess and create a treatment plan for its clients.

10. The Licensure Section witness testified that the basis for finding Future Innovations out of compliance with 10A NCAC 27G .0205 was that substance abuse treatment was not provided to two residents.
11. For one of the residents, substance abuse specific treatment was provided through at least February 12, 2012. Individual therapy continued for this resident for the entirety of the resident's stay at the facility.
12. For the other resident, individual therapy was provided for the entirety of the resident's stay at the facility.
13. The topics of discussion and coping skills developed during individual therapy sessions assist residents with dealing with the underlying issues and problems that give rise to substance abuse problems.
14. The Licensure Section failed to review any of the individual therapy notes for these two residents cited in this alleged survey findings and failed to consider whether the individual therapy treatment provided to the residents met the residents' needs.
15. Providing individual therapy can meet the needs of individuals, and 10A NCAC 27G .0205 does not require Future Innovations to provide substance abuse specific therapy.
16. Future Innovations created a treatment plan in accordance with 10A NCAC 27G .0205 for each of these residents and provided individual therapy to the residents to address the needs in the plan.

Client Services Allegations

17. The survey findings allege that Future Innovations failed to comply with 10A NCAC 27G .0208 by failing to assure that activities provided to the residents were suitable for the residents' interests and treatment needs. (*Id.* at p. 5)
18. The Licensure Section's alleged findings were based on its observation that the residents were watching television for several hours during the two days the survey team was at the facility. The allegation also was based on interviews with a limited number of residents who stated that residents watched a lot of television and the facility was boring and that school had not been provided for at least a month. (*Id.* at pp. 5-7)
19. During the survey, Future Innovations' staff was required to spend time assisting with the survey and participating in interviews with the survey team. Additionally, many of the residents were also asked to participate in interviews with the survey team.
20. In addition to the survey process, Future Innovations' staff was also investigating an abuse complaint that was made against a staff member.

21. The survey team requested dedicated space to conduct its survey and was placed in the resident activity room where most of the resident activities occur during the day.
22. The facility decided to cancel resident activities during the survey and have the residents remain in the television room because the survey team was working in the activity room, and the staff was required to assist the survey team and conduct its own independent investigation of the July 10, 2012, abuse complaint.
23. The documentary evidence and testimony of Future Innovations' staff demonstrates that Future Innovations provides school and educational activities, group therapy activities, individual therapy, group discussions, and outside recreational activities at the facility. (P. Exs. N, Q, and W)
24. Future Innovations had conducted school and educational activities during the first week of July which resulted in the residents receiving grades for the activities completed. (P. Ex. N)
25. Quamil Frazier and Keyshawn Marrow, both residents at the facility, testified that they participated in school and educational activities, group therapy activities, individual therapy, group discussions, and outside recreational activities at the facility.
26. The Licensure Section never has cited Future Innovations for failing to provide appropriate client services in the past. The Licensure Section conducted an on-site survey of the facility as recently as March 2012 and found no issues relating to the appropriateness of the activities and client services provided by Future Innovations.

Medication Administration Allegations

27. The survey findings allege that Future Innovations failed to comply with 10A NCAC 27G .0209 by failing to administer medication according to the written order of a physician, failing to keep its Medication Administration Record ("MAR") current, and failing to ensure that staff demonstrated competency in medication administration. (P. Ex. C, pp. 7-13)
28. For one resident, the survey alleged that the facility failed to provide one prescribed medication for several days. (*Id.*, pp. 8-9)
29. In that instance, the physician who prescribed the medication for the resident had not determined prior to the order whether the medication was authorized for payment by Medicaid.
30. The facility was not able to obtain release of the medication from the pharmacy until the authorization for payment was approved. (*see also* P. Ex. C, p. 9)
31. The MAR record for this recipient documents that the facility was awaiting authorization for the medication during the time the medication was not provided. (P. Ex. U)

32. There were no adverse effects on the patient for not receiving the medication.
33. The survey findings also allege that the facility failed to provide two medications to a new resident of the facility for the first six days of his treatment at the facility. (P. Ex. C, pp. 12-13)
34. These medications were not related to the patient's mental health diagnosis.
35. The resident in question had been admitted on an emergency basis. As a result, the resident did not have his prescription or his medication with him upon admission to the facility.
36. It took the facility several days to learn of the existence of the prescription and have the prescription filled.
37. There was no adverse effect on the patient for not receiving the medication.
38. It is reasonable that a facility may not be aware of all of the medications that an adolescent resident previously may have been prescribed prior to admission to the facility, especially upon an emergency admission, and that the facility may not be aware of or able to provide such medications upon admission.
39. The survey findings also allege that staff failed to document providing certain medication on the MAR system to one resident. (P. Ex. C, p. 11)
40. The survey includes a statement from the resident that he had not missed his medication and a statement from staff that its documentation error was an oversight. (*Id.*)

Reporting of Abuse Allegation

41. The survey alleges that Future Innovations failed to follow the requirements of N.C. Gen. Stat. § 131E-256 when it failed to notify the Department within 24 hours of an allegation of abuse made against one of its staff members. This finding was based on an allegation by a resident that a staff member at the facility choked and hit him and was allegedly supported by the statements of a limited number of the residents at the facility. (*Id.* at pp. 13-16)
42. N.C. Gen. Stat. § 131E-256 contains no provision which requires the reporting of an incident within a 24 hour time period.
43. The Licensure Section erred in finding that Future Innovations was in violation of N.C. Gen. Stat. § 131E-256.
44. The survey also alleged that Future Innovations violated 10A NCAC 27D .0101(b)(1) by failing to report an allegation of abuse to the Robeson County Department of Social Services. (*Id.* at pp. 16-21)

45. Licensure Section witnesses testified that a policy or regulation required reporting allegations of abuse within 24 hours, although these witnesses could not recall the specific policy or regulation and did not cite any policy or regulation in its survey findings.
46. Even to the extent that the Future Innovations had a duty to report the incident within 24 hours, Future Innovations met this burden.
47. The Future Innovation Witnesses all testified that they learned of the alleged incident of abuse on the morning of July 10, 2010, and immediately started an investigation of the abuse allegation. The Licensure Section's witness, Emily Stanley, testified that she was told by facility staff that the facility was investigating the incident.
48. After concluding its initial investigation, Future Innovations filed an Incident Report with the Department and Robeson County Department of Social Services on July 11, 2012. (R. Ex. 12) A copy of the Incident Report was provided to the Licensure Section survey team before they completed their survey.
49. Based on the Incident Report, Robeson County Department of Social Services conducted an independent investigation of the alleged incident and determined that the allegation could not be substantiated. (P. Ex. H)

Staff Abuse Allegation

50. The survey alleges that Future Innovations violated 10A NCAC 27D .0304 by failing to protect residents from harm, abuse, or neglect. This finding was based on: (1) the allegation of physical abuse of a resident by a staff member and (2) the Licensure Section's findings of alleged violations of 10A NCAC 27 D. 101, 10A NCAC 27G .0205, .0208, and .0209, and .0303. (*Id.* at pp. 21-32) The Agency testified that it determined that the violations of 10A NCAC 27 D. 101, 10A NCAC 27G .0205, .0208, and .0209, and .0303. constituted neglect.
51. The allegation of abuse of a resident by a staff member involved a resident's allegation (the "accusing resident") that a male staff member ("accused staff member") had choked and hit him in the face during a dispute over whether the resident could retrieve deodorant from his room.
52. The accusing resident made the allegation more than 24 hours after the alleged event to a contract therapist that is not employed by Future Innovations.
53. The alleged abuse took place sometime between 6 a.m. and 7 a.m. on Sunday, July 8, 2010.
54. Based on the accusing resident's written statement and interview, the accusing resident became verbally aggressive with the accused staff member after he was told he could not go to his room to retrieve his deodorant. The accusing resident stated that in response to his aggressive behavior, the accused staff member choked the accusing resident, told the

- accusing resident that he would kill him, asked the other residents to leave the room, and then hit the accusing resident repeatedly in the face. (P. Ex. C, p. 26)
55. The accusing resident's statement varies on the number of times he was hit in the face. In his initial report made to his therapist, he alleged that the staff member hit him three times in the face. (R. Ex. 13) In a later interview with the Licensure Section, the accusing resident stated he was hit five times in the face. (P. Ex. C, p. 26) The accusing resident also told at least one resident that he was hit in the face only twice. (*Id.* at p. 23)
 56. Written statements and interviews of several of the residents at the facility purportedly supported the allegation that a staff member had choked and hit the resident. (*Id.*)
 57. The written statements and interviews supporting the allegations of the accusing residents included several important variations. For example, one resident testified that the staff member held the resident down in a chair as he choked him. (P. Ex. C, p. 23) Another resident stated that the resident and the staff were "swinging all over the floor." (*Id.*, p. 25) One resident claimed he saw the staff member push the accusing resident into the corner and hit him." (*Id.*, p. 24)
 58. Other residents' written statements contradicted the allegations. For example, one resident wrote that he only saw the staff member restrain the accusing resident with no mention of choking or hitting. (P. Ex. I, Statement of Resident D.B.)
 59. The written statements and interviews of staff members who were present at the time of the alleged incident support that the resident became aggressive with the accused staff member. (P. Ex. I, Statement of Staff J.P. and I.S.) However the written statement and interviews with staff do not support the allegation that the accused staff member choked or hit the accusing resident. (*Id.*; see also P. Ex. C, pp. 28-30)
 60. A physical examination of the accusing resident by facility staff and by the Licensure Section Survey team revealed that the accusing resident had no swelling, bruising, or marks on his face or neck. A physical examination of the resident by the Robeson County Department of Social Services also revealed that the accusing resident had no marks or bruising. (P. Ex. H)
 61. Subsequent to the investigation, several of the residents voluntarily informed the facility that the accusing resident had asked them to lie for him and support his story that he was choked and hit by the accused staff member. The accusing resident told these individuals that he could get the facility closed down if they supported his story. (P. Exs. K-M)
 62. Quamil Frazier and Keyshawn Marrow, residents at the facility who were present during the incident, testified that the accusing resident had asked them to go along with his story so that they all could be discharged from the facility.
 63. Quamil Frazier testified that while he was not afraid of the accusing resident, he agreed to go along with the accusing resident's story because he wanted to go home.

64. Both Quamil Frazier and Keyshawn Marrow testified that they did not see a staff member choke or hit the accusing resident.
65. The Licensure Section was provided copies of the residents' written statements which raised serious doubts about the information the survey team had collected during its July 10 and 11 survey. No one at the Licensure Section performed any follow-up investigation or questioning of any of the residents after the Licensure Section received this information. (P. Ex. W)
66. Octavia George, Future Innovations' Qualified Professional, testified that she did not believe that the residents were being honest with her during her initial investigation.
67. The accusing resident's clinical record demonstrates that the accusing resident had a history of violence, lying, failing to take responsibility for his actions, and had once attempted to convince the residents of a youth detention facility that they could "join together and bust out of the facility." (P. Exs. E-F)
68. Approximately one week prior to the alleged incident, the accusing resident made an allegation against a staff member. The accusing resident alleged that the staff member had cursed at another staff member for waking up a resident for breakfast. Both staff members denied that the incident had occurred. (P. Ex. S)
69. On the evening of July 9, 2010, a staff member reported that the accusing resident stated to her that the accused staff member was going to be fired. When asked why he believed the accused staff member would be fired, the accusing resident stated that: "he wanted to kill the man for making him sit down and getting loud with him in front of his peers." The accusing resident made no allegation at that time that the accused staff member had physically abused him. (P. Ex. S)
70. On August 3, 2012, the accusing resident communicated to Qualified Professional Octavia George that he was planning on contacting the Robeson County Department of Social Services and doing everything in his power to shut the facility down. This threat made Octavia George uncomfortable, and a police report was filed with the Robeson County Sheriff's Department. (P. Ex. G)
71. The Robeson County Department of Social Services conducted its own independent investigation of the incident and determined that the allegation of abuse could not be substantiated. (P. Ex. H)
72. The Licensure Section was aware of the Department of Social Services' investigation but did not consult with the Social Services investigators in conducting its investigation and did not consider that the Department of Social Services had determined that the allegation could not be substantiated.
73. Based on the above Findings of Fact, the preponderance of the evidence does not support a finding that Future Innovations or its staff physically harmed or abused the accusing resident.

74. Based on the above Findings of Fact, the preponderance of the evidence does not support a finding that the Licensure Section's allegations relating to 10A NCAC 27 D .0101, 10A NCAC 27G .0205, .0208, .0209, and .0303 constitute neglect of any of the residents of the facility.
75. The Agency erred in finding that Future Innovations was in violation of 10A NCAC 27D .0304.

Clean and Safe Facility Allegations

76. The survey findings also allege that the facility violated 10A NCAC 27G .0303 by failing to maintain the facility in a clean, safe, attractive, and orderly manner. The Licensure Section based this allegation on issues related to two sinks in the facility not being in working and serviceable order on the first day of its survey, a fan blade being missing from a non-operational fan, a hole that was punched in a resident's room wall, peeling paint in one of the day rooms, a wall plate missing from the wall, and a light bulb missing from a resident's overhead light socket. (P. Ex. C, pp. 32-33)
77. The testimony of Lee Cooper and Marcus Gales demonstrates that the facility was aware of the issues relating to the two sinks and had contacted a plumber to service the sinks prior to the unannounced arrival of the survey team on July 10, 2012.
78. Chavis Plumbing arrived at the facility just prior to or shortly after the survey team arrived at the facility for its unannounced visit.
79. Chavis Plumbing completed work on two lavatories, including two sinks on July 10, 2012, at total cost of repair of \$250.00. (P. Ex. P)
80. In regard to the missing overhead light cover and bulb in one of the resident rooms, Future Innovations witnesses testified that it often removes these items from resident rooms if the resident attempts to break the lights because the broken glass could cause harm to the resident.
81. Given the height of the facility ceiling, the empty socket posed no risk to the residents.
82. In regard to the missing overhead fan blade, the fan blade has been missing since Future Innovations took possession of the building. The Licensure Section and the Construction Section never has cited the facility for this issue. The missing fan blade posed no risk to the residents.
83. In regard to the peeling paint in the facility sitting room, Future Innovations witnesses testified that it made every effort to re-paint these rooms when paint began to peel and that residents often peel paint from the walls.

84. As to the punched hole that was observed in the resident's room, many of the facility's residents suffer from behavioral and anger management issues, and it is not unusual for a frustrated and angry resident to punch a hole in a wall.
85. Marcus Gale, the Assistant Facility Manager, testified that he personally repairs the walls as soon as practical after such incidents occur. Marcus Gales described the technique he used to repair the walls and testified that he keeps his tools for making such repairs in his vehicle because of the frequency of these events.
86. The Licensure Section conducted an on-site survey of the facility in March 2012 and had not cited the facility for any of the issues cited in the July 2012 survey.
87. Given the short period of time between the March 2012 on-site survey and the July 2012 survey, it is not reasonable to conclude that the facility is not maintained in a clean and safe manner.

Hot Water Allegation

88. Finally, the survey alleged that Future Innovations violated 10A NCAC 27G .304 because the hot water temperature at the time of testing by the survey team was 80 degrees. (P. Ex. C, pp. 33-34). Several residents testified that the water at the facility was either "always cold" or cold after a several showers had been taken. (*Id.*).
89. Facility staff checks the water temperature at the facility several times per shift, and the hot water temperature had always been between 100 and 116 degrees. Future Innovations keeps a log of the water temperatures. The log indicates that the temperature of the water at the facility on July 10, 2012, varied between 101 and 109 degrees. (P. Ex. Q)
90. Future Innovations witnesses testified that staff had not received complaints from residents about the water temperature. David Curtis testified that based upon the size of the hot water heater, it was possible that, in the course of providing twelve showers, the water temperature may decrease as the hot water heater is emptied.
91. The survey team checked the water temperature on July 10, 2012, which is the same day that a plumber was working on the sinks and water system.
92. The Licensure Section was not aware if the plumber was working in the facility at the time it checked the hot water temperature and did not know if the plumber had turned off the hot water heater in order to complete the necessary repairs.

Type A1 Penalty

93. N.C. Gen. Stat. § 122C-24.1(1) states that the Department shall impose an administrative penalty for Type A1 violations when a violation of the regulations, standards, and requirements "result in a death or serious physical harm, abuse, neglect, or exploitation."

The monetary penalty for a Type A1 penalty can be no less than \$1,000.00 and no more than \$20,000.00.

94. As a result of the survey findings, the Licensure Section issued a Type A1 Penalty in the amount of \$6,000.00 to Future Innovations on July 31, 2012. (P. Ex. A) The July 31, 2012 Notice stated that the basis for the Type A1 penalty was the alleged finding that Future Innovations violated 10A NCAC 27D .0304 – Clients Rights – Protection from Harm, Abuse, Neglect, and Exploitation. (*Id.*)
95. The Type A1 penalty was based on the alleged finding of serious physical harm that allegedly occurred when a staff member choked and hit a resident on July 9, 2012. The Type A1 penalty also was based on the Licensure Section's finding that the alleged violations of 10A NCAC 27G .0205 (substance abuse treatment), 27G .0208 (client services), 27G .0209 (medication requirements), 10A NCAC 27 D .0101 (failure to report to DSS), and 10A NCAC 27G .303 (location and exterior requirements) constituted serious negligence.
96. 10A NCAC 27C .0102(b)(1) defines abuse to mean the infliction of mental or physical harm or injury by other than accidental means.
97. 10A NCAC 27C .0102(b)(17) defines neglect to mean the failure to provide care or services necessary to maintain the mental or physical health and well-being of the client.
98. The \$6,000.00 penalty issued by the Licensure Section was based on the Penalty Matrix completed by the Department. (R. Ex. 5) The matrix completed by the Department resulted in a total score of 19.
99. Based on the above Findings of Fact, the Penalty Matrix should have reflected a score of 5 in the first column, a score of 1 in the second column, a score of 2 in the third column, a score of 0 in the fourth column, and a score of 1 in the last column for a total of 9.
100. Based on this score, the monetary penalty should not exceed \$1,000.00.
101. Based on the above Findings of Fact, the incidents and violations alleged by the Agency did not cause death or serious physical harm, abuse, neglect, or exploitation to any of the residents of the facility.
102. Based on the above Findings of Fact, a penalty in the amount of \$1,000.00 is appropriate for the survey findings related to Medication Administration only.

Suspension of Admissions

103. N.C. Gen. Stat. § 122C-23(g) allows for the suspension of admission to a facility where the conditions of the facility are detrimental to the health or safety of the clients.

104. The Licensure Section determined that based on the survey findings, it was suspending new admissions to the facility (P. Ex. B)
105. Based on all on the above Findings of Fact, the conditions at Future Innovations were not detrimental to the health or safety of its clients.

Intent to Revoke Future Innovations License

106. N.C. Gen. Stat. § 122C-24(c) allows the revocation of a provider's license in any case in which there has been a substantial failure to comply with any provision the statute or regulations that govern the facility.
107. On July 31, 2012, the Licensure Section issued a Notice of Intent to Revoke Future Innovations License based on the same facts and circumstances set forth in its Notice of Suspension of Admissions. (P. Ex. D)
108. The Notice of Intent to Revoke was sent to all of the Local Management Entities ("LMEs") for which Future Innovations serves patients. (*Id.*)
109. Since the filing of its appeal, the Licensure Section has informed Future Innovations that its decision to revoke Future Innovations' license has been affirmed.

To the extent that certain portions of the foregoing Findings of Fact constitute mixed issues of law and fact, such Findings of Fact shall be deemed incorporated herein as Conclusions of Law. Based upon the foregoing Findings of Fact, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter under chapters 122C and 150B of the North Carolina General Statutes.
2. All parties correctly have been designated, and there is no question as to misjoinder or nonjoinder.
3. An ALJ need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute. *Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993).
4. N.C. Gen. Stat. § 122C-24.1(1) states that the Department shall impose an administrative penalty for Type A1 violations when a violation of the regulations, standards, and requirements "result in a death or serious physical harm, abuse, neglect, or exploitation." The monetary penalty for a Type A1 penalty can be no less than \$1,000.00 and no more than \$20,000.00.

5. Future Innovations complied with the requirements of 10A NCAC 27G .0205 because it had assessed and created a treatment plan for the two residents who allegedly were found not to be in compliance with this regulation.
6. Based on the above Findings of Facts, the Agency erred in finding that Future Innovations violated 10A NCAC 27G. 0205.
7. Given the recent history of observed compliance with the client services requirement, the extenuating circumstances of the survey and internal investigation process, and the testimony and documentary evidence regarding client services provided at the facility, the preponderance of the evidence supports a finding that Future Innovations provides adequate client services in compliance with 10A NCAC 27G .0208.
8. Based on the above Findings of Fact, the undersigned finds that the Agency erred in finding Future Innovations in violation of 10A NCAC 27G. 0208.
9. Based on the above Findings of Facts, the Agency did not err in its finding that Future Innovations was in violation of 10A NCAC 27G. 0208 by failing to document on its MAR that it had provided medication to one resident. However, the resident statement indicates that the resident received the medication and that the facility's error was a documentation oversight.
10. The documentation error does not rise to the level of a Type A1 penalty, and it does not justify suspending the facility's admissions or the issuance of an Intent to Revoke the facility's license.
11. Although no harm or death resulted from the facility's failure to document providing medication, based on the testimony of the Licensure Section witnesses, the undersigned has determined that a Type A2 penalty would be appropriate for this finding because there is a risk that physical harm could occur if medication administration is not documented appropriately.
12. Based on the above Findings of Fact, the Agency erred in finding that Future Innovations violated N.C. Gen. Stat. § 131E-256 and 10A NCAC 27D .0101(b)(1).
13. Based on the above Findings of Facts, the undersigned finds that the Agency erred in finding that Future Innovations was in violation of 10A NCAC 27G .0303.
14. Based on the above Findings of Fact, the Licensure Section did not err by finding that Future Innovations was in violation of 10A NCAC 27G .304 based on the survey team's temperature measurements. However, the preponderance of the evidence supports a finding that the water temperature during the period preceding and after the survey complied with the regulation. Furthermore, there is no evidence that the water temperature could have caused any harm to the residents.

15. This finding does not rise to the level of a Type A1 penalty, does not justify suspending the facility's admissions or the issuance of an Intent to Revoke the facility's license.
16. The preponderance of the evidence does not support a finding that a Future Innovations' staff member choked or hit a resident. Therefore, there is no basis for finding that Future Innovations caused serious physical harm or abuse to any of its residents.
17. There was no evidence presented that the facility failed to maintain the mental or physical health of its residents. There is therefore no basis for finding serious neglect as required for a Type A1 penalty under N.C. Gen. Stat. 122C-24.1(1).
18. Based on all of the above Findings of Fact, Future Innovations has not failed to substantially comply with the provision of the statute and regulations that govern the facility.
19. Based on all of the above Findings of Fact, the Licensure Section has inadequate basis to issue the Intent to Revoke or to affirm its decision to revoke Future Innovations' license.
20. The preponderance of the evidence supports a finding that Future Innovations' residents did not suffer death, substantial physical harm, abuse, neglect, or exploitation.
21. The Agency violated the standards of N.C. Gen. Stat. § 150B-23 by erroneously issuing Future Innovations a Type A1 monetary penalty on the asserted basis that residents at the facility suffered substantial physical harm, abuse, or neglect.
22. The preponderance of the evidence supports a finding that Future Innovations can be subject to a \$1,000.00 monetary penalty relating to violations of Medication Administration.
23. The medication administration violation does not support a Type A1 penalty, suspension of admissions, or revocation of Future Innovations license.
24. N.C. Gen. Stat. § 122C-23(g) allows for the suspension of admission to a facility where the conditions of the facility are detrimental to the health or safety of the clients.
25. The preponderance of the evidence supports a finding that the conditions at the Future Innovations facility were not detrimental to the health or safety of its clients.
26. The Agency violated the standards of N.C. Gen. Stat. 150B-23 when it erroneously suspended admissions to the Future Innovations facility.
27. N.C. Gen. Stat. § 122C-24(c) allows the revocation of a provider's license in any case in which there has been a substantial failure to comply with any provision the statute or regulations that govern the facility.

28. Future Innovations has not failed to substantially comply with the provision of the statute and regulations that govern the facility.
29. The Agency violated the standards of N.C. Gen. Stat. 150B-23 by erroneously issuing a Notice of Intent to Revoke Future Innovations License.
30. Because Future Innovations challenged the Licensure Section's Notice of Intent to Revoke its License and the Licensure Section subsequently affirmed that decision, the undersigned accepts the oral request of Petitioner to amend the Contested Case Petition such that the petition now includes the subsequent decision made by the Licensure Section to affirm its decision to revoke Future Innovations' license.
31. Amending the petition to include the Licensure Section's subsequent decision to affirm its July 31, 2012 Notice of Intent to Revoke Future Innovations' license does not prejudice Respondent in any way because the decision to affirm the revocation was based on the reasons for revocation as set forth in the Licensure Section's July 31, 2012 Notice of Intent to Revoke.
32. In the interest of justice, judicial economy and with an eye at protecting the resources of the State there is no basis or justification for requiring Future Innovations to file a separate contested case petition to challenge the subsequent decision to affirm the Licensure Section's Intent to Revoke Future Innovations' license given that the undersigned has found that the findings that led to such decision have insufficient support in the evidence.
33. Because the undersigned has found as a matter of fact and law that the Licensure Section erred in its findings that gave rise to the issuance of the Notice of Intent to Revoke there remains no basis to revoke Future Innovations' license. Any attempt to do so, based on the July 2012 survey and July 31, 2012 Notice of Intent to Revoke, is erroneous, null, and void.
34. The Licensure Section's actions substantially prejudiced Future Innovation's rights by erroneously requesting a monetary penalty, suspending the facility's admissions, issuing an intent to revoke, and subsequently affirming its decision to revoke Future Innovation's License.

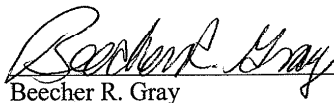
FINAL DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent Licensure Section's decision to issue a Type A1 Administrative Penalty, suspend new admissions to the Future Innovation Facility, and issue an Intent to Revoke Future Innovations' License is erroneous, not supported by the evidence, and is REVERSED. A monetary penalty of \$1,000.00 shall be paid by Future Innovations and Future Innovations shall fully and completely abide by the Plan of Correction it submitted to the Department in response to the July 10-11 Survey Findings.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 16 day of April, 2013.



Beecher R. Gray
Administrative Law Judge

On this date mailed to:

ROBERT A LEANDRO
Parker Poe Adams & Bernstein, LLP
PO BOX 389
RALEIGH, NC 27602
Attorney - Petitioner

JOSEPH E ELDER
Assistant Attorney General
NC Department of Justice
9001 MAIL SERVICE CENTER
RALEIGH, NC 27699
Attorney - Respondent

This the 16th day of April, 2013.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6714
Telephone: 919/431-3000
Fax: 919/431-3100

COUNTY OF FORSYTH

SPEAKEASY THERAPY, LLC,

Petitioner,

VS.

N.C. DEPT. OF HEALTH & HUMAN
SERVICES, DIVISION OF MEDICAL
ASSISTANCE,

Respondent.

IN THE OFFICE OF

2017 APR 25 PM 4:45 ADMINISTRATIVE HEARINGS
12-DHR-7296

Office of
Administrative Management

DECISION

This contested case was heard before Eugene Cella, Administrative Law Judge, on December 19, 2012, in High Point, North Carolina.

For Petitioner: Curtis B. Venable, Attorney at Law
OTT CONE & REDPATH, P.A.
P.O. Box 3016
Asheville, NC 28802

For Respondent: Thomas J. Campbell, Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

Whether the Department of Health and Human Services (DHHS) Hearing Officer correctly decided to uphold the decision of the Division of Medical Assistance (DMA) to review Speech/Language-Audiology Therapy Services provided to Medicaid recipients by Petitioner Speakeasy, and that Speakeasy received an overpayment of \$60,196.50 as the result of the allegedly improperly documented 100 claims for Speech/Language-Audiology Therapy Services delivered to Medicaid recipients.

As stipulated by the parties: This matter is in the appropriate form and venue. The matter was filed in a timely and appropriate fashion. All parties necessary are joined.

BURDEN OF PROOF

Respondent bears the burden of proof in this matter, pursuant to N.C. Gen. Stat. §108C-12(d).

DOCUMENTARY EVIDENCE

As stipulated by the parties as to authenticity and admissibility:

The parties agreed to the authenticity and the admissibility of the following:

For Respondent:

1. Medicaid Provider Agreement dated 10/5/10 (executed by Julie Casey)
2. DMA Clinical Coverage Policy 10A (effective December 1, 2009)
3. Records Request Letter dated 3/1/2012
4. A sample of non-compliant medical records submitted for this audit by Petitioner for the following recipients:
 - a. Makari Boston DOS 7/13/11 and 8/4/11;
 - b. Altavian Carethers DOS 5/25/11, 6/22/11, 6/29/11 and 7/19/11;
 - c. Jerry Summers DOS 4/13/11, 4/20/11, 5/4/11, 8/1/11 and 8/10/11;
 - d. Jamire Wiley DOS 4/11/11, 5/2/11, 7/13/11 and 7/18/11.
5. Complete and accurate copy of all medical records (other than those specifically identified above) submitted by Petitioner for this audit.
6. Audit tool sample
7. CV for Alicia Browning
8. CV for John Feaganes, DrPH
9. Summary of findings charts prepared by Alicia Browning detail errors based upon review
10. Chart with overpayment amounts based upon initial review of Alicia Browning
11. Charts of paid/overpaid amounts prepared by John Feaganes, Dr. PH
12. RAT-STATS Variable Unrestricted Appraisal dated 4/26/2012
13. Tentative Notice of Overpayment dated 5/10/2012
14. CCME Response to In-Person Appeal dated 6/8/2012
15. CCME Response to In-Person Appeal dated 7/9/12
16. Hearing Officer's Decision dated 7/26/12
17. Diagram prepared by Dr. Feaganes to illustrate statistical concepts (demonstrative)
18. Copy of 21 NCAC 64.0216 (Standard of Practice for Speech and Language Pathologists)
19. December 2010 Medicaid Bulletin from the NC Department of Health and Human Services

For Petitioner:

None.

WITNESSES

Witnesses for Petitioner:

Julie Casey, SLP, owner Speakeasy Therapy, LLC

Witness for Respondent:

Alicia Browning, CCME
John Feaganes, Dr. PH

Expert Witnesses:

The parties stipulated that Alicia Browning possesses the scientific, technical or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue and by virtue of the knowledge, skill, experience, training or education of Ms. Browning, she qualifies as an expert in the area of speech-language pathology pursuant to Rule 702 of the North Carolina Rules of Evidence.

The parties stipulated that Julie Casey, SLP, possesses the scientific, technical or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue and by virtue of the knowledge, skill, experience, training or education of Ms. Casey, she qualifies as an expert in the area of speech-language pathology pursuant to Rule 702 of the North Carolina Rules of Evidence.

The parties stipulated that John Feaganes, Dr. PH possesses the scientific, technical or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue and by virtue of the knowledge, skill, experience, training or education of Dr. Feaganes, he qualifies as an expert in the area of statistics pursuant to Rule 702 of the North Carolina Rules of Evidence.

Based upon the preponderance of the admissible evidence, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner does not dispute the following findings of an overpayment from the Hearing Officer's decision for the following patients, dates of services, units of service and amount:

| | Patient's Last Name | First Name | Date of Service | Unit of Service | Amount |
|---|------------------------|------------|--------------------|--------------------|--------|
| A | CA | CA | 4/18/2011 | 1 | 68.25 |
| A | CA | CA | 5/9/2011 | 1 | 68.25 |
| A | CA | CA | 5/23/2011 | 1 | 68.25 |
| A | CA | CA | 5/25/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 4/5/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 4/25/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 5/16/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 7/20/2011 | 1 | 68.25 |

| Patient's Last Name | First Name | Date of Service | Unit of Service | Amount |
|------------------------|------------|--------------------|--------------------|--------|
| B | KHAM | 8/9/2011 | 1 | 68.25 |
| B | KHAM | 8/10/2011 | 1 | 68.25 |
| D | CA | 4/11/2011 | 1 | 68.25 |
| D | CA | 5/12/2011 | 1 | 68.25 |
| F | NO | 4/25/2011 | 1 | 68.25 |
| F | NO | 5/4/2011 | 1 | 68.25 |
| F | NO | 5/25/2011 | 1 | 68.25 |
| H | TE | 5/12/2011 | 1 | 68.25 |
| H | TE | 8/16/2011 | 1 | 68.25 |
| K | MI | 8/2/2011 | 1 | 68.25 |
| K | MI | 8/4/2011 | 1 | 68.25 |
| K | MI | 8/9/2011 | 1 | 68.25 |
| N | CA | 4/7/2011 | 1 | 68.25 |
| R-S | BR | 4/4/2011 | 1 | 68.25 |
| R-S | BR | 7/5/2011 | 1 | 68.25 |
| R-S | BR | 7/29/2011 | 1 | 68.25 |
| R-S | BR | 8/9/2011 | 1 | 68.25 |
| S | AM | 8/4/2011 | 1 | 68.25 |
| S | AM | 8/22/2011 | 1 | 68.25 |
| S | AM | 8/29/2011 | 1 | 68.25 |
| S | JE | 4/20/2011 | 1 | 68.25 |
| S | JE | 5/4/2011 | 1 | 68.25 |
| V-V | MI | 7/8/2011 | 1 | 68.25 |
| V-V | SA | 3/3/2011 | 1 | 68.25 |
| V-V | SA | 7/29/2011 | 1 | 68.25 |
| V-V | SA | 8/24/2011 | 1 | 68.25 |

2. Respondent conducted a review of Petitioner's Medicaid Speech/Language-Audiology Therapy services claims with dates of service between March 1, 2011 and August 31, 2011 by reviewing 100 records.

3. During the period reviewed, Petitioner conducted 882 events covered by Respondent, with a total amount paid by Respondent to Petitioner of \$60,196.50.

4. Respondent informed Petitioner by a document entitled "Tentative Notice of Overpayment" (Resp. Ex. 13) dated May 10, 2012 of its initial determination that Petitioner had submitted allegedly erroneous claims in 100 out of 100 records.

5. The value of the allegedly erroneous 100 records totaled \$6,825.

6. Respondent extrapolated the alleged errors to Petitioner's total amount received (\$60,196.50) and alleged a total overpayment of \$60,196.50.

7. Subsequent to Petitioner's request, Respondent conducted an informal reconsideration of the original tentative overpayment.

8. Respondent's informal reconsideration upheld the original findings by determining that 100 records were in error, with a total value of \$60,196.50 (Resp. Ex. 16).

9. In providing Speech/Language-Audiology Therapy services, Petitioner documented the planned activities between the patient and the provider of clinical service by producing a Plan of Care for each patient.

10. In providing Speech/Language-Audiology Therapy services, Petitioner documented the activities between the patient and the provider of clinical service by producing a handwritten note for each patient's date of service.

11. Respondent's findings of Petitioner's alleged errors arose from a review of Petitioner's Plans of Care for each patient.

12. Respondent's findings of Petitioner's alleged errors additionally arose from a review of Petitioner's handwritten note for each patient's dates of service.

13. Respondent's found that in each instance that Petitioner's documentation of Plans of Care failed to "include a specific content...."

14. Respondent's found that in all but seven dates of services, Petitioner's documentation of treatment failed to contain a "[d]escription of services (intervention and outcome/client response) performed...."

15. For seven dates of services Respondent found no error with Petitioner's notes, the only issue cited by Respondent concerned Petitioner's failure to "include specific content" for patients' Plans of Care. The seven dates of service:

| Patient's Last Name | First Name | Date of Service | Unit of Service | Amount |
|------------------------|------------|--------------------|--------------------|--------|
| B | MA | 7/13/2011 | 1 | 68.25 |
| B | MA | 8/4/2011 | 1 | 68.25 |
| C | AL | 6/29/2011 | 1 | 68.25 |
| S | J | 4/13/2011 | 1 | 68.25 |
| W | JA | 5/2/2011 | 1 | 68.25 |
| W | JA | 7/13/2011 | 1 | 68.25 |
| W | JA | 7/18/2011 | 1 | 68.25 |

16. Ms. Casey explained the phonological processes of:

- "syllable reduction" occurs when a syllable has been deleted by the patient from a word containing two or more syllables ("*butterfly*" becomes "*bufly*";
- "fronting" occurs when velar or palatal consonants are replaced by the patient by other sounds in the front of the mouth (*shoe*, *vision*, *cheer*, *juice* change to *sue*, *vizzin*, *seer*, *zuice*, respectively);
- "gliding" typically affects /r/ and /l/ phonemes, which are classified as "liquids" (*my right leg* becomes *my wight weg*);
- "consonant cluster" is two or more consonants in a sequence without any vowels between them, such as the /sp/ combination in *speak*, *spot*, or the /skr/ combination in *scrape*, *scream*. A patient may reduce or delete one of the sounds

(*speak, spot, become peak, pot*), as a result, these are the instances of "consonant reduction" or "consonant deletion;"

- "vocalization" occurs when the patient replaces, /l/, or /r/ with a more neutral vowel ("*simple*" becomes "*simpo*" or "*paper*" becomes "*abuh*")
- "prevocalic voicing" occurs when the patient voices of an initial voiceless consonant in a word ("*peach*" is pronounced "*beach*");
- "deaffrication" occurs when a patient changes an affricate to a fricative ("*jump*" pronounced as "*zump*") and,
- "stopping" occurs when the articulators are pressed together instead of allowing space for the air together, a stop consonant /p, b, t/ or /d/ is produced instead (*face, vase* become *pace, base; cheer, jeer* become *teer, deer*).

17. Findings of Fact for each of Petitioner's contested Plans of Care and each contested Date of Service are specifically denominated in this Final Order's Attachment A, incorporated herein by reference. No findings are necessary as to the Plans of Care and Dates of Service not contested by Petitioner.

CONCLUSIONS OF LAW

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

2. Respondent bears the burden of proof in this matter pursuant to N.C. Gen. Stat. §108C-11(d).

3. The Code requires proper documentation. Likewise, each provider signs a "participation agreement" wherein he or she agrees to operate and provide services in accordance with state law and all manner of rules, regulations, policies, manuals, bulletins and the like which would command proper documentation.

4. The North Carolina Administrative Code has two provisions which are entitled "Recoupment", 10A NCAC 22F .0601 and 10A NCAC 22F .0706.

5. 10A NCAC 22F .0706 speaks to recoupment of overpayments and how the money will be distributed.

6. The Code states at 10A NCAC 22F .0601 "the Medicaid agency will seek full restitution of any and all improper payments made to providers by the Medicaid program." (Emphasis added) "Improper payments" are not defined in the Code; however, in reading *in pari materi* other sections one may discern the meaning and intent.

7. 10A NCAC 22F .0103 also similarly states that the Division shall institute methods and procedures to, among other things, "recoup improperly paid claims."

8. The Administrative Code states at 10A NCAC 22F .0103 that "The Division shall develop, implement and maintain methods and procedures for preventing, detecting, investigating, reviewing, hearing, referring, reporting, and disposing of cases involving fraud, abuse, error, overutilization or the use of medically unnecessary or medically inappropriate

services." (Emphasis added). "Error" is the only misdeed applicable; i.e., there are no allegations of fraud, abuse, overutilization or use of medically unnecessary or inappropriate services.

9. There has been no assertion or allegation in this proceeding that Petitioner was in any way responsible for fraud as defined in N.C.G.S. §108A-63, i.e., there is no allegation or assertion of the Petitioner "knowingly and willfully making or causing to be made any false statement or representation of material fact" or other type of fraud as defined therein.

10. Respondent also moves to extrapolate the result of the audit findings in this action to the entirety of the Medicaid payments received by Petition.

11. N.C. Gen. Stat. §108C-5(i) requires that "[p]rior to extrapolating the results of any audits, the [Respondent] shall demonstrate and inform the provider that (i) the provider failed to substantially comply with the requirements of State or federal law or regulation...."

12. N.C. Gen. Stat. §90-293(3) outlines that

"The practice of speech and language pathology" means the application of principles, methods, and procedures for the measurement, testing, evaluation, prediction, counseling, treating, instruction, habilitation, or rehabilitation related to the development and disorders of speech, voice, language, and swallowing for the purpose of identifying, preventing, ameliorating, or modifying such disorders.

13. The Principle of Ethics II of the North Carolina Board of Examiners for Speech and Language Pathologists and Audiologists (21 N.C.A.C. 64 .0303) requires, in relevant part, that the "Licensees shall maintain adequate records of professional services rendered."

14. The Board, in 21 N.C.A.C. 64 .0209(a), directs that "[t]he definition of 'adequate records of professional services' required to be maintained by Rule .0303(4) shall include:

- (1) The full name of the patient;
- (2) The nature of the service provided;
- (3) The date services were provided;
- (4) The identification of the person providing the service;
- (5) The identification of the person preparing or signing the record if not by the person providing the service."

15. Respondent proffered the document entitled as "DMA Clinical Coverage Policy 10A (effective December 1, 2009)" as binding upon Petitioner as permitted by N.C. Gen. Stat. §108A-54.2.

16. Respondent issued Clinical Coverage Policy 10A to direct the provision of "outpatient specialized therapies," (therapeutic physical, occupational, speech, respiratory and audiologic services) and the billing for such services for Medicaid recipients.

17. The relevant portion of Clinical Coverage Policy 10A (Section 5.1 Treatment Services) requires:

- (c) The written plan for services must include defined goals for each therapeutic discipline.
- (d) Each plan must include a specific content, frequency, and length of visit of service for each therapeutic discipline.

18. Respondent proffered no binding definition for "specific content."

19. The relevant portion of Clinical Coverage Policy 10A (Section 7.2 Documenting Services) requires that “[e]ach provider must maintain and allow [Respondent’s Division of Medical Assistance] to access the following documentation for each individual:

- (d) Description of services (intervention and outcome/client response) performed and dates of service.

20. Respondent proffered no binding definition for “intervention.” Stedman’s Medical Dictionary (2002) defines the word as “interference so as to modify a process or situation.” Merriam-Webster Dictionary defines the word as “the act or fact or a method of interfering with the outcome or course especially of a condition or process (as to prevent harm or improve functioning).”

21. In December, 2010, Respondent offered to providers its non-binding interpretation and guidance to practitioners concerning the documentation requirements of Clinical Coverage Policy 10A in an issuance entitled the North Carolina Medicaid Bulletin (available online at: <http://www.ncdhhs.gov/dma/bulletin/1210bulletin.htm>). The issuance is non-binding as directed by N.C. Gen. Stat. §150B-18 as it was not promulgated pursuant to the requirements of N.C. Gen. Stat. Chapter 150B, Article 2A.

22. Both speech therapy witnesses, Ms. Casey and Ms. Browning were accepted as experts concerning speech therapy. Ms. Browning testified as to her knowledge concerning Respondent’s documentation requirements. This decision has considered Ms. Browning testimony and knowledge and accorded appropriate weight to her opinions.

23. The Court gives weight to Ms. Casey’s credibility as a result of her acknowledgement of error in 34 dates of services. Furthermore, this decision has considered Ms. Casey’s testimony and knowledge and accorded appropriate weight to her opinions.

24. Ms. Browning testified that Respondent’s documentation requirements call for the speech therapist’ Plan of Care to provide elaboration as to the specific treatments planned for the patient and that simple references to the patient’s goals would not satisfy Respondent’s requirements for documenting “specific content ... of services.”

25. The records of Petitioner’s Plans of Care contain various descriptions of defined goals and contents. Examples include, *inter alia*: plans’ focus upon various phonological process such as “final consonant deletion,” “syllable deletion,” “syllable reduction,” “prevocalic voicing,” “cluster reduction,” “gliding,” “deaffrication,” “vocalization,” “fronting,” and “stopping.”

26. With the exception of the Plans of Care conceded by the Petitioner as being in error, each of the records of Petitioner’s Plans of Care for speech therapy services contain such descriptions of defined goals and contents for each the remaining patients’ Plans of Care.

27. The therapist’s “measurement, testing, evaluation, prediction, counseling, treating, instruction, habilitation, or rehabilitation” of such phonological processes fall within the definition of the “practice of speech and language pathology” as defined by N.C. Gen. Stat. §90-293(3).

28. As a result, Petitioner substantially complied with the requirements of Respondent’s Clinical Coverage Policy 10A, Section 5.1 by maintaining documentation of each patients’ Plan of Care that contain defined goals and specific content.

29. The records of Petitioner's delivery of speech therapy services contain various descriptions of the interventions provided to patients. Examples include, *inter alia*:

- The therapist targeted the phonological process of "final consonant deletion."
- The therapist targeted the phonological process of "final syllable deletion."
- The therapist targeted the phonological process of "deaffrication and fronting."
- The therapist targeted the phonological process of "syllable reduction."
- The therapist provided the intervention of "minimal pairs."
- The therapist targeted the phonological process of "cluster reduction."
- The therapist targeted the phonological process of "gliding."
- The therapist provided an intervention by targeting the phoneme /l/ at the word and sentence level.
- The therapist provided an intervention by targeting the phoneme /th/ and /l/ at the word and sentence level.
- The therapist targeted the phonological process of "stopping."
- The therapist focused the patient's efforts at specific levels, such as at the "syllable and word level" or "word, sentence and conversation level" as required by the patient.
- The therapist targeted a specific process at different positions within words, such as "initial," "medial," or "final."

30. The therapist's "measurement, testing, evaluation, prediction, counseling, treating, instruction, habilitation, or rehabilitation" of such phonological processes fall within the definition of the "practice of speech and language pathology" as defined by N.C. Gen. Stat. §90-293(3).

31. The records of Petitioner's delivery of speech therapy services contain various notations as to the patient's responses to the interventions. Some dates of services recorded the responses by the use of "+" (plus sign for successful patient response) or "-" (minus sign for unsuccessful patient response). Other dates of service recorded the responses by the use of "hash marks" such as "////" for successful responses or "----" for unsuccessful responses by the patient. Other dates of service recorded the responses by the use of "+" (plus sign for successful patient response) or "0" (zero sign for unsuccessful patient response).

32. Ms. Browning testified that Respondent's documentation requirements call for the speech therapist to provide elaboration as to the specific treatments provided to patients and that simple references to "cuing" would not be sufficient.

33. With the exception of the dates of service conceded by the Petitioner as being in error, each of the records of Petitioner's delivery of speech therapy services contain descriptions of the services provided to patients for each the remaining disputed date of service.

34. With the exception of the dates of service conceded by the Petitioner as being in error, each of the records of Petitioner's delivery of speech therapy services contain a record of the patient's responses to utilized interventions for each the remaining disputed date of service.

35. With the exception of the dates of service conceded by the Petitioner as being in error, each of the records of Petitioner's delivery of speech therapy services for each of the remaining disputed dates of service document "the act or fact or a method of interfering with the outcome or course especially of a condition or process (as to prevent harm or improve functioning)."

36. As a result, Petitioner substantially complied with the requirements of Respondent's Clinical Coverage Policy 10A, Section 7.2 by maintaining documentation of the "description of services (intervention and outcome/client response) performed...."

37. Petitioner's "records of professional services" for each disputed date of service include the "the nature of the service provided" required by 21 N.C.A.C. 64 .0209(a) and .0303(4).

38. With the exception of the dates of service conceded by the Petitioner as being in error, Respondent has failed to demonstrate how Petitioner "failed to substantially comply with the requirements of State or federal law or regulation" as required by N.C. Gen. Stat. §108C-5(i).

39. Respondent has demonstrated error on the part of Petitioner for the following patients, dates of service, units of service and amounts:

| | Patient's Last Name | First Name | Date of Service | Unit of Service | Amount |
|-----|------------------------|------------|--------------------|--------------------|--------|
| A | CA | CA | 4/18/2011 | 1 | 68.25 |
| A | CA | CA | 5/9/2011 | 1 | 68.25 |
| A | CA | CA | 5/23/2011 | 1 | 68.25 |
| A | CA | CA | 5/25/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 4/5/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 4/25/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 5/16/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 7/20/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 8/9/2011 | 1 | 68.25 |
| B | KHAM | KHAM | 8/10/2011 | 1 | 68.25 |
| D | CA | CA | 4/11/2011 | 1 | 68.25 |
| D | CA | CA | 5/12/2011 | 1 | 68.25 |
| F | NO | NO | 4/25/2011 | 1 | 68.25 |
| F | NO | NO | 5/4/2011 | 1 | 68.25 |
| F | NO | NO | 5/25/2011 | 1 | 68.25 |
| H | TE | TE | 5/12/2011 | 1 | 68.25 |
| H | TE | TE | 8/16/2011 | 1 | 68.25 |
| K | MI | MI | 8/2/2011 | 1 | 68.25 |
| K | MI | MI | 8/4/2011 | 1 | 68.25 |
| K | MI | MI | 8/9/2011 | 1 | 68.25 |
| N | CA | CA | 4/7/2011 | 1 | 68.25 |
| R-S | BR | BR | 4/4/2011 | 1 | 68.25 |
| R-S | BR | BR | 7/5/2011 | 1 | 68.25 |
| R-S | BR | BR | 7/29/2011 | 1 | 68.25 |
| R-S | BR | BR | 8/9/2011 | 1 | 68.25 |
| S | AM | AM | 8/4/2011 | 1 | 68.25 |

| | Patient's Last Name | First Name | Date of Service | Unit of Service | Amount |
|-----|------------------------|------------|--------------------|--------------------|--------|
| S | | AM | 8/22/2011 | 1 | 68.25 |
| S | | AM | 8/29/2011 | 1 | 68.25 |
| S | | JE | 4/20/2011 | 1 | 68.25 |
| S | | JE | 5/4/2011 | 1 | 68.25 |
| V-V | | MI | 7/8/2011 | 1 | 68.25 |
| V-V | | SA | 3/3/2011 | 1 | 68.25 |
| V-V | | SA | 7/29/2011 | 1 | 68.25 |
| V-V | | SA | 8/24/2011 | 1 | 68.25 |

40. Respondent has demonstrated a total error arising from the 34 dates of services (alternatively referred to as claim details) listed above in the amount of \$2,320.50

41. For all other dates of service (alternatively referred to as claim details) arising from Respondent's PI #2012-0511, Respondent has failed to carry its burden to prove that the Department of Health and Human Services (DHHS) Hearing Officer correctly decided to uphold the decision of the Division of Medical Assistance (DMA) to review Speech/Language-Audiology Therapy Services provided to Medicaid recipients by Petitioner and that Petitioner received an overpayment of \$60,196.50 as a result of improperly documenting claims for Speech/Language-Audiology Therapy Services delivered to Medicaid recipients.

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

DECISION

Petitioner received an overpayment in the amount of \$2,320.50 for the following patients, dates of service, units of service and amounts:

| | Patient's Last Name | First Name | Date of Service | Unit of Service | Overpaid Amount |
|---|------------------------|------------|--------------------|--------------------|--------------------|
| A | | CA | 4/18/2011 | 1 | 68.25 |
| A | | CA | 5/9/2011 | 1 | 68.25 |
| A | | CA | 5/23/2011 | 1 | 68.25 |
| A | | CA | 5/25/2011 | 1 | 68.25 |
| B | | KHAM | 4/5/2011 | 1 | 68.25 |
| B | | KHAM | 4/25/2011 | 1 | 68.25 |
| B | | KHAM | 5/16/2011 | 1 | 68.25 |
| B | | KHAM | 7/20/2011 | 1 | 68.25 |
| B | | KHAM | 8/9/2011 | 1 | 68.25 |
| B | | KHAM | 8/10/2011 | 1 | 68.25 |
| D | | CA | 4/11/2011 | 1 | 68.25 |
| D | | CA | 5/12/2011 | 1 | 68.25 |
| F | | NO | 4/25/2011 | 1 | 68.25 |

| | Patient's Last Name | First Name | Date of Service | Unit of Service | Overpaid Amount |
|-----|------------------------|------------|--------------------|--------------------|--------------------|
| F | | NO | 5/4/2011 | 1 | 68.25 |
| F | | NO | 5/25/2011 | 1 | 68.25 |
| H | | TE | 5/12/2011 | 1 | 68.25 |
| H | | TE | 8/16/2011 | 1 | 68.25 |
| K | | MI | 8/2/2011 | 1 | 68.25 |
| K | | MI | 8/4/2011 | 1 | 68.25 |
| K | | MI | 8/9/2011 | 1 | 68.25 |
| N | | CA | 4/7/2011 | 1 | 68.25 |
| R-S | | BR | 4/4/2011 | 1 | 68.25 |
| R-S | | BR | 7/5/2011 | 1 | 68.25 |
| R-S | | BR | 7/29/2011 | 1 | 68.25 |
| R-S | | BR | 8/9/2011 | 1 | 68.25 |
| S | | AM | 8/4/2011 | 1 | 68.25 |
| S | | AM | 8/22/2011 | 1 | 68.25 |
| S | | AM | 8/29/2011 | 1 | 68.25 |
| S | | JE | 4/20/2011 | 1 | 68.25 |
| S | | JE | 5/4/2011 | 1 | 68.25 |
| V-V | | MI | 7/8/2011 | 1 | 68.25 |
| V-V | | SA | 3/3/2011 | 1 | 68.25 |
| V-V | | SA | 7/29/2011 | 1 | 68.25 |
| V-V | | SA | 8/24/2011 | 1 | 68.25 |

Respondent was in error in concluding that all other dates of services (alternatively referred to as claim details) arising from Respondent's PI #2012-0511 did not satisfy the requirements of Respondent's Clinical Coverage Policy 10A (effective December 1, 2009).


The amount of the recoupment shall be adjusted in accordance with these findings of fact and conclusions of law.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review.

Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 24th day of April, 2013.


Eugene Cella
Administrative Law Judge

Findings of Fact for Petitioner's Plans of Care and Treatment Notes

| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> | |
|--------------------------------|-----------------------|----------------------------|--|
| B | KHAL | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of final consonant deletion," "phonological process of syllable reduction," and "phonological process of deaffrication." |
| B | KHAL | 4/4/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion" at the final position of the words given to the patient. |
| B | KHAL | 4/18/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion" and "syllable reduction." The therapist worked with the patient's phonological processes at two levels: at word and phrase level. |
| B | KHAL | 5/9/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion" and "deaffrication." The therapist worked with the phonological processes at two levels: at the phrase and the sentence level. |
| B | KHAL | 8/2/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion," "deaffrication" and "fronting" and "syllable reduction." The therapist worked with the patient at one level: the conversational level. |
| B | KHAM | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's receptive and expressive language conceptual, semantic, grammatical, and MLU (mean length of utterance) needs of "spatial concepts," "action identification," "pronoun usage," "regular plural usage," and "3-4 word utterance" productions. |
| B | KHAM | 6/27/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by the plan's focus upon spatial concepts, utterance expansion, and pronoun usage; note cueing guide on prior page |
| B | KHAM | 6/29/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by the plan's focus upon utterance expansion and plural usage; note cueing guide on prior page |
| B | MA | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of final consonant deletion," "phonological process of syllable deletion," and "stopping," and the plan's focus upon the patient's receptive and expressive language conceptual, semantic, grammatical, and MLU (mean length of utterance) |

| <u>Findings of Fact for Petitioner's Plans of Care and Treatment Notes</u> | | |
|--|-----------------------|----------------------------|
| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> |
| B | MA | 7/13/2011 |
| B | MA | 8/4/2011 |
| B | DA | PLAN |
| B | DA | 6/17/2011 |
| B | DA | 7/12/2011 |
| C | AL | PLAN |
| C | AL | 5/25/2011 |

needs of "part/whole relationships," "descriptive concepts," "regular plural usage," and "3-4 word utterance" productions.

Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the patient's "phonological process of final consonant deletion," "syllable reduction," and "3-4 word utterance productions"; the intervention of "minimal pairs" was used

Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the patient's "phonological process of final consonant deletion," and "phonological process of syllable deletion;" the intervention of "minimal pairs" was used

Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of syllable reduction," "phonological process of stopping," "phonological process of prevocalic voicing," and the plan's focus upon the patient's receptive and expressive language conceptual, semantic, grammatical, and MLU (mean length of utterance) needs of "2-4 word utterance" productions, "verb identification," and "use of words"

Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the "imitation/production of 2-4 word utterances" with the use of cueing and carrier phrases ("shapes ___ please") and use of "play food items" to provide Child-Centered therapy techniques

Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the "imitation/production of 2-4 word utterances" with the use of cueing/promoting and carrier phrases ("shapes ___ please") and use of "bathroom" and "writing/drawing activity" to provide Child-Centered therapy techniques

Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of final consonant deletion," "phonological process of cluster reduction," "phonological process of gliding," and "phonological process of vocalization" and the plan's focus upon the patient's receptive and expressive language conceptual, semantic, and grammatical needs of "locate noun+ 2-identifying adjectives," "identify complex body parts," "name a category," and "qualitative concepts of 'short' and 'long'"

Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion," and "cluster reduction." The therapist targeted the sounds at the word level.

| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> | <u>Findings of Fact for Petitioner's Plans of Care and Treatment Notes</u> |
|--------------------------------|-----------------------|----------------------------|---|
| C | AL | 6/22/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion" and "category naming." The therapist worked with the patient at the word level. |
| C | AL | 6/29/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion," "indicating advanced body parts," and "category naming." The therapist worked with the patient at the word level and the intervention of "minimal pairs" was used. |
| C | AL | 7/19/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion," and "gliding." The therapist worked with the patient at two levels: word level for gliding and sentence level for final consonant deletion. |
| C | DE | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of cluster reduction," "phonological process of gliding," "phonological process of stopping," "phonological process of deaffrication," and the plan's focus upon the receptive and expressive language conceptual, semantic, and grammatical needs of "more/most," "how/why/hypothetical questions," "name a category," and "pronoun usage (he/she/I)". |
| C | DE | 3/25/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "pronoun usage of 'I'" with and without the cue of a "carrier phrase," "wh-questions," and "category naming." |
| C | DE | 4/14/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "pronoun usage of 'I'" with and without a "cue," "wh-questions," and the phonological process of "cluster reduction." The therapist targeted the sounds at the word level. |
| C | DE | 4/21/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "cluster reduction" and "gliding." The therapist worked with the patient at the word level and provided cues. The therapist also intervened by targeting "wh-questions" and "pronouns." |
| C | DE | 5/3/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "cluster reduction." The therapist worked with the patient at the word level. The therapist also intervened by targeting "pronoun usage of 'I'" with without a "cue" and "category naming." |

| <u>Findings of Fact for Petitioner's Plans of Care and Treatment Notes</u> | | | |
|--|-------------------|------------------------|--|
| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> | |
| C | DE | 5/19/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "cluster reduction." The therapist worked with the patient at the word level. The therapist also intervened by targeting "category naming." Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's receptive and expressive language conceptual, semantic, grammatical, and MLU (mean length of utterance) needs of "produce 2-4 word utterances," "identify/name animals, clothes, food, household items," "identify/name actions in pictures," "Identify/use spatial concepts," "understand/use regular plurals." |
| D | CA | PLAN | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "2-4 word utterances" and animal and clothing vocabulary by identification ("R"), with a verbal cue ("E-Rep"), and expressively ("E"). |
| D | CA | 4/7/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "2-4 word utterances" with the use of the therapist's carrier phrase "I want + _____" and spatial concepts by identification ("R") and with a verbal cue ("E-Rep"). |
| D | CA | 5/19/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by providing an informal assessment of therapy goals noting that cueing is no longer needed for "plurals," sound substitutions (p/ for /b/, /t/ for /d/, and /d/ for /g/. The therapist also noted that the child needs to decrease his use of "final consonant deletion," increase his vocabulary, and that the child is using some "fronting." |
| D | CA | 8/16/2011 | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of syllable reduction," "phonological process of gliding /l/ only," "phonological process of fronting," "phonological process of stopping." The plan also focuses upon the patient's receptive and expressive language conceptual, semantic, grammatical, and MLU (mean length of utterance) needs of "spatial concepts," "how/why questions," and "identify/label categories" |
| F | NO | PLAN | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "syllable reduction" and "fronting." The therapist worked with the patient at both the isolation and word level. The therapist targeted these phonological processes in the initial position of the words given to the patient. |
| F | NO | 4/11/2011 | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of final consonant deletion," "phonological process of fronting," "phonological process of stopping," and "phonological process of vocalization." |
| G | MA | PLAN | |

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Findings of Fact for Petitioner's Plans of Care and Treatment Notes

| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> | |
|--------------------------------|-----------------------|----------------------------|--|
| G | MA | 4/15/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion" using final/k/ words. The therapist targeted the process at the word level. The therapist targeted the process at the final position of all of the words. |
| G | MA | 5/13/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion" and "fronting." The therapist targeted these processes at the syllable and word level. |
| G | MA | 6/1/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion." The therapist targeted the phonological process at the phrase level. |
| G | MA | 7/20/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "fronting" (as defined by the "hard C" and "K" sound in the words). The therapist targeted the process at the word level. |
| H | JA | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of vocalization," "phonological process of fronting," and "phonological process of deaffrication." |
| H | JA | 4/5/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "fronting." The therapist targeted the sounds at the isolation and at word level. The therapist targeted these sounds at the levels of isolation and word level and in the initial and final positions of words. |
| H | JA | 5/4/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the process of "deaffrication" (i.e. "cage") and "fronting" (i.e. sing, tick tock, shoe, squish, ring, crash). The therapist targeted the sounds at the word level. The therapist targeted the sounds at the initial and final position of words. The therapist noted errors in the production of /sh/ were continuing to be fronted to an /s/ production. |
| J | JO | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's receptive and expressive language conceptual, semantic, grammatical, and MLU (mean length of utterance) needs of "imitate 2-4 word utterances," "spontaneously produce 2-4 word utterances," "identify/name body parts, animals, clothes, food items," "identify/name actions," and "understand/use spatial concepts." |
| J | JO | 3/23/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting a cued ("I" for imitation) and uncued ("S") 2-4 word utterance productions, |

| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> | <u>Findings of Fact for Petitioner's Plans of Care and Treatment Notes</u> |
|--------------------------------|-----------------------|----------------------------|--|
| J | JO | 6/30/2011 | a joint book reading of "I Spy Little Leaves" and a verbal cue ("E-Rep") for naming productions of "spatial concepts." Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting clothing vocabulary receptively ("R") with cueing (as noted by the "check") and expressively ("E") without cueing (as noted by the vertical line). The therapist targeted spatial concepts by identification ("R"), with a verbal cue ("E-Repeated"), and expressively ("E") with "modeling." The therapist also targeted "2-4 word utterances" by using "modeling." Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting 2-4 word utterances with cueing (as noted by the "check") and without cueing (as noted by the two vertical lines). The therapist targeted animal and household vocabulary expressively ("E") with "prompting." Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's receptive and expressive language conceptual, semantic, grammatical, and MLU (mean length of utterance) needs of "identifying/naming simple spatial concepts," "understanding/using simple descriptive concepts," "using 'is+ing,'" "using 3-4 words in spontaneous speech." |
| J | JO | 7/14/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting spatial concepts receptively ("R"), with a verbal cue ("E-Rep"), and expressively ("E") without cueing. The therapist targeted also targeted "2-4 word utterances." Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's ability to "produce /l/ in all positions of words" and "produce voiceless [sic] /th/ in all positions of words," as well as upon the patient's receptive and expressive language conceptual, semantic, and grammatical needs of "identifying pictured quantities by number and amount (e.g. half/whole)," "identifying pictured time concepts," "and using regular/irregular past tense verbs." |
| M | JI | PLAN | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phoneme /l/. The therapist targeted these sounds in two different positions of words: "I" (representing targeting of the sound in the "initial position" of words) and "M" (representing targeting of sounds in the "medial" position). The therapist targeted the sounds at two different levels: /l/ at word level and /l/ at the sentence level. |
| M | JI | 5/31/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting spatial concepts receptively ("R"), with a verbal cue ("E-Rep"), and expressively ("E") without cueing. The therapist targeted also targeted "2-4 word utterances." Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's ability to "produce /l/ in all positions of words" and "produce voiceless [sic] /th/ in all positions of words," as well as upon the patient's receptive and expressive language conceptual, semantic, and grammatical needs of "identifying pictured quantities by number and amount (e.g. half/whole)," "identifying pictured time concepts," "and using regular/irregular past tense verbs." |
| M | BR | PLAN | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phoneme /l/. The therapist targeted these sounds in two different positions of words: "I" (representing targeting of the sound in the "initial position" of words) and "M" (representing targeting of sounds in the "medial" position). The therapist targeted the sounds at two different levels: /l/ at word level and /l/ at the sentence level. |
| M | BR | 4/1/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phoneme /l/. The therapist targeted the sounds in two different positions |
| M | BR | 4/7/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phoneme /l/. The therapist targeted the sounds in two different positions |

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| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> | <u>Findings of Fact for Petitioner's Plans of Care and Treatment Notes</u> |
|--------------------------------|-----------------------|----------------------------|---|
| M | BR | 4/19/2011 | of words: "r" (representing the targeting of sounds in the "initial position" of words) and "M" (representing the targeting of sounds in the "medial" position of words). The therapist targeted the /l/ sounds at the word level. The therapist also targeted productions of "past tense verbs" and "quantities" concepts. |
| M | BR | 5/19/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonemes /th/ and /l/. The therapist targeted the sounds in both the "initial" and "medial" positions of words. The therapist targeted the sounds at two levels: /th/ at the syllable level and /l/ at the word level. |
| M | BR | 5/20/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phoneme /th/ and /l/. The therapist targeted these sounds in two different positions of words: "initial" and "final" positions of words. The therapist targeted sounds at three levels: /th/ at word and phrase level; and /l/ at phrase and sentence level. |
| M | BR | 5/20/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phoneme /l/. The therapist targeted the sounds in three different positions: "initial," "medial," and "final." The letter "r" representing the word "final." The therapist targeted these sounds at two levels: /l/ at word and conversational level. |
| M | DA | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of gliding," "phonological process of deaffrication," and "phonological process of stopping," as well as upon the patient's receptive and expressive language conceptual, semantic, and grammatical needs of "name items in a category," "name a category," "object identify an object that does not belong to a group," "understand/use passive voice verbs," and "understand/use past tense verbs." |
| M | DA | 4/25/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phoneme /l/. The therapist targeted this sound in the "initial" position of words only. The therapist targeted the sounds at two levels: /l/ at isolation and word level. Therapist mentions overgeneralization of her phonetic placement cue (i.e. "tried so hard to elevate tongue..."). |
| M | DA | 5/9/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "deaffrication" (as noted by the words targeted with /sh/ and /ch). The therapist targeted sounds in both the initial, medial, and final position. The therapist targeted the sounds at the word level. The therapist also targeted "identify objects not in a category." |

| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> | <u>PLAN</u> | <u>Findings of Fact for Petitioner's Plans of Care and Treatment Notes</u> |
|--------------------------------|-----------------------|----------------------------|-------------|---|
| N | CA | | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's receptive and expressive language conceptual, semantic, grammatical needs, and MLU (mean length of utterance) needs of "follow 1-step directions," "identify/name 10 animals/clothes, food, household items," "identify/name spatial concepts," "spontaneously produce 3-4 words," and "answer 'what' and 'where' questions." |
| N | CA | 5/23/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "2-4 word" utterances without cueing ("S") to assess generalization, following "1-step" directions, and "food" vocabulary receptively ("R"), with a verbal cue ("E-Rep"), and expressively ("E") without cueing. |
| N | CA | 6/8/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "2-4 word" utterances without cueing ("S") to assess generalization and "vehicle" vocabulary with a verbal cue ("E-Rep") using the carrier phrase "I want + _____." |
| N | CA | 7/7/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "2-4 word" utterances with the use of the carrier phrase "I see _____/I want _____/It is _____," providing a verbal cue ("I" for imitation) for the utterances "what's this" and "where go," and modeled the name of "animals exposed to in book." The therapist also targeted 1-step directions as noted by the "check." |
| N | CA | 7/19/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "animal" vocabulary expressively ("E"), "2-4 word" utterances without cueing ("W") to assess generalization, answering "what" and "where" questions with cueing (as noted by the "check," "clothing" vocabulary with and without cueing (as noted by the "vertical line" vs. "check). The therapist also used the visual cue of "mouthing the phrase" to prompt "independent" speech. |
| S | JA | | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of final consonant deletion," "phonological process of syllable reduction," "phonological process of fronting," "phonological process of stopping," and "phonological process of prevocalic voicing." |
| S | JA | 6/6/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "final consonant deletion." The therapist targeted the phonological process at the phrase level. The therapist focused the process in the final position of words. The therapist informally assessed that Jayden was weak in color identification. |

Findings of Fact for Petitioner's Plans of Care and Treatment Notes

| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> | |
|--------------------------------|-----------------------|----------------------------|--|
| S | JA | 6/9/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "syllable reduction." The therapist targeted these phonological processes at the word level. The therapist targeted the process in all positions of the words. |
| S | VA | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of syllable reduction," "phonological process of stopping," and "phonological process of postvocalic devoicing." |
| S | VA | 6/7/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "stopping." The therapist targeted the process at the phrase level. |
| S | JE | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's receptive and expressive language conceptual, semantic, and grammatical needs of "identify a noun with two identifying adjectives," "identify an object that doesn't belong," "understand/use passive voice verbs," "repeat sentences of 5+ words," "understand/use past tense verbs," and "respond to 'why' questions." |
| S | JE | 4/13/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "identification of an object that doesn't belong with a group" and reducing the difficulty ("difficulty w/ #2 in a field of four. Decrease to a field of 3 and still had difficulty"). The therapist also targeted repeating sentences of 5+ words with no cues. |
| S | JA | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's receptive and expressive language conceptual, semantic, and grammatical needs of "identify and name colors," "identify and name spatial concepts," "understand/complete age-appropriate analogies," and "answer questions about hypothetical events." |
| S | JA | 8/1/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting understanding and completing age-appropriate analogies. |
| S | JA | 8/10/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting identifying and naming colors. |
| T | MI | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of fronting," "phonological process of stopping," "phonological process of gliding," and "phonological process of deaffrication." |
| T | MI | 5/5/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "fronting." The therapist targeted the process at |

| <u>Patient's Last Name</u> | | <u>First Name</u> | <u>Date of Service</u> | <u>Findings of Fact for Petitioner's Plans of Care and Treatment Notes</u> |
|----------------------------|----|-------------------|------------------------|--|
| T | MI | 6/8/2011 | | both the sentence and structured conversation levels. The therapist provided "carrier phrases" to assist the child. Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "gliding." The therapist targeted the work at the word level. The therapist targeted the phonological process in all word positions: initial, medial and final. |
| T | MI | 7/21/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "gliding" (as noted by the therapist choice of words targeting /l/). The therapist targeted the process at the word level. The therapist targeted the phonological process in all of the word positions: initial, medial and final. |
| T | MI | 8/2/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "deaffrication," "gliding," "fronting" and "stopping." The therapist targeted these processes at the word, sentence and conversational levels. The therapist made the informal assessment that the "ending /l/ and blends" are "more difficult." |
| T | MI | 8/22/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "gliding" (as noted by the practice of /l/ and /r/ words). The therapist targeted the process at both the phrase and sentence level. The therapist targeted phonological process in the initial position of words. |
| V-V | MI | PLAN | | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's receptive and expressive language conceptual, semantic, grammatical, and MLU (mean length of utterance) needs of "understand part/whole relationships," "understand/label simple descriptive concepts," "understand/label quantity concepts," "use verb+ing," and "identify/name at least 10 household items, toys, school items." |
| V-V | MI | 3/7/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting quantity concepts (one/some/rest/all) and direct teaching ("introduced") the concept of "whole/part." |
| V-V | MI | 5/4/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "4-5 word" utterances with cueing ("R" for "repetition") and without cueing ("S") to assess generalization, "is verb-ing" by using "min[imal] cues," and "some/all." |
| V-V | MI | 5/9/2011 | | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "4-5 word" utterances with cueing ("I" for "imitation") and without cueing |

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Findings of Fact for Petitioner's Plans of Care and Treatment Notes

| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> | |
|--------------------------------|-----------------------|----------------------------|---|
| V-V | MI | 8/16/2011 | ("S") to assess generalization and "household" and "school items" vocabulary. The therapist also informally assessed the household and school vocabulary the child was unable to name. Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "negatives" and limiting the selection to "a field of 3," targeting "function" of objects with cueing (as noted by the "check"), and targeting naming categories with and without cueing (cueing noted with a "check" and without with a "-"). |
| V-V | MI | 8/29/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "whole/part" relationships by cueing with a carrier phrase ("show me the eye of the ____" and "nose of the ____") and negatives by cueing with a carrier phrase "which one is not ____?" |
| V-V | SA | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's receptive and expressive language conceptual, semantic, grammatical, and MLU (mean length of utterance) needs of "repeat 2-4 word utterances," "produce 2-4 word utterances," "identify/name 5 body parts/clothes/animals/food items," "identify/name actions in pictures," and "understand/use spatial concepts." |
| V-V | SA | 5/19/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "2-4 word" utterances without cueing ("S") to assess generalization, "spatial" concepts without cueing to assess generalization, and "animal" vocabulary receptively ("R"), with a verbal cue ("E-Rep"), and expressively ("E") without cueing. |
| V-V | SA | 6/16/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting "2-4 word" utterances with cueing ("I") and a carrier phrase "I see ____". The therapist targeted "body part" and "animal" vocabulary with a verbal cue ("I" for imitation) and carrier phrase (i.e. "____ please"). |
| W | JA | PLAN | Petitioner's plan of care contained defined goals and specific content by the plan's focus upon the patient's "phonological process of syllable reduction," and "phonological process of fronting." |
| W | JA | 4/11/2011 | Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "syllable reduction" and "fronting." The therapist targeted these processes at both the syllable and word level. The therapist provided "visual" and "tactile cues" with the work on syllable reduction and separately assessed the child's productions without the cues present. |

| <u>Findings of Fact for Petitioner's Plans of Care and Treatment Notes</u> | | |
|--|-----------------------|----------------------------|
| <u>Patient's Last Name</u> | <u>First Name</u> | <u>Date of Service</u> |
| W | JA | 5/2/2011 |
| W | JA | 7/13/2011 |
| WI | JA | 7/18/2011 |

Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "syllable reduction" and "fronting." The therapist provided the intervention of "minimal pairs" to target both processes.

Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "syllable reduction" and "fronting." The therapist provided the intervention of "minimal pairs" to target both processes.

Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by targeting the phonological process of "syllable reduction" and "fronting." The therapist provided the intervention of "minimal pairs" to target both processes.

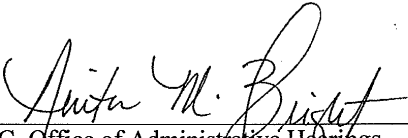
Speakeasy Therapy v NCHHS 12 DHR 7296 Attachment A Page 12

On this date mailed to:

CURTIS B VENABLE
OTT CONE & REDPATH, PA
PO BOX 3016
ASHEVILLE, NC 28802
ATTORNEY FOR PETITIONER

THOMAS J CAMPBELL
N.C. DEPARTMENT OF JUSTICE
9001 MAIL SERVICE CENTER
RALEIGH, NC 27699
ATTORNEY FOR RESPONDENT

This the 25th day of April, 2013.



N. C. Office of Administrative Hearings
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Raleigh NC 27699-6714
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STATE OF NORTH CAROLINA

COUNTY OF ROBESON

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12DHR07440

| | |
|---|-----------------------|
| Faline Dial Petitioner, v. N. C. Dept of Health and Human Services, Division of Medical Assistance Respondent. | FINAL DECISION |
|---|-----------------------|

This contested case was heard before the Undersigned on December 12, 2012, in Fayetteville, North Carolina.

APPEARANCES

For Petitioner: Curtis B. Venable, Attorney at Law
OTT CONE & REDPATH, P.A.
P.O. Box 3016
Asheville, NC 28802

For Respondent: Thomas J. Campbell, Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

ISSUE

Whether the Department of Health and Human Services (DHHS) Hearing Officer correctly decided to uphold the decision of the Division of Medical Assistance (DMA) to review Speech/Language-Audiology Therapy Services provided to Medicaid recipients by Petitioner Dial, and that Dial received an overpayment of \$84,016.00 as the result of the allegedly improperly documented 45 claims for Speech/Language-Audiology Therapy Services delivered to Medicaid recipients.

JURISDICTION

As stipulated by the parties: This matter is in the appropriate form and venue. The matter was filed in a timely and appropriate fashion. All parties necessary are joined.

BURDEN OF PROOF

Respondent bears the burden of proof in this matter, pursuant to N.C. Gen. Stat. §108C-12(d).

DOCUMENTARY EVIDENCE

As stipulated by the parties as to authenticity and admissibility:

The parties agreed to the authenticity and the admissibility of the following:

For Respondent:

1. Medicaid Provider Agreement dated 12/16/09 executed by Faline Dial)
2. DMA Clinical Coverage Policy 10A (effective December 1, 2009)
3. Records Request Letter dated 4/2/2012
4. All Speech N Progress records which were provided by Petitioner to CCME for the audit that is the subject of the within case.
5. Audit tool sample
6. Summary of findings charts prepared by Alicia Browning
7. CV for Alicia Browning
8. Charts of paid/overpaid amounts prepared by John Feaganes, Dr. PH
9. CV for John Feaganes, Dr. PH
10. Diagram prepared by Dr. Feaganes to illustrate statistical concepts (demonstrative)
11. RAT-STATS Variable Unrestricted Appraisal dated 6/5/2012
12. Tentative Notice of Overpayment dated 6/7/2012
13. CCME Response to In-Person Appeal dated 7/2/2012
14. Email from Alicia Browning to Hearing Officer Jacobs dated 7/10/12 re: post-hearing review of materials provided by Petitioner
15. RAT-STATS Variable Unrestricted Appraisal dated 7/31/2012
16. Corrected Notice of Decision dated August 8, 2012, PI Case #2012-0551
17. RAT-STATS Variable Unrestricted Appraisal dated 12/10/2012

For Petitioner:

None.

WITNESSES**Witnesses for Petitioner:**

Faline Dial, SLP

Witness for Respondent:

Alicia Browning, CCME
John Feaganes, Dr. PH

Expert Witnesses:

The parties stipulated that Alicia Browning possesses the scientific, technical or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue and by virtue of the knowledge, skill, experience, training or education of Ms. Browning, she qualifies as an expert in the area of speech-language pathology pursuant to Rule 702 of the North Carolina Rules of Evidence.

The parties stipulated that Faline Dial possesses the scientific, technical or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue and by virtue of the knowledge, skill, experience, training or education of Ms. Dial, she qualifies as an expert in the area of speech-language pathology pursuant to Rule 702 of the North Carolina Rules of Evidence.

The parties stipulated that John Feaganes, Dr. PH possesses the scientific, technical or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue and by virtue of the knowledge, skill, experience, training or education of Dr. Feaganes, he qualifies as an expert in the area of statistics pursuant to Rule 702 of the North Carolina Rules of Evidence.

BASED UPON the preponderance of the admissible evidence or the lack thereof, the undersigned makes the following:

FINDINGS OF FACT

1. Petitioner does not dispute the following findings from the Hearing Officer's decision:
 - That the Petitioner received an overpayment in the amount of \$68.25 for the claim billed for Patient McL, S for services rendered on 06/23/2011.
 - That the Petitioner received an overpayment in the amount of \$68.25 for the claim billed for Patient Re, J for services rendered on 04/11/2011.
 - That the Petitioner received an overpayment in the amount of \$68.25 for the claim billed for Patient Re, J for services rendered on 07/28/2011.
2. Respondent conducted a review of Petitioner's Medicaid Speech/Language-Audiology Therapy services claims with dates of service between March 1, 2011 and August 31., 2011 by reviewing 100 records.
3. During the period reviewed, Petitioner conducted 3352 events covered by Respondent, with a total amount paid by Respondent to Petitioner of \$228,732.96.
4. Respondent informed Petitioner by a document entitled "Tentative Notice of Overpayment" (Resp. Ex. 13) dated June 7, 2012 of its initial determination that Petitioner had submitted allegedly erroneous claims in 48 out of 100 records.

5. The value of the allegedly erroneous 48 records totaled \$6,825.
6. Respondent extrapolated the alleged errors to Petitioner's total amount received (\$228,732.96) and alleged a total overpayment of \$90,781.00.
7. Subsequent to Petitioner's request, Respondent conducted an informal reconsideration of the original tentative overpayment.
8. Respondent's informal reconsideration modified the original findings by determining that 45 records were in error, with a total value of \$3071.25 (Resp. Ex. 18 & 19A).
9. Respondent's informal reconsideration modified the original findings by determining an extrapolated amount in error of \$84,016.00.
10. In providing Speech/Language-Audiology Therapy services, Petitioner documented the activities between the patient and the provider of clinical service by producing a handwritten note for each patient's date of service.
11. Respondent's findings of Petitioner's alleged errors arose from a review of Petitioner's handwritten note for each patient's date of service.
12. Respondent's found that in each instance that Petitioner's documentation of treatment failed to contain "[d]escription of services (intervention and outcome/client response) performed...."
13. Patient Be, L, date of service 3/2/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "max sentence cues" and "using word modeling cues."
14. Patient Br, J, date of service 3/16/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "sound/syllable cues" and "repetition cues" and "giving picture cues and field of 2."
15. Patient Br, C, date of service 3/21/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "physical cues, verbal cues hand-over-hand cues to demonstrate correct response."
16. Patient Br, J, date of service 4/18/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "few visual and auditory cues."
17. Patient Bu, R, date of service 5/12/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "synonym cues" and "antonym cues."
18. Patient Ca, M, date of service 3/9/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "word modeling cues" and "max word modeling cues."
19. Patient Co, K, date of service 5/12/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "physical cues, auditory cues" and "repetition cues."
20. Patient Co, J, date of service 6/23/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by utilizing "auditory cues" and working with the patient to "correct placement of articulators."

21. Patient Co, J, date of service 6/28/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "auditory cues" to work with the patient on various word sounds.

22. Patient De, D, date of service 4/8/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "confrontational naming cues" and "auditory cues."

23. Patient Do, G, date of service 6/20/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "pictures cues, confrontational cues and imitation of animal sounds, sound cues" used.

24. Patient Fa, R, date of service 6/3/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "physical cues" and "picture cues" and "using confrontational naming techniques."

25. Patient Gr, C, date of service 3/25/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "max word cues" and "word modeling cues."

26. Patient Hu, D, date of service 4/26/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by interacting with the patient "with books, blocks, repetition cues" and "coloring sheets (animals, objects), circle clothing, sound/syllable cues."

27. Patient Hu, S, date of service 5/6/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "confrontational naming cues" and "repetition cues."

28. Patient Hu, S, date of service 6/3/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "max. repetition cues" and "word cues."

29. Patient Hu, S, date of service 6/9/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "max. repetition cues" and "max. word modeling."

30. Patient Hu, S, date of service 6/24/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "max. repetition cues."

31. Patient Ja, Ja, date of service 5/11/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "physical cues" and "sounds modeled by clinician" and "physical/verbal cues" and "words modeled by clinician giving picture cues."

32. Patient Ja, Je, date of service 5/23/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "sound cues" and "physical/verbal cues" and "picture/verbal cues" and "verbal/physical cues."

33. Patient Ja, Je, date of service 7/6/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by utilizing "physical cues" and "model/picture cues" and "sounds modeled by clinician" and giving the patient "physical/verbal cues."

34. Patient Ja, Je, date of service 7/19/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by "words modeled by clinician/picture cues given" and giving the patient "sound model" and "physical cues" and "verbal/physical cues."

35. Patient Ja, Je, date of service 8/22/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "physical cues," "verbal cues," "word model/picture cues" and physical/verbal cues."

36. Patient Jo, N, date of service 3/8/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "picture cues" and "sound/syllable cues" and "sentence model."

37. Patient Jo, J, date of service 4/19/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "sound/syll. [syllable] cues" and "sentence completion" and "using confrontational naming."

38. Patient Jo, J, date of service 4/21/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by "using confrontational naming" and "picture cues" and giving the patient "sound/syll. [syllable] cues."

39. Patient Lo, Cha, date of service 6/23/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by working with the patient to "correct placement of articulators" and "using confrontational naming cues."

40. Patient Lo, Chr, date of service 3/1/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "physical cues" and "modeled given objects presented to patient" and giving "sound models" and "physical/verbal cues."

41. Patient Lo, D, date of service 6/1/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "verbal reminders" and "corrective feedback techniques" to work on targeted sounds.

42. Patient Lo, D, date of service 5/26/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "corrective feedback techniques and verbal reminders for correct production" of specific word sounds.

43. Patient Lo, To, date of service 3/16/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "sound cues . . . as needed."

44. Patient Lo, T, date of service 6/28/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by working with the patient to "correct placement of articulators" and utilizing "confrontational naming cues."

45. Patient Lo, D, date of service 5/3/2011: Petitioner's notes recorded that the provider of clinical services conducted an evaluation of the patient.

46. Petitioner billed Respondent for a session of treatment for this patient for the date of service in error. Petitioner should have billed Respondent for an evaluation.

47. As a result of Petitioner's error, Respondent paid Petitioner a lesser amount than would have been paid if Petitioner had not committed the error.

48. Patient McP, T, date of service 5/12/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "sentence model" and "physical cues."

49. Patient Me-Co, K, date of service 3/8/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "picture cues/sentence model" and "physical cues" and "picture cues."

50. Patient Mo, K, date of service 4/18/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "sound/syllable cues" and "physical cues" and "corrective feedback" and "picture cues."

51. Patient Pi, J, date of service 3/15/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by using "picture cues" and "confrontational naming cues" and "physical cues."

52. Patient Ri, N, date of service 5/16/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by providing "corrective feedback" and "sound/syll. [syllable] cues" and "picture cues giving corrective feedback."

53. Patient Ro-Pe, J, date of service 3/30/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving the patient "verbal cues" and "picture cues" and "verbal/physical cues."

54. Patient Sc, Co, date of service 6/2/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by giving "picture cues" and "using sentence completion" and "using picture cues/corrective feedback techniques."

55. Patient St, H, date of service 4/22/2011: Petitioner's treatment notes recorded that the provider of clinical services intervened with the patient by working with the patient on "corrective placement of articulators" to work on specific word sounds.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to 150B of the North Carolina General Statutes.
2. Respondent bears the burden of proof in this matter pursuant to N.C. Gen. Stat. §108C-11(d).
3. The Code requires proper documentation. Likewise, each provider signs a "participation agreement" wherein he or she agrees to operate and provide services in accordance with state law and all manner of rules, regulations, policies, manuals, bulletins and the like which would command proper documentation.
4. The North Carolina Administrative Code has two provisions which are entitled "Recoupment", 10A NCAC 22F .0601 and 10A NCAC 22F .0706.
5. 10A NCAC 22F .0706 speaks to recoupment of overpayments and how the money will be distributed.

6. The Code states at 10A NCAC 22F .0601 "the Medicaid agency will seek full restitution of any and all improper payments made to providers by the Medicaid program." (Emphasis added) "Improper payments" are not defined in the Code; however, in reading *in pari materi* other sections one may discern the meaning and intent.

7. 10A NCAC 22F .0103 also similarly states that the Division shall institute methods and procedures to, among other things, "recoup improperly paid claims."

8. The Administrative Code states at 10A NCAC 22F .0103 that "The Division shall develop, implement and maintain methods and procedures for preventing, detecting, investigating, reviewing, hearing, referring, reporting, and disposing of cases involving fraud, abuse, error, overutilization or the use of medically unnecessary or medically inappropriate services." (Emphasis added). "Error" is the only misdeed applicable; i.e., there are no allegations of fraud, abuse, overutilization or use of medically unnecessary or inappropriate services.

9. There has been no assertion or allegation in this proceeding that Petitioner was in any way responsible for fraud as defined in N.C.G.S. §108A-63, i.e., there is no allegation or assertion of the Petitioner "knowingly and willfully making or causing to be made any false statement or representation of material fact" or other type of fraud as defined therein.

10. Respondent also moves to extrapolate the result of the audit findings in this action to the entirety of the Medicaid payments received by Petitioner.

11. N.C. Gen. Stat. §108C-5(i) requires that "[p]rior to extrapolating the results of any audits, the {Respondent} shall demonstrate and inform the provider that (i) the provider failed to substantially comply with the requirements of State or federal law or regulation...."

12. The Principle of Ethics II of the North Carolina Board of Examiners for Speech and Language Pathologists and Audiologists (21 N.C.A.C. 64 .0303) requires in relevant part that the "Licensees shall maintain adequate records of professional services rendered."

13. The Board, in 21 N.C.A.C. 64 .0209(a), directed that "[t]he definition of 'adequate records of professional services' required to be maintained by Rule .0303(4) shall include:

- (1) The full name of the patient;
- (2) The nature of the service provided;
- (3) The date services were provided;
- (4) The identification of the person providing the service;
- (5) The identification of the person preparing or signing the record if not by the person providing the service."

14. Respondent proffered the document entitled as "DMA Clinical Coverage Policy 10A (effective December 1, 2009)" as binding upon Petitioner as permitted by N.C. Gen. Stat. §108A-54.2.

15. Respondent issued Clinical Coverage Policy 10A to direct the provision of "outpatient specialized therapies," (therapeutic physical, occupational, speech, respiratory and audiologic services) and the billing for such services for Medicaid recipients.

16. The relevant portion of Clinical Coverage Policy 10A (Section 7.2 Documenting Services) requires that "[e]ach provider must maintain and allow [Respondent's Division of Medical Assistance] to access the following documentation for each individual:

(d) Description of services (intervention and outcome/client response) performed and dates of service."

17. Respondent proffered no binding definition for "intervention." Stedman's Medical Dictionary (2002) defines the word as "interference so as to modify a process or situation." Merriam-Webster Dictionary defines the word as "the act or fact or a method of interfering with the outcome or course especially of a condition or process (as to prevent harm or improve functioning)."

18. In December, 2010, Respondent offered to providers its non-binding interpretation and guidance to practitioners concerning the documentation requirements of Clinical Coverage Policy 10A in an issuance entitled the North Carolina Medicaid Bulletin (available online at: <http://www.ncdhhs.gov/dma/bulletin/1210bulletin.htm>). The issuance is non-binding as directed by N.C. Gen. Stat. §150B-18 as it was not promulgated pursuant to the requirements of N.C. Gen. Stat. Chapter 150B.

19. Specific to speech therapy, the Bulletin contained the following "excerpts" to "serve as examples of [the written daily note documentation] requirements specific to "Description of Services (intervention and outcome/client response):"

Treatment included imitation, modeling of behavior, and tactile cues to elicit turn taking during structured pragmatic activities (e.g., "go fish"). Patient was most responsive to tactile cues and was able to take turns with moderate cueing and 60% accuracy. At end of session, instructed Mom about family activities and effective cues that could be used to elicit turn taking.

20. Both speech therapy witnesses, Ms. Dial and Ms. Browning were accepted as experts concerning speech therapy. Ms. Browning testified as to her knowledge concerning Respondent's documentation requirements. This decision has considered Ms. Browning testimony and knowledge and accorded appropriate weight to her opinions.

21. Ms. Browning testified that Respondent's documentation requirements call for the speech therapist to provide elaboration as to the specific treatments provided to patients and that simple references to "cuing" would not be sufficient.

22. The records of Petitioner's delivery of speech therapy services contain various descriptions of the services provided to patients. Examples include, inter alia:

- "word modeling cues"
- "confrontational naming cues" and "repetition cues"
- "physical cues" and "sounds modeled by clinician" and "physical/verbal cues" and "words modeled by clinician giving picture cues"
- "model/picture cues"
- "using confrontational naming techniques"
- "modeled given objects presented to patient"
- "verbal reminders" and "corrective feedback techniques" to work on targeted sounds
- "sentence model"
- "max. repetition cues" and "max. word modeling."
- "sounds modeled by clinician."

23. With the exception of the three dates of service conceded by the Petitioner as being in error, each of the records of Petitioner's delivery of speech therapy services contains such descriptions of the services provided to patients for each the remaining disputed date of service.

24. With the exception of the three dates of service conceded by the Petitioner as being in error, each of the records of Petitioner's delivery of speech therapy services for each of the remaining disputed dates of service document "the act or fact or a method of interfering with the outcome or course especially of a condition or process (as to prevent harm or improve functioning)."

25. With the exception of the three dates of service conceded by the Petitioner as being in error, each of Petitioner's descriptions of services for each of the remaining disputed dates of service are substantially similar to the except offered by Respondent's Bulletin noted above.

26. As a result, Petitioner substantially complied with the requirements of Respondent's Clinical Coverage Policy 10A, Section 7.2 by maintaining documentation of the "description of services (intervention and outcome/client response) performed...."

27. Petitioner's error in billing services rendered to Patient Lo, D, date of service 5/3/2011, resulted in no loss of funds for Respondent. Respondent paid Petitioner a lesser amount for treatment than it would have paid Petitioner for an assessment of the patient.

28. Petitioner's "records of professional services" for each disputed date of service include the "the nature of the service provided" required by 21 N.C.A.C. 64 .0209(a) and .0303(4).

29. With the exception of the three dates of service conceded by the Petitioner as being in error, Respondent has failed to demonstrate how Petitioner "failed to substantially comply with the requirements of State or federal law or regulation" as required by N.C. Gen. Stat. §108C-5(i).

30. Respondent has demonstrated error on the part of Petitioner:

- in the amount of \$68.25 for the claim billed for Patient McL, S for services rendered on 06/23/2011;
- in the amount of \$68.25 for the claim billed for Patient Re, J for services rendered on 04/11/2011; and,
- in the amount of \$68.25 for the claim billed for Patient Re, J for services rendered on 07/28/2011.

31. Respondent has demonstrated a total error arising from the three claims detail listed above in the amount of \$204.75,

32. For all other claims details arising from Respondent's PI #2012-0551, Respondent has failed to carry its burden to prove that the Department of Health and Human Services (DHHS) Hearing Officer correctly decided to uphold the decision of the Division of Medical Assistance (DMA) to review Speech/Language-Audiology Therapy Services provided to Medicaid recipients by Petitioner and that Petitioner received an overpayment of \$84,016.00 as a result of improperly documenting claims for Speech/Language-Audiology Therapy Services delivered to Medicaid recipients.

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

FINAL DECISION

Petitioner received an overpayment in the amount of \$68.25 for the claim billed for Patient McL, J for services rendered on 06/23/2011.

Petitioner received an overpayment in the amount of \$68.25 for the claim billed for Patient Re, J for services rendered on 04/11/2011.

Petitioner received an overpayment in the amount of \$68.25 for the claim billed for Patient Re, J for services rendered on 07/28/2011.

Respondent was in error in concluding that all other claims details arising from Respondent's PI #2012-0551 did not satisfy the requirements of Respondent's Clinical Coverage Policy 10A (effective December 1, 2009).

The amount of the recoupment shall be adjusted in accordance with these findings and conclusions of law.

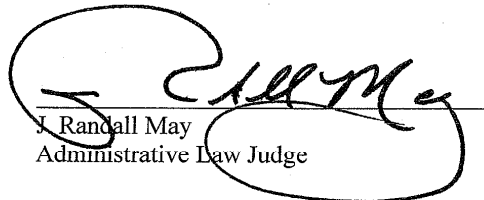
ACKNOWLEDGMENT

It is acknowledged that whenever, in this document, reference is made to the Undersigned, the undersigned Judge, or the Court, reference is being made to the undersigned Administrative Law Judge with the Office of Administrative Hearings.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 7th day of February, 2013.

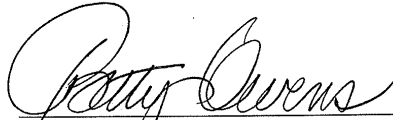

Randall May
Administrative Law Judge

On this date mailed to:

CURTIS B VENABLE
OTT CONE & REDPATH, PA
PO BOX 3016
ASHEVILLE, NC 28802
ATTORNEY - PETITIONER

THOMAS J CAMPBELL
N.C. DEPARTMENT OF JUSTICE
9001 MAIL SERVICE CENTER
RALEIGH, NC 27699
ATTORNEY - RESPONDENT

This the 7th day of February, 2013.



Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6714
Telephone: 919/431-3000
Fax: 919/431-3100

STATE OF NORTH CAROLINA

COUNTY OF HENDERSON

FILED

2013 MAR 19 AM 10:31

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12-DHR-7441

PRN MEDICAL RESOURCES, PLLC, OFFICE OF
ADMIN HEARINGS

Petitioner,

vs.

N.C. DEPT. OF HEALTH & HUMAN
SERVICES, DIVISION OF MEDICAL
ASSISTANCE,

Respondent.

FINAL DECISION

This contested case was heard before Selina M. Brooks, Administrative Law Judge, on January 9, 2013, in Asheville, North Carolina.

APPEARANCES

For Petitioner: Curtis B. Venable, Attorney at Law
OTT CONE & REDPATH, P.A.
P.O. Box 3016
Asheville, NC 28802

For Respondent: Michael Wood, Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

PROTECTIVE ORDER

At the call of this contested case for hearing, the Parties submitted a Joint Motion For Protective Order and, upon consent, a Qualified Protective Order was entered and **the entire record herein placed under seal.**

ISSUE

Whether the Department of Health and Human Services (DHHS) Hearing Officer correctly decided to uphold the decision of the Division of Medical Assistance (DMA) to review Speech/Language-Audiology Therapy Services provided to Medicaid recipients by Petitioner prn Medical, and that prn Medical received an overpayment of \$43,340.00 as the result of the allegedly improperly documented 78 claims for Speech/Language-Audiology Therapy Services delivered to Medicaid recipients.

JURISDICTION

As stipulated by the parties: This matter is in the appropriate forum and venue. The matter was filed in a timely and appropriate fashion. All parties necessary are joined.

BURDEN OF PROOF

Respondent bears the burden of proof in this matter, pursuant to N.C. Gen. Stat. §108C-12(d).

DOCUMENTARY EVIDENCE

The parties stipulated to the authenticity and the admissibility of the following:

For Respondent:

1. DMA Clinical Coverage Policy 10A (effective December 1, 2009)
2. DMA December 2010 Medicaid Bulletin
3. Basic Medicaid Billing Guide, Sept 2009, excerpts
4. CCME Audit tool
5. Medicaid Provider Agreement
6. First Request for Medical Records, 4/2/12
7. Rat-Stats output dated 5/17/12
8. Tentative Notice of Overpayment, 5/18/12
9. Rat-Stats output dated 6/29/12
10. CCME Response to In-Person Appeal, 6/29/12
11. Rat-Stats output dated 7/19/12
12. Notice of Decision, 7/24/12
13. Diagram prepared by Dr. Feaganes to illustrate statistical concepts (demonstrative)
14. Summary chart for 78 claims out-of-compliance
15. All medical records submitted to CCME by Petitioner for this audit (binders).

For Petitioner:

None.

WITNESSES**Witnesses for Petitioner:**

Debra Stierwalt, SLP, owner prn Medical Resources, PLLC

Witness for Respondent:

Cheryl Wessell, SLP, Carolinas Center for Medical Excellences ("CCME")

Expert Witnesses:

The parties stipulate that Cheryl Wessell, SLP, possesses the scientific, technical or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in

issue and by virtue of the knowledge, skill, experience, training or education of Ms. Wessell, she qualifies as an expert in the area of speech-language pathology pursuant to Rule 702 of the North Carolina Rules of Evidence.

The parties stipulate that Debra Stierwalt, SLP, the owner of prn Medical Resources, PLLC possesses the scientific, technical or other specialized knowledge to assist the trier of fact to understand the evidence or to determine a fact in issue and by virtue of the knowledge, skill, experience, training or education of Ms. Stierwalt, she qualifies as an expert in the area of speech-language pathology pursuant to Rule 702 of the North Carolina Rules of Evidence.

BASED UPON the preponderance of the admissible evidence, the Undersigned makes the following:

FINDINGS OF FACT

1. Respondent, through its contractor CCME, conducted a review of Petitioner's Medicaid Speech/Language-Audiology Therapy services claims with dates of service between March 1, 2011 and August 31, 2011 by reviewing 99 records.
2. During the period reviewed, Petitioner had billed 879 events to Respondent, with a total amount paid by Respondent to Petitioner of \$59,798.97.
3. Respondent informed Petitioner by a document entitled "Tentative Notice of Overpayment" (Resp. Ex. 8) dated May 18, 2012 of its initial determination that Petitioner had submitted allegedly erroneous claims in 96 out of 100 records.
4. The value of the allegedly erroneous 96 records totaled \$6,533.64. (Resp. Exs. 7 & 8)
5. Respondent extrapolated the alleged errors to Petitioner's total amount received of \$59,798.97 and alleged a total overpayment of \$55,421.00. (Resp. Ex. 8)
6. Petitioner requested and Respondent conducted an informal reconsideration of the original tentative overpayment.
7. Respondent's informal reconsideration review modified the original findings by determining that 78 records were in error with a total value of \$5,377.98. (Resp. Exs. 11 & 12)
8. Following Respondent's informal reconsideration review the Hearing Officer modified the original findings by determining an extrapolated amount in error of \$43,340.00. (Resp. Ex. 12).
9. In providing Speech/Language-Audiology Therapy services, Petitioner documented the activities between the patient and the provider of clinical service by producing a handwritten treatment note for each patient's date of service.
10. Respondent's findings of Petitioner's alleged errors arose from a review of Petitioner's handwritten note for each patient's date of service.
11. Respondent found that in 78 instances that Petitioner's documentation of treatment failed to contain "[d]escription of services (intervention and outcome/client response) performed..." pursuant to DMA Clinical Coverage Policy 10A (effective December 1, 2009), Sec. 7.2(d). (Resp. Ex. 12).

12. After a review of the evidence, the Undersigned finds as fact that for 48 contested dates of service, Petitioner's documentation of treatment contains proper descriptions of services, including interventions and outcomes pursuant to DMA Clinical Coverage Policy 10A (effective December 1, 2009), Sec. 7.2(d).

13. The Findings of Fact for these 48 contested dates of service are specifically denominated in this Final Decision's Attachment A incorporated herein by reference and are also listed in the Undersigned's Amended Order entered on February 4, 2013.

14. The remaining 30 contested dates of service, as denominated in Respondent's Exhibit 14, fail to provide a "[d]escription of services (intervention and outcome/client response) performed" as required by DMA Clinical Coverage Policy 10A (effective December 1, 2009), Sec. 7.2(d).

15. Following issuance of the Undersigned's Amended Order on February 4, 2013, and based upon the Undersigned's findings reflected in that Order, Respondent through its contractor CCME, generated a new extrapolation of the overpayment amount subject to recoupment. The new extrapolation is dated February 11, 2013. Respondent provided that document to Petitioner on February 13, 2013. A copy of the new extrapolation is appended as Attachment B to this Final Decision and incorporated by reference.

CONCLUSIONS OF LAW

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

2. Respondent bears the burden of proof in this matter pursuant to N.C. Gen. Stat. §108C-11(d).

3. The North Carolina Administrative Code requires that Medicaid providers support reimbursement claims with proper documentation. Likewise, each provider signs a Medicaid "participation agreement" wherein he or she agrees to "[c]omply with federal and state laws, regulations, state reimbursement plan and policies governing the services authorized under this Medicaid Program and this agreement." Resp. 5 at ¶ 1.

4. The North Carolina Administrative Code has two provisions which are entitled "Recoupment," 10A NCAC 22F .0601 and 10A NCAC 22F .0706.

5. 10A NCAC 22F .0706 speaks to recoupment of overpayments and how the money will be distributed.

6. The Code states at 10A NCAC 22F .0601: "the Medicaid agency will seek full restitution of any and all improper payments made to providers by the Medicaid program." (Emphasis added). "Improper payments" are not defined in the Code; however, in reading *in pari materia* with other sections one may discern the meaning and intent.

7. 10A NCAC 22F .0103 also similarly states that the Division shall institute methods and procedures to, among other things, "recoup improperly paid claims."

8. The Administrative Code states at 10A NCAC 22F .0103 that "The Division shall develop, implement and maintain methods and procedures for preventing, detecting, investigating, reviewing, hearing, referring, reporting, and disposing of cases involving fraud, abuse, error, overutilization or

the use of medically unnecessary or medically inappropriate services." "Error" is the only misdeed applicable; i.e., there are no allegations of fraud, abuse, overutilization or use of medically unnecessary or inappropriate services.

9. There has been no assertion or allegation in this proceeding that Petitioner was in any way responsible for fraud as defined in N.C.G.S. §108A-63; i.e., there is no allegation or assertion of the Petitioner "knowingly and willfully making or causing to be made any false statement or representation of material fact" or other type of fraud as defined therein.

10. Respondent has extrapolated the result of the audit findings in this action to the entirety of the Medicaid payments received by Petitioner for the applicable sampling frame size and time period.

11. N.C. Gen. Stat. §108C-5(i) requires that "[p]rior to extrapolating the results of any audits, the [Respondent] shall demonstrate and inform the provider that (i) the provider failed to substantially comply with the requirements of State or federal law or regulation...."

12. Respondent proffered the document entitled "DMA Clinical Coverage Policy 10A (effective December 1, 2009)" as binding upon Petitioner as permitted by N.C. Gen. Stat. §108A-54.2. The Undersigned finds that DMA Clinical Coverage Policy 10A was binding on Petitioner at all times relevant to this audit.

13. Respondent issued Clinical Coverage Policy 10A to direct the provision of "outpatient specialized therapies," (therapeutic physical, occupational, speech, respiratory and audiologic services) and the billing for such services for Medicaid recipients.

14. The relevant portion of Clinical Coverage Policy 10A (Section 7.2 Documenting Services) requires that "[e]ach provider must maintain and allow [Respondent's Division of Medical Assistance] to access the following documentation for each individual:

- (d) Description of services (intervention and outcome/client response) performed and dates of service."

15. Respondent proffered no binding definition for "intervention." Stedman's Medical Dictionary (2002) defines the word as "interference so as to modify a process or situation." Merriam-Webster Dictionary defines the word as "the act or fact or a method of interfering with the outcome or course especially of a condition or process (as to prevent harm or improve functioning)."

16. Respondent did proffer DMA December 2010 Medicaid Bulletin which addresses the "description of services (intervention and outcome/client response" requirements under Policy 10A, 7.2(d). (Resp. Ex. 2, pp 4-5). There were no representations made that the DMA December 2010 Medicaid Bulletin was enacted in accordance with N.C.G.S. § 108A-54.2.

17. Both speech therapy witnesses, Ms. Stierwalt and Ms. Wessell were accepted as experts concerning speech-language pathology and therapy. Ms. Wessell testified as to her knowledge concerning Respondent's documentation requirements. This decision has considered Ms. Wessell's testimony and knowledge and accorded appropriate weight to her opinions.

18. Ms. Wessell testified that Respondent's documentation requirements call for the speech therapist to comply with the "description of services" requirements specified under Policy 10A, Sec. 7.2(d).

19. Certain of the records of Petitioner's delivery of speech therapy services contain various descriptions of the services provided to patients. Examples include, *inter alia*:

- "structured speech;"
- "verbal prompts;"
- "direct sentence model;"
- "structured communication" and "maximum cues;" and,
- utilizing an "AAC device" (augmentative, alternative communication device) with reduced cuing.

20. For 48 contested dates of service as found in Finding of Fact #13 above and listed in Attachment A herein, Petitioner's delivery of speech therapy services contains such descriptions of the services provided to patients for each disputed date of service.

21. As a result, Petitioner substantially complied with the requirements of Respondent's Clinical Coverage Policy 10A, Section 7.2 (effective December 1, 2009) and the Basic Medicaid Billing Guide pp. 3-4 by maintaining documentation of the "description of services (intervention and outcome/client response) performed..." in these 48 contested dates of service, as found in Finding of Fact #13 above and listed in Attachment A herein.

22. Respondent has demonstrated that Petitioner's documentation "failed to substantially comply with the requirements of State or federal law or regulation" as required by N.C. Gen. Stat. §108C-5(i), Respondent's Clinical Coverage Policy 10A, Section 7.2 (effective December 1, 2009), and the Basic Medicaid Billing Guide pp. 3-4, for these remaining 30 contested dates of service, as denominated in Respondent's Exhibit 14.

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

FINAL DECISION

For 48 dates of service arising from Respondent's audit denoted as PI #2012-0541, Respondent has failed to carry its burden to prove that the Department of Health and Human Services (DHHS) Hearing Officer correctly decided to uphold the decision of the Division of Medical Assistance (DMA) to review Speech/Language-Audiology Therapy services provided to Medicaid recipients by Petitioner during the audit period. The Undersigned hereby overrules the Hearing Officer's determinations on these 48 dates of service.

In the remaining 30 dates of service, Respondent has carried its burden proof. The Undersigned hereby upholds and affirms the Hearing Officer's findings that Petitioner's documentation for these 30 dates of service did not comply with DMA Clinical Coverage Policy 10A, Section 7.2(d). Based upon these 30 dates of service, Petitioner received an extrapolated overpayment of \$13,668.00 (as specifically denominated in this Final Decision's Attachment B, incorporated herein by reference) as a result of improperly documented claims for Speech/Language-Audiology Therapy Services delivered to Medicaid recipients.

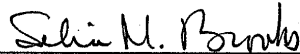
ACKNOWLEDGMENT

It is acknowledged that whenever, in this document, reference is made to the Undersigned, the undersigned Judge, or the Court, reference is being made to the undersigned Administrative Law Judge with the Office of Administrative Hearings.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-I, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 18th day of March, 2013.



Selina M. Brooks
ADMINISTRATIVE LAW JUDGE

ATTACHMENT A

| | | |
|--------------|-----|-----------------------------|
| R. Ex. 15-10 | DOS | 4/18, 4/19, 7/6, 7/13, 8/17 |
| R. Ex. 15-12 | DOS | 4/23, 7/23 |
| R. Ex. 15-13 | DOS | 3/8, 3/22 |
| R. Ex. 15-15 | DOS | 5/10, 7/21 |
| R. Ex. 15-16 | DOS | 5/19, 6/7, 6/29, 7/7, 8/2 |
| R. Ex. 15-17 | DOS | 8/17 |
| R. Ex. 15-19 | DOS | 3/12 (92507), 8/11 (92609) |
| R. Ex. 15-20 | DOS | 7/19 |
| R. Ex. 15-21 | DOS | 6/3, 7/29, 8/19 |
| R. Ex. 15-22 | DOS | 8/3, 8/15 |
| R. Ex. 15-24 | DOS | 8/1, 8/8, 8/9 |
| R. Ex. 15-25 | DOS | 8/4 |
| R. Ex. 15-26 | DOS | 3/22, 4/8, 4/26 |
| R. Ex. 15-27 | DOS | 4/14, 5/3, 7/21 |
| R. Ex. 15-28 | DOS | 4/20, 5/30 |
| R. Ex. 15-29 | DOS | 8/4 |
| R. Ex. 15-31 | DOS | 5/12 |
| R. Ex. 15-32 | DOS | 6/9, 7/7 |
| R. Ex. 15-33 | DOS | 5/6, 5/13, 5/16, 5/25, 7/28 |
| R. Ex. 15-36 | DOS | 8/18, 8/26 |

NCPATS_2012-0541_201204_ExtrapolationResultsPostAppeal_OAHDecision

ATTACHMENT B

Windows RAT-STATS

Date: 2/11/2013

Statistical Software
VARIABLE UNRESTRICTED APPRAISAL
AUDIT/REVIEW: 2012-0541

Time: 11:06

DATA FILE USED: U:\EPI\PATS\PPV Extrapolation\From PPV to
RAT-STATS\ANA_NCPATS_2012-0541_201204_Input_RAT_STATS_PostAppeal.xls

| | | | | |
|----------------|-------------------|------------------|-------------------------|------------------------|
| SAMPLE SIZE | EXAMINED VALUE | NONZERO DIFFS | TOTAL OF DIFF VALUES | TOTAL OF AUD VALUES |
| 99 | 6,802.05 | 30 | 2,042.91 | 4,759.14 |

```

----- E X A M I N E D -----
MEAN / UNIVERSE                                68.71                                871
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SKEWNESS                                       9.49
KURTOSIS                                      93.25
STANDARD ERROR (MEAN)                         .61
STANDARD ERROR (TOTAL)                       534
POINT ESTIMATE                               59,844
  
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CONFIDENCE LIMITS
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PRECISION PERCENT                          1.15%
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PRECISION PERCENT                          1.77%
T-VALUE USED                              1.984467454509
  
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----- A U D I T E D -----
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SKEWNESS                                       - .66
KURTOSIS                                      2.04
STANDARD ERROR (MEAN)                         3.08
STANDARD ERROR (TOTAL)                       2,679
POINT ESTIMATE                               41,871
  
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CONFIDENCE LIMITS
80% CONFIDENCE LEVEL
LOWER LIMIT                                38,414
  
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Page 1

NCPATS_2012-0541_201204_ExtrapolationResultsPostAppeal_OAHDecision

UPPER LIMIT 45,327
PRECISION AMOUNT 3,456
PRECISION PERCENT 8.26%
T-VALUE USED 1.290249903890

90% CONFIDENCE LEVEL
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UPPER LIMIT 46,319
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PRECISION PERCENT 10.62%
T-VALUE USED 1.660551217066

95% CONFIDENCE LEVEL
LOWER LIMIT 36,555
UPPER LIMIT 47,187
PRECISION AMOUNT 5,316
PRECISION PERCENT 12.70%
T-VALUE USED 1.984467454509

----- D I F F E R E N C E -----
MEAN / UNIVERSE 20.64 871
STANDARD DEVIATION 31.46
SKEWNESS 1.86
KURTOSIS 1.74
STANDARD ERROR (MEAN) 2.98
STANDARD ERROR (TOTAL) 2,593
POINT ESTIMATE 17,973

CONFIDENCE LIMITS
80% CONFIDENCE LEVEL
LOWER LIMIT 14,628
UPPER LIMIT 21,319
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90% CONFIDENCE LEVEL
LOWER LIMIT 13,668
UPPER LIMIT 22,279
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T-VALUE USED 1.660551217066

95% CONFIDENCE LEVEL
LOWER LIMIT 12,829
UPPER LIMIT 23,118
PRECISION AMOUNT 5,145
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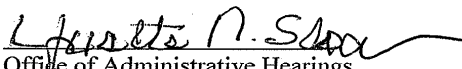
CERTIFICATE OF SERVICE

A copy of the foregoing was sent to:

Curtis B. Venable, Esq.
Ott Cone & Redpath, PA
PO Box 3016
Asheville, NC 28802
ATTORNEY FOR PETITIONER

Michael T. Wood
Assistant Attorney General
N.C. Department of Justice
PO Box 629
Raleigh, NC 27602-0629
ATTORNEY FOR RESPONDENT

This the 14th day of March, 2013.


Office of Administrative Hearings
6714 Mail Service Center
Raleigh, N.C. 27699-6714
Tel: (919) 431-3000
Fax: (919) 431-3100

STATE OF NORTH CAROLINA
COUNTY OF GRANVILLE

FILED

2013 FEB 14 PM 11:11

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DHR 08258

GLORIA MITCHELL,

Petitioner,

v.

NC DEPT OF HEALTH AND HUMAN
SERVICES, DIVISION OF MEDICAL
ASSISTANCE,

Respondent.

OFFICE OF
ADMIN HEARINGS

FINAL DECISION [PROPOSED]

THIS MATTER came on for hearing before Administrative Law Judge, Selina M. Brooks, on January 29, 2013 in Wake County, North Carolina.

APPEARANCES

For Respondent: Brian D. Rabinovitz
Assistant Attorney General
N.C. Department of Justice
Raleigh, North Carolina

Petitioner: Gloria Mitchell, *pro se*

ISSUE

Whether Respondent substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it denied Petitioner's request for an undue hardship waiver of Medicaid estate recovery under the rules of 10A NCAC 21D .0500 *et seq.* and the North Carolina State Plan for Medical Assistance.

EXHIBITS

For Respondent: Exhibits 1-2 and 4-8 were admitted. The Administrative Law Judge took judicial notice of Respondent's Exhibit 3.

For Petitioner: No Exhibits were offered into evidence by Petitioner.

WITNESSES

Glana Surles (Estate Recovery Case Manager, Division of Medical Assistance)
Gloria Mitchell (Petitioner)
Gary Mitchell (Petitioner's brother)

APPLICABLE STATUTES, RULES, REGULATIONS AND POLICIES

N.C. Gen. Stat. § 108A-70.5
42 U.S.C. § 1396p
10A N.C.A.C. 21D .0500 *et seq.*
North Carolina State Plan for Medical Assistance

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, along with documents and exhibits received and admitted in evidence and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which each witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner, Gloria Mitchell, has requested an undue hardship waiver of Respondent's estate claim against the Estate of Eula L. Webb.

2. Respondent, North Carolina Department of Health and Human Services, Division of Medical Assistance (the "Department"), is an official state agency of the State of North Carolina and the agency responsible for administration of the Medicaid program in North Carolina.

3. Eula L. Webb was a Medicaid recipient prior to her death on March 18, 2012.

4. As a Medicaid recipient, Eula L. Webb received medical services paid for by the Department that subjected her estate to the North Carolina Medicaid Estate Recovery Plan, pursuant to N.C.G.S. § 108A-70.5.

5. N.C.G.S. § 108A-70.5, the North Carolina Estate Recovery Plan, directs the Department to recover expenses paid for certain medical services on behalf of Medicaid recipients from the estates of these recipients.

6. The Department expended \$6,248.12 on behalf of Eula L. Webb for medical services that are subject to the North Carolina Estate Recovery Plan under N.C.G.S. § 108A-70.5. See Exhibit 6, Medicaid Estate Recovery Claim and Invoice for Services.

7. Eula L. Webb died on March 18, 2012, leaving an estate containing assets, including real property, subject to claims from creditors.

8. Pursuant to N.C.G.S. § 108A-70.5, the Department holds a statutory estate claim and is a sixth-class creditor, as prescribed in N.C.G.S. § 28A-19-6, for purposes of determining the order of claims against the Estate of Eula L. Webb.

9. Eula L. Webb's Estate qualified for estate recovery and the Department made a claim against her estate.

10. The primary asset of Eula L. Webb's Estate is a one-half interest in real property located at 103 North Allen Street, Creedmoor, NC, which Ms. Webb owned at the time of her death as tenant in common with Petitioner. See Respondent's Exhibit 8, Non-Warranty Deed.

11. Pursuant to N.C.G.S. § 28A-15-1, which states that "[a]ll of the real and personal property, both legal and equitable, of a decedent shall be assets available for the discharge of debts and other claims against the decedent's estate," Eula L. Webb's interest in the real property described above became an asset of her estate upon her death and is available to pay claims against her estate.

12. There are circumstances when the Department waives estate recovery, including when the sale of the estate's real property would result in undue hardship to a surviving heir.

13. Undue hardship is defined by the North Carolina Administrative Code, 10A NCAC 21D .0502, as follows:

(b) Undue or substantial hardship shall include the following:

- (1) Real or personal property included in the estate is the sole source of income for a survivor and the net income derived is below 75 percent of the federal poverty level for the dependents of the survivor(s) claiming hardship, or
- (2) Recovery would result in forced sale of the residence of a survivor who lived in the residence for at least 12 months immediately prior to and on the date of the decedent's death and who would be unable to obtain an alternate residence because the net income available to the survivor and her spouse is below 75 percent of the federal poverty level and assets in which the survivor or her spouse have an interest are valued below twelve thousand dollars (\$12,000).

14. The Department applies these rules as updated by the North Carolina State Plan for Medical Assistance, which increases the qualifying income level to 200 percent of the federal poverty level. Accordingly, in order to qualify under the definition of undue hardship, the individual claiming hardship must either: (1) have a household income less than 200 percent of the poverty level and the real property is the sole source of household income, or (2) have lived in the residence for at least 12 months immediately prior to and continuously since the death of the Medicaid recipient, have household income less than 200 percent of the poverty level, and have household assets valued less than \$12,000. See Respondent's Exhibit 3, North Carolina State Plan for Medical Assistance, Attachment 4.17-A, Page 2.

15. Petitioner requested a waiver of estate recovery based on undue hardship and submitted documentation to the Department in support of her request. See Respondent's Exhibit 2, Documentation Submitted by Petitioner.

16. The Department reviewed the information provided by Petitioner and informed her by letter dated August 30, 2012 that her request for an undue hardship waiver was denied. See Respondent's Exhibit 1, Document Constituting Agency Action.

17. In requesting an undue hardship waiver of estate recovery, Petitioner does not claim that the real property of the estate is her sole source of income.

18. Accordingly, the only issue in this case is whether Petitioner satisfies the residency, income, and asset criteria for an undue hardship waiver.

19. Petitioner provided income documentation to the Department, including federal tax documentation, showing her income for several years, including 2011, the year prior to the death of Eula L. Webb. See Respondent's Exhibit 2, Documentation Submitted by Petitioner.

20. The income documentation provided to the Department by the Petitioner shows that her adjusted gross income for 2011 was \$33,700.00. See Respondent's Exhibit 2, Documentation Submitted by Petitioner, p. 15.

21. The 2012 federal poverty level for a family of one is \$11,170.00 and 200% of this guideline is \$22,340.00. See Respondent's Exhibit 1, Document Constituting Agency Action.

22. Petitioner's household income exceeds 200% of the poverty level.

23. Petitioner's household income is above the allowable income limit to qualify for an undue hardship waiver of the Department's estate recovery claim.

24. The Petitioner is an owner of a one-half interest as tenant in common of the real property located at 103 North Allen Street, Creedmoor, NC. See Respondent's Exhibit 8, Non-Warranty Deed.

25. The tax value of the real property located at 103 North Allen Street, Creedmoor, NC is \$59,585.00 according to the publically accessible records of the Granville County Tax

Department. See Respondent's Exhibit 7, Granville County Tax Administration Property Record Card.

26. Petitioner owns assets valued greater than \$12,000.00.
27. The value of Petitioner's assets exceeds the allowable asset limit to qualify for an undue hardship waiver of the Department's estate recovery claim.
28. Petitioner does not satisfy the criteria to qualify for an undue hardship waiver of the Department's estate recovery claim against the Estate of Eula L. Webb.

CONCLUSIONS OF LAW

Based on the foregoing facts, the Undersigned makes the following Conclusions of Law:

1. The North Carolina 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.* All necessary parties have been joined. The parties received proper notice of the hearing in this matter.
2. To the extent that the findings of facts 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. *Bonnie Ann F. v. Callahan Indep. Sch. Bd.*, 835 F. Supp. 340 (S. D. Tx. 1993).
3. Pursuant to 42 U.S.C. § 1396p(b) and N.C.G.S. § 108A-70.5, the Department is required, in applicable circumstances, to recover from the estates of Medicaid recipients the cost paid for the recipient's medical assistance.
4. The Estate of Eula L. Webb qualified for the North Carolina Medicaid Estate Recovery Plan under N.C.G.S. § 108A-70.5, Chapter 21D of the North Carolina Administrative Code, and the North Carolina State Plan for Medical Assistance.
5. The procedure for requesting and exclusive criteria for qualifying for a waiver of the Department's Medicaid estate recovery claim based on undue hardship are contained in 10A N.C.A.C. 21D .0500 *et seq.* and the North Carolina State Plan for Medical Assistance.
6. The only issue in this contested case is whether the Department substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it determined that Petitioner did not meet the criteria for an undue hardship waiver of the Department's estate recovery claim and denied her request for a waiver.
7. Petitioner has the burden of proof to show that the Department has substantially prejudiced Petitioner's rights and has exceeded its authority or jurisdiction, acted erroneously,

failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.

8. The Department's evidence shows that its decision to deny Petitioner's undue hardship request was based on full consideration of the information available to it and that Petitioner did not sufficiently demonstrate that she met the criteria for an undue hardship waiver.

9. Petitioner did not contest that the information used by the Department in denying undue hardship was accurate information.

10. Petitioner did not present evidence that the Department substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.

11. Petitioner did not meet her burden in showing that the Department substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.

12. Based on all of the information presented to the Court, Petitioner does not meet the criteria for an undue hardship waiver of estate recovery as defined in the North Carolina Administrative Code and in the North Carolina State Plan for Medical Assistance.

13. The Department acted properly in denying Petitioner's request for an undue hardship waiver of estate recovery and did not substantially prejudice Petitioner's rights, exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule in denying Petitioner's request.

FINAL DECISION

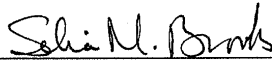
Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby **UPHOLDS** the agency's denial of Petitioner's undue hardship waiver request.

NOTICE

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute § 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the

Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 14th day of February, 2013.


Selina M. Brooks
Administrative Law Judge

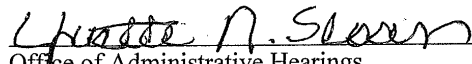
CERTIFICATE OF SERVICE

A copy of the foregoing was sent to:

Gloria Mitchell
103 North Allen St
PO Box 882
Creedmoor, NC 27522
PETITIONER

Brian D Rabinovitz
Assistant Attorney General
N.C. Department of Justice
PO Box 629
Raleigh, NC 27602
ATTORNEY FOR RESPONDENT

This the ~~14th~~ day of February, 2013.


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